

The International Comparative Legal Guide to:

# **Corporate Investigations 2018**

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A practical cross-border insight into corporate investigations

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# Introduction



Keith D. Krakaur



Skadden, Arps, Slate, Meagher & Flom LLP

Ryan Junck

As the new U.S. administration settled in this year, the U.S. Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), among other U.S. enforcement authorities, have continued to show a commitment to prosecute and regulate business crimes and related regulatory issues, as evidenced by a number of significant, well-publicised prosecutions and settlements.

Yet, uncertainty remains within the investigations defence bar regarding the future of white-collar enforcement under Attorney General Sessions. For example, commentators and practitioners have questioned whether the DOJ will: (i) continue to prioritise the prosecution of white-collar crimes – in terms of funding and focus – over other Department priorities, including drug offences, violent crime and immigration; (ii) articulate new policies to improve coordination and avoid "piling on" with duplicative financial sanctions by regulators in multi-jurisdictional enforcement proceedings; and (iii) amend the 2015 "Yates Memorandum", which issued guidance to DOJ criminal and civil prosecutors about the importance of individual accountability in civil and criminal investigations.

While we do not have a crystal ball regarding DOJ priorities and funding for the next three years, it seems evident that the DOJ (and SEC) will continue working to provide increased certainty to corporate defendants with respect to enforcement processes. This was aptly demonstrated by the recently announced Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy, which makes the 2016 FCPA Pilot Program a permanent DOJ policy. Under this Policy, if an entity voluntarily self-discloses an FCPA violation, cooperates fully, and appropriately remediates the issues, it can avoid prosecution unless aggravating circumstances exist or the offender is a criminal recidivist. If prosecution is warranted, the DOJ may still recommend a 50 percent reduction off the low end of the fine range for entities that self-reported the misconduct and a 25 percent reduction for entities that did not self-report but fully cooperated and timely and appropriately remediated per the Policy's standards.

The DOJ's decision to provide clarity regarding FCPA enforcement is welcome news for practitioners and corporates, as the DOJ continues to drive a large percentage of significant international anti-corruption investigations. It is also important because the U.S. approach to the investigation, prosecution and resolution of business crimes has often served to inspire changes in the legal regimes of other countries. For example, the U.K.'s use of Deferred Prosecution Agreements ("DPAs") has moved it closer to the U.S. approach. Indeed, in 2017, the Serious Fraud Office ("SFO") used DPAs to resolve two of the most significant enforcement actions on its docket in recent memory: against Rolls-Royce on bribery-related

offences; and against Tesco on allegations of false accounting. The Rolls-Royce resolution, which resulted in a landmark penalty of £671 million, also involved U.S. and Brazilian authorities.

Other jurisdictions are also starting to introduce and use DPAs in an effort to encourage self-reporting by companies. In 2016, France passed "Sapin II", which, among other things, requires the management of companies with more than 500 employees and revenues exceeding €100 million to implement anti-corruption compliance programmes, and offers a French equivalent of a U.S.-style DPA for corruption, money laundering of tax evasion proceeds and related offences. Recently, French prosecutors relied on this new regime when entering into France's first-ever DPA with HSBC, which agreed to pay €300 million for money laundering and tax evasion offences. Australia is also actively considering whether to introduce DPAs.

Although a number of jurisdictions have now provided guidance on the benefits of cooperation and self-reporting, both corporates and individuals should expect enforcement authorities globally to continue to be aggressive when cases so merit. The DOJ's decision-making around the Yates memo and concerns related to "piling on" will not change this fact of life for parties caught in the crosshairs of a U.S. regulatory investigation, although such guidance, assuming it is forthcoming, may help further clarify best practice in the area of cross-border investigations.

Outside of the U.S., international regulators are also continuing to press ahead with their enforcement priorities. For example, in 2017, the U.K. Financial Conduct Authority ("FCA"), for its part, issued its largest-ever anti-money laundering penalty against Deutsche Bank for failing to implement adequate anti-money laundering controls, know-your-customer procedures and automated systems for detecting suspicious trades. In addition to the £163 million FCA fine, the New York Department of Financial Services imposed a fine of \$425 million for engaging in a purported money laundering scheme by using "mirror trades" to move money out of Russia. The World Cup and Lava Jato investigations also continue to produce global headlines, prosecutions and settlements.

A number of noteworthy individual prosecutions were also announced in 2017. For example, in November 2017 the DOJ announced that three former Rolls-Royce employees and an individual who worked for a consulting firm instructed by a former Rolls-Royce customer had pleaded guilty and that a fifth individual, who worked as an intermediary for Rolls-Royce, had been indicted in connection with bribery and corruption offences. That same month, two former executives of the Dutch company SBM Offshore NV pleaded guilty to conspiracy to violate the FCPA.

Another important topic that has received attention in multiple jurisdictions this year revolves around the applicability of privilege protection over attorney-client communications or attorney work product. Even in jurisdictions where privilege protection is recognised, practitioners need to be aware that there may be significant legal and practical differences that may impact internal investigations and interactions with enforcement authorities. In the U.K., for example, a May 2017 High Court judgment (that is currently being appealed) would significantly limit the circumstances in which a company conducting an internal investigation prior to initiation of formal criminal proceedings could successfully claim litigation privilege over work product generated during the investigation. In another decision, the English High Court further restricted the scope of privilege by refusing to grant protection to notes of interviews of current or former employees. The Swiss Federal Supreme Court adopted a similar stance in investigations relating to the Swiss Anti-Money Laundering Act. These judgments could dramatically impact the practice of internal investigations in the U.K. and Switzerland, particularly those that are undertaken to address whistleblower allegations or compliance concerns absent a formal inquiry from an external regulator, and further complicate multi-agency, multijurisdictional investigations.

These developments, and others, are discussed in Global Legal Group's *The International Comparative Legal Guide to: Corporate Investigations 2018*, where leading practitioners have shared their insights on practices, developments, and trends in internal investigations in 20 countries, including with respect to the following areas:

- duties, benefits, and other factors to consider in deciding whether to launch an internal investigation;
- the process and potential effects of voluntary disclosure to civil and criminal enforcement authorities;
- strategies for cooperating with law enforcement authorities in multi-jurisdictional investigations; and
- the structuring, planning, execution, and internal reporting of investigations.

In this guide, we and our fellow contributors aim to provide readers with an introduction to the key aspects of corporate internal investigations globally in today's enforcement landscape. This guide also helps to highlight and focus on new or increased risks and challenges that corporates may face with respect to enforcement and regulation, which are unlikely to abate given the increased whistleblower activity and aggressive multi-jurisdictional government investigations of recent years.

We hope that this 2018 edition of *The International Comparative Legal Guide to: Corporate Investigations* will provide a valuable introduction to the key considerations steering internal investigations today and provide you with a helpful resource to help you confront significant questions relating to the scope, nature and timing of internal investigations. We would like to thank Global Legal Group for giving us and our fellow contributors the opportunity to share our insights.

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The Government Enforcement and White-Collar Crime practice of Skadden, Arps, Slate, Meagher & Flom LLP and affiliates is an internationally recognised leader in the representation of corporations, boards of directors, management, and other individuals in connection with a broad range of government investigations, enforcement actions, internal investigations, and white-collar criminal investigations and litigation. The close coordination between criminal and civil regulatory authorities when investigating allegations of wrongdoing has increasingly blurred the line separating criminal, civil, and administrative offences, resulting in heightened risks when conducting business, both domestically and internationally. Skadden is well positioned to help clients navigate the legal landscape when business conduct results in concurrent criminal, civil, and/or administrative proceedings that require a strategically coordinated response.

### Multi-Jurisdictional Criminal Investigations – Emerging Good Practice in Anglo-French Investigations

Matthew Cowie



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#### 1 Introduction

The rise in multi-jurisdictional criminal and regulatory investigations over the last few years has led to improvements in cross-border co-operation with overseas enforcement authorities in corporate investigations and resulted in numerous enforcement proceedings and global settlements.

In France, Sapin II¹ appears to have had an almost immediate effect. On 14 November 2017, the Parquet National Financier ("PNF") entered into the first French deferred prosecution agreement/convention judiciaire d'intérêt public ("CJIP") with HSBC Private Bank (Suisse) SA.² HSBC Private Bank (Suisse) SA agreed to pay €300 million to the French authorities to settle allegations that the bank assisted its clients to evade tax. This landmark settlement marks a distinct break from the past and suggests a future where the French authorities become active enforcers in complex international fraud and bribery cases.

In recent years, the UK has built a good reputation for bringing global enforcement cases for both fraud (LIBOR and FX) and bribery (Rolls-Royce). Recognising the difficulties of working with different justice systems, this article explores whether the UK authorities can build good relationships with their French counterparts following the introduction of Sapin II.

This article covers the likely practical issues, pitfalls and good practices that companies and their advisers need to know about when conducting an internal investigation into suspected economic crime which could be settled in both the UK and France.

### 2 Securing Evidence – Data Preservation and Collection

#### Preserving evidence

The first step at the outset of any investigation requires careful action to ensure that all electronic and hard copy materials (collectively referred to as "Data") that are potentially relevant to the issues under investigation are preserved. It is imperative for advisers to engage with the company's IT personnel to understand how the company's IT infrastructure and document management systems are organised to determine how and where Data is stored.

It is best practice for the company to disseminate an adequately scoped document retention notice ("**DRN**") and suspend any Data destruction policy in place if it would conflict with the requirements of the DRN. Both UK and French laws contain criminal sanctions for falsifying, concealing or destroying evidence that may be relevant to the investigation.<sup>3</sup>

Advisers need to ensure that the DRN has been sufficiently scoped and disseminated within the company, and that recipients understand what the DRN covers to maximise Data preservation.

#### Collecting and processing Data

Once potentially relevant Data has been identified and preserved, the investigation team should collect and process the Data. Advisers, investigators or specialist e-discovery/forensic vendors must take care when handling Data and follow practices which meet regulator expectations on evidence integrity. Again, companies are advised to understand that expectations, laws and practices of implicated jurisdictions differ.

When collecting and processing Data, careful consideration should be given to applicable data protection laws and data privacy concerns. Both France and the UK are subject to the EU Data Protection Directive<sup>4</sup> (the "Directive"). As directives are required to be implemented into national law, Member States are given some flexibility as to their interpretation and implementation of the Directive, with French national laws supporting an individual's right to privacy. Advisers can anticipate that France will continue to strongly protect an individual's right to privacy under the new EU General Data Protection Regulation ("GDPR").<sup>5</sup> The GDPR is designed to strengthen individuals' data protection rights, and its direct applicability in Member States should lead to a more uniform approach to data protection rules in the EU.

In France, particular consideration needs to be given to:

- Personal or private information it is important to ensure that the steps taken are clearly explained to employees and employee representatives of the workers' unions.
- Involving the Data Protection Officer ("DPO") unlike in the US and the UK, Data that is deemed to be personal or private will need to be isolated. Privacy search terms prepared by the investigation team should be applied across the Data, and the investigation team should work with the company's DPO to ensure that employees' privacy rights are appropriately protected.
- Sensitive information for investigations concerning sectors which involve confidential, sensitive or state secrets, similar actions will need to be co-ordinated with the company's security officer or department. As above, specific search terms will be helpful to identify sensitive information.

#### **Transferring Data**

Data in an investigation will often need to be moved or consolidated in a third jurisdiction, or company servers may be located worldwide. Before transferring Data from one jurisdiction to another, the investigation team will need to carefully consider the relevant laws and regulations of the jurisdictions concerned. In France, for example, particular consideration should be given to the French Blocking Statute ("FBS"),<sup>6</sup> which prohibits the transfer of certain data out of France for use in foreign judicial or administrative proceedings.<sup>7</sup>

Although there has historically been a lack of enforcement of the FBS, Sapin II has created a new anti-corruption authority, L'Agence française anti-corruption (the "AFA"), which will monitor compliance with the FBS. As a refusal to disclose certain documents/information to a foreign requesting agency may impact the co-operation credit a company may receive, if the FBS is deemed to be a potential issue, the investigation team should engage with the foreign regulator and seek local advice at an early stage of the investigation.

#### 3 Fact Analysis and Internal Reporting

#### **Document review**

For the purpose of conducting an efficient and effective review of the Data, processed Data should be uploaded to an electronic platform. There are different methods to review Data and there is no "one size fits all". For investigations involving large volumes of Data, the investigation team may decide to use algorithm-based software to improve the accuracy and speed within which highly relevant documents are identified.

It is best practice for the investigation team to consolidate review guidelines into a written document review protocol which should be updated regularly to keep the reviewers working in a co-ordinated and efficient manner. The review process should also be used to identify additional individuals who may hold potentially relevant Data and whose Data should be collected in subsequent rounds of collections

#### Reporting structure

The company and the investigation team should give thought to and decide on the appropriate individual(s) who will lead the investigation. This role is normally fulfilled by the company's general counsel and the in-house legal team. It may also be appropriate to establish an executive steering/litigation committee comprised of board members, individuals from the legal and compliance teams, and other senior business representatives. It will be important for these individuals to be independent from the investigation, not be implicated in the conduct and to understand the benefits of: (i) constructively engaging with the appropriate regulators; (ii) "ring-fencing" any individuals potentially implicated from evidential findings and from influencing the investigation; and (iii) following international best practices in internal investigations. The committee's mandate would include giving instructions to the company's general counsel and the investigation team.

In the context of an Anglo-French investigation, the company should seek local advice on how best to preserve UK legal professional privilege ("LPP") and French "secret professionnel", i.e. professional secrecy.<sup>8</sup>

The French law of *secret professionnel* applies to communications between a lawyer and his/her client. The concept is different to legal professional privilege.

Although *secret professionnel* can broadly apply to the whole file, *secret professionnel* does not apply to in-house legal advisers ("*juristes*") or to documents exchanged by clients with third parties. Because of the complexity of and importance of maintaining *secret professionnel*, advisers should assemble a suitably qualified French firm to work alongside a UK firm during the investigation, and seek advice so as to ensure that appropriate protections are maintained in the different jurisdictions.

#### 4 Employee Interviews and Discipline

#### Interview procedure

When interviewing an employee in the UK or France during an internal investigation that may lead to disciplinary or criminal sanctions, it is good practice for the company's lawyers to:

- ensure that it is legally permissible to conduct the proposed interviews;
- consider offering the employee the opportunity to appoint their own independent legal counsel. Companies may face challenges in finding suitably qualified and "sensitive" legal counsel with the appropriate expertise to advise individuals who need separate representation; and
- ensure that the interviewee understands the role of the lawyer at the outset. In the UK, the warning will inform the employee that the lawyers only represent the company and not the employee, that the privilege attaching to the interview belongs to the company, and that the company may choose to waive privilege and share the transcript of the interview with third parties, including governmental authorities. In France, the warning will inform the employee that the interview is not covered by *secret professionnel*.

Interview practice and procedure in French internal investigations differs from the UK and US approach in a number of respects:

- Co-operation: UK executives will generally co-operate with an internal investigation to avoid an adverse disciplinary finding, and obligations to co-operate are generally set forth in employment contracts. In France, the Labour Code and other employment laws provide strong employee protections, and co-operation and discipline issues should be carefully navigated.
- Timing: in France, employees will expect to be interviewed during the early stages of the investigation even where a full review of the documents has not been carried out, whereas in the UK and US interviews will most likely only be held once the document review is completed or where substantial review progress has been made.
- Number of interviews: French employees may find it unusual or potentially unacceptable to be interviewed multiple times by the investigation team. In US and UK internal investigations, interviewees are often interviewed multiple times.
  - Advance disclosure: employees being interviewed as part of a French internal investigation (in particular where an accusation is made against the employee) might refuse to co-operate in the absence of receiving advance notice of the topics to be discussed during the interview, and the documents that will be put to them at interview. In UK and US investigations, it is customary to only provide access to documents and topics shortly (if at all) before the interview so as to protect the integrity of the investigation. This ensures that difficult investigative questions are put to employees without giving them the opportunity to prepare rehearsed (and potentially fabricated) answers.

#### Interview records

Structuring interviews as privileged from the outset of the investigation provides the company with an element of control. The company can then weigh up the risks of disclosing interview records, and consider later disclosure on a limited waiver basis should the company choose to make a self-report.

The UK Serious Fraud Office ("**SFO**") has indicated that the value of first-hand witness accounts is paramount and that companies will be afforded co-operation credit for disclosing interview records which a company believes could be privileged.<sup>9</sup>

Although companies will retain their right to *secret professionnel* when disclosing interview memoranda, the direction of travel for the French under Sapin II remains unclear. Companies face the risk that the French authorities will add interview transcripts to their file, making them potentially disclosable to third parties.

Obvious differences exist between oral testimony in adversarial as opposed to inquisitorial systems. The Paris Bar Council has recommended allowing interviewees to review and sign their statements where a *verbatim* transcript is recorded, but that the interviewee should not be provided with a copy of the transcript where it is necessary to preserve the confidentiality of the investigation (in accordance with French or foreign confidentiality rules).<sup>10</sup>

#### Disciplinary measures and termination

In France, a company has to work with more restrictive options to suspend potentially implicated employees pending the outcome of an investigation:

- **Dismissal process**: under French employment law, an employer discovering misconduct or gross misconduct is required to start the dismissal process within two months of becoming aware of the misconduct, failing which, the company will be unable to sanction the employee. This period starts from the employer's discovery of the facts, and any further investigation required should be conducted within this two-month period.
- Gardening leave: unlike Anglo-Saxon countries, France does not recognise the concept of placing an employee on gardening leave, which can be problematic in lengthy investigations.
- Settlement: companies wishing to mutually agree on a separation with the individual may choose to enter into a settlement agreement after notification of the dismissal. Advisers need to carefully consider the optics of how the authorities might view monies paid under settlement agreements with executives implicated in some way in the investigation. The company should maintain a clear audit trail justifying any payments made.

#### 5 Multi-Jurisdictional Reporting and Settlement

#### Disclosure and reporting

Companies can either decide to take a traditionally adversarial approach with the regulators or co-operate. Prior to Sapin II, the incentives for company co-operation in France were more complex and nuanced

If a company decides to co-operate with the regulator(s), there are various considerations that should be taken into account:

Co-operation: both UK and US authorities place significant weight on the extent of the company's co-operation in considering settlement options. Corporates should be aware that even in cases where the company is co-operating with enforcement agencies, the French authorities may still carry out dawn raids to collect evidence. It is likely that this practice will become less frequent over time as the French enforcement agencies become more familiar and comfortable with credible lawyer-led investigations.

The first French CJIP was approved by the French court (tribunal de grande instance) on 14 November 2017. The first deputy financial prosecutor of the PNF (premier vice-procureur financier du PNF), M. Eric Russo, stated that the HSBC Private Bank (Suisse) SA fine was proportionate due to "the minimal co-operation of the bank, the seriousness of the facts and the organisational fraud". The bank's minimal co-operation led to a penalty of c. EUR 71.6 million. The first CJIP indicates that a company's failure to co-operate with the French authorities will be penalised and have a monetarised effect on the fine the company is subjected to, but will not necessarily prevent a CJIP.

Settlements: companies subject to multi-agency and multijurisdictional investigations are advised to negotiate a coordinated settlement to try and obtain a global resolution. The finality of a co-ordinated global settlement should reduce the risk of overlapping penalties or multiple fines arising from parallel enforcement actions, and allow the company to draw a public line under the investigations and get on with its business.

Sapin II, which has introduced the concept of French DPAs, should facilitate global co-ordinated settlements when enforcement agencies in France, the UK, the US and other jurisdictions which have similar settlement tools are involved.

#### 6 Conclusion

Multi-jurisdictional investigations can raise a number of complex issues that companies and their advisers need to consider at the outset when: (i) structuring a corporate internal investigation; (ii) engaging with different regulators; and (iii) working towards a coordinated global resolution. It is important for the different members of the investigation team to think through how the interplay of local laws can impact the overall strategy and outcome of the multijurisdictional investigation.

Sapin II brings French anti-corruption law into closer alignment with the corresponding legislation in countries such as the US and the UK. Sapin II will now enable French authorities to exert jurisdictional claims in cases of overseas corruption with a French connection and, of course, to participate in discussions about penalties and disgorgements.

Despite some French opposition to the Sapin II settlement powers, the new legal framework provides a clear, speedy and more certain environment for corporate criminal settlements involving French conduct. The HSBC CJIP is the first practical indication that a new French era of active enforcement is likely to lead to the French authorities bringing multi-jurisdictional criminal cases with other sophisticated enforcement authorities.

#### **Endnotes**

- 1. Law No. 2016-1691 of 9 December 2016.
  - Convention judiciaire d'intérêt public entre le Procureur de la République Financier et HSBC Private Bank (Suisse) SA, 14 November 2017, <a href="https://www.economie.gouv.fr/afa/publications-legales">https://www.economie.gouv.fr/afa/publications-legales</a>.

- Criminal Justice Act 1987, Section 2(16) and Code pénal Article 434-4.
- 4. Directive 95/46/EC.
- 5. EU Regulation 2016/679. Note that from May 2018, the GDPR will replace the Directive.
- 6. Law No. 68-678 of 26 July 1968.
- 7. *Ibid.*, Article 1*bis*. This relates to information of an economic, commercial, industrial, financial or technical nature.
- For an overview of LPP and maintaining privilege in UK investigations, see Dechert's article on Maintaining Privilege in UK Regulator-Facing Investigations: Issues for Company Advisers, The ICLG to: Corporate Investigations 2017 (1st edition).
- 9. In the Rolls-Royce case, the company disclosed all interview memoranda to the SFO (on a limited waiver basis), despite Rolls-Royce's belief that the material was capable of resisting an order for disclosure, on the basis that it was privileged. SFO v Rolls-Royce plc and Rolls-Royce Energy Systems Inc (Case No.: U20170036), para 20 (ii).

- Nouvelle annexe XXIV: Vademecum de l'avocat chargé d'une enquête interne (13 September 2016), recommendation 2.5.
- Comments made by M. Eric Russo, PNF: HSBC Private Bank conclut la première transaction pénale à la française: Les Echos (14 November 2017): <a href="https://www.lesechos.fr/finance-marches/banque-assurances/030871515318-hsbc-private-bank-conclut-la-premiere-transaction-penale-a-la-francaise-2130061.php#HPL72cO5MzzRpVgg.99">https://www.lesechos.fr/finance-marches/banque-assurances/030871515318-hsbc-private-bank-conclut-la-premiere-transaction-penale-a-la-francaise-2130061.php#HPL72cO5MzzRpVgg.99</a>.
- Convention judiciaire d'intérêt public entre le Procureur de la République Financier et HSBC Private Bank (Suisse) SA, 14 November 2017, page 8, para 44: <a href="https://www.economie.gouv.fr/files/files/directions-services/afa/CJIP-HSBC.pdf">https://www.economie.gouv.fr/files/directions-services/afa/CJIP-HSBC.pdf</a>.

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# Dechert

Dechert LLP is a global specialist law firm with 27 offices in the UK, Europe, Asia, Middle East and across the USA. Our expert lawyers are focused on sectors with the greatest complexities, legal intricacies and highest regulatory demands. Dechert has an impressive track record of resolving difficult and sensitive investigations discreetly and favourably without prosecution. Our lawyers have represented organisations and their officers, boards and senior management in all phases of civil and criminal investigations, actions and prosecutions. We regularly assist clients in responding to government and regulatory investigations, and have extensive experience in dealing with the Serious Fraud Office, the Financial Conduct Authority, HM Revenue & Customs, HM Treasury, OFAC, the Department of Justice and the Securities and Exchange Commission. Whether allegations of misconduct arise internally, as a result of a government investigation, whistleblower claims, an audit, or from civil or criminal litigation, our lawyers act promptly, investigating the allegations and offering strategic solutions to resolve the situation and limit our clients' exposure. Our white-collar defence and securities teams include more than 100 lawyers globally. Dechert has leading white-collar crime practices in the UK, and the US, which enables us to deal with simultaneous multi-jurisdictional investigations. We offer a co-ordinated mix of legal, strategic and public affairs advice to clients. The team includes former prosecutors and government lawyers who provide experienced guidance, determine the facts, assess legal exposure and recommend appropriate action, including the development of, or modifications to, compliance programmes.

# Standard Issues in Corporate Investigations: What GCs Should Know

Carl Jenkins





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#### Introduction

Investigations are a fact of life at any large corporation. An unavoidable cost of doing business, they potentially enable companies to identify wrongdoing in its initial stages, curtail damage to the enterprise, identify how or why investments or acquisitions may not have performed as expected, position the company to cooperate productively with regulators, and protect companies against potentially spiralling risks. While it is impossible to know how prevalent internal corporate investigations are, Duff & Phelps, a large provider of investigative services, can attest that a typical multinational company may have dozens of probes under way at any given time. The majority never reach public view.

Investigations and the allegations they address tend to arise primarily from three sources. First, many stem from individual employees' temptations to enrich themselves, or from their struggles to contend with myriad financial, career and personal pressures. Examples of this type of wrongdoing include stealing, self-dealing (such as insider trading) and smaller-scale fraud or bribery. Second, some types of wrongdoing can often be traced to incentive structures tied to sales or profits, or internal pressures to meet the expectations of shareholders, analysts and other external constituencies. These tend to be the source of more elaborate schemes, raising complex legal and business issues. Third, many investigations arise from failures to comply with regulatory requirements imposed by state, federal or foreign entities whether intentional or not. While professional investigative firms can play an important role in scrutinising all three types of wrongdoing, external support is especially crucial in the latter two categories.

The regulatory enforcement landscape changed significantly early in the new millennium, in the wake of the WorldCom, Enron and Tyco scandals (among others) and the 2007–2008 financial crisis. Federal statutes such as Sarbanes-Oxley and Dodd-Frank have bolstered protections and incentives for whistleblowers beyond those already available in the form of *qui tam* actions under the federal False Claims Act. Meanwhile, funding for regulatory agencies has not kept pace with an increasingly complex, fast-paced economy. As such, regulators have increasingly relied on whistleblowers to identify potential corporate wrongdoing. Rather than prosecutors or enforcement attorneys firing the opening salvos in an investigation, the initial source of information may be a relatively low-level employee.

Whistleblowers may be incentivised by a significant payout and facilitated by attorneys who will take on this work on a contingent fee basis, often requiring little to no financial commitment by the whistleblower. For corporations, whistleblower-driven investigations

can be particularly unnerving. Informants may wield inside knowledge and have expansive access to data. Furthermore, the government often assumes that the whistleblower's claims are valid until proven wrong.

By some measures, the number of whistleblower tips has been skyrocketing. The SEC, for example, received over 4,200 tips in 2016, up more than 40% compared to 2012. The SEC paid out \$136 million to 37 whistleblowers from 2011–2016, as a share of penalties recovered. In July 2017, it proposed a record-breaking \$61 million payout to two informants.

The current frequency and character of government probes compels companies to conduct a greater number of internal investigations. Self-policing is an effective insurance policy. If an internal matter comes to the attention of regulators or prosecutors and the general counsel's (GC's) office is asked: "Were you aware of this and did you investigate it?" the best response is always "yes". Moreover, if a company shows that it has proactively investigated allegations and has cooperated with enforcement authorities, it may generally anticipate more favourable treatment relating to eventual fines or other remedial actions (as discussed below).

Duff & Phelps has decades of experience investigating corporate wrongdoing and associated controversies, including theft, broken deals, post-acquisition disputes and a wide range of financial, accounting and other frauds. We have scrutinised cases involving a broad array of regulatory and criminal authorities, including the SEC, DOJ, FINRA, IRS, and FTC, along with state regulators and prosecutors, as well as enforcement authorities around the world. Our professionals include former officials and agents from the SEC, FBI and CIA who provide invaluable insight into how government investigators think and the investigative processes they employ. As a global firm offering a broad array of independent advisory services, we serve more than 5,000 clients each year, including over 50% of the S&P 500, 80% of the Am Law 100 and 70% of the world's top-tier hedge funds and private equity funds.

Informed by our collective experience and knowledge, this article summarises key issues to consider when managing corporate investigations. We stress that each investigation, situation and corporation is unique. No single playbook could substitute for the judgment of the GC's office or for the expert advice of outside counsel and other advisors.

### **Key Issues in Managing Corporate Investigations**

While misconduct and investigations are unavoidable, a GC can expect a better outcome if their organisation has investigative plans and procedures in place, is proactive in confronting any suspicions of wrongdoing, and if the investigative team avoids common pitfalls. The following sections discuss key factors that GCs should consider in developing internal compliance measures and their own best practices for investigations.

#### Encourage employees to speak up

It is not possible for the GC or other executives to identify at the outset whether and where misconduct is occurring across a large, complex organisation. This fact, coupled with the incentives afforded to whistleblowers who may be the first to identify misconduct, means that it is imperative for companies to build a culture that encourages employees to speak up internally when they suspect wrongdoing.

There are several measures that can help create such a culture. For starters, the company's compliance policies should set the right "tone at the top" by encouraging employees to report their concerns and by providing clear guidance on how to submit such reports. The company should also take care to ensure that whistleblowers are treated with respect. While the law prohibits discouraging a tipster from filing a report with law enforcement, companies can diminish the odds of escalation by stressing that the tip is welcomed and demonstrating that allegations will be taken seriously. In further support of this principle, the company should have a well-articulated and enforced policy against retaliation, so that tipsters feel comfortable reporting suspicions internally without fear of retribution. In addition to being good compliance policy, this is a critical legal issue given that employment law assigns criminal penalties for retaliating against whistleblowers.

Companies with a strong compliance programme often provide anonymous reporting options – for example, a hotline or anonymous email address. Anonymous reports should be treated with the same gravity as those from a known accuser. It's often helpful to engage a third party to administer a hotline or an anonymous email address, rather than the company, to further assuage employees' concerns about reporting directly to their employer. A company policy directing employees to report suspicions directly to the GC can have a chilling effect, especially in cases in which senior managers or executives might be the subject of the report. Having an independent intermediary field reports can help to alleviate the pressures that exist in these situations.

In cases involving identified accusers, it is important to ensure that employees are made aware of their rights. For example, the GC should provide an "Upjohn warning" – advising the employee that: (i) company counsel represents the company and not the employee; and therefore (ii) conversations with company counsel are not privileged with respect to the employee. Also, the employee should be informed that they have a right to representation, and possibly be encouraged to obtain representation in the event they might be implicated in the alleged misconduct or otherwise have concerns about their own exposure.

#### Begin investigations immediately

Companies often ask our experts: "How do we know we need an investigation?" The short answer: if you think you may need one, then you need one. The GC needs to be vigilant for triggers signalling that an inquiry is warranted.

Aside from tips from employees, investigations often are triggered by concerns expressed by the board of directors, CFO or CEO, or from managers or other mid-level supervisory personnel who suspect misconduct. Suspicions may arise when expenses spike in a department, performance shifts dramatically in a business unit (e.g., spikes in revenues and profits and the end of a reporting period), or a major contract or transaction unexpectedly succeeds or fails.

Surprising behaviour – such as employees refusing vacation or living beyond what their compensation would allow – may also raise red flags. Alternatively, the GC may find out that a government agency is investigating the company's competitors as part of an industry "sweep", as often happens, for example, in FCPA and money laundering enforcement.

In these circumstances, it is best to conduct a preemptory investigation and address the issues proactively if wrongdoing is discovered. Sometimes companies delay the commencement of an investigation because they don't want to acknowledge the possibility that serious wrongdoing has occurred and might reflect poorly on management. Investigations shouldn't be viewed as a penalty or an admission of guilt. They should be viewed as good risk management practice.

The time to launch an investigation is when you first think you may need one, not when you absolutely *know* you need one. Remember, it's better to know all the bad news up front.

#### Establish an incident management team

An effective investigation tends to require a diverse pool of skills and perspectives and the incident management team should be carefully selected to gather the necessary talent. At a minimum, the team should generally include legal, the head of the relevant business unit and representatives from IT and HR. The team also should be independent of the business units and individuals affected and should be properly resourced and supported by senior management.

As discussed in the following section, depending on the nature of the investigation, the team should also engage various specialists, including external legal advisors, forensic accountants, IT experts and public relations professionals.

#### Consider hiring independent, outside investigative support

For many companies, it is tempting to conduct investigations entirely in-house, motivated by a desire to minimise costs. With rare exceptions, this is not a prudent approach. In-house investigations may be less thorough and objective; they may cause additional harm; and they may expose the company or employees to conflict-of-interest accusations. Managers who lack experience in conducting rigorous inquiries risk alienating employees, missing key issues or tipping off witnesses or suspects. In one case in which we were involved, managers sought to cut costs by using off-the-shelf software to copy and search emails, rather than following the rigorous protocols employed by experts. This approach led to corruption of the data and raised chain-of-custody issues. It also ultimately increased the cost and time needed to complete the investigation.

Duff & Phelps is sometimes called upon to take over an investigation that has proved too complex or expansive for in-house staff. In our experience, conducting a well-organised and thorough investigation from the start is critical to getting it right, particularly when interviewing sources and handling data. A witness or accused who has been repeatedly contacted before a professional interview takes place will have time to cover tracks, reducing the likelihood of obtaining a firsthand, unfiltered and accurate account.

Seeking to engage the company's regular outside auditors to conduct or consult on an investigation is also not advisable, as this approach poses numerous conflict and independence issues. Auditors are inevitably concerned about being blamed. If accounting issues are involved, the auditor is likely to be sued. Auditors may seek to protect themselves, and will typically contact their lawyers immediately upon learning of an investigation, potentially slowing the process, adding

costs and yielding an inferior outcome. Public companies have certain obligations under the federal securities laws to inform their independent auditor of potential illegal acts, but informing them is different than relying on them to contribute to your own investigation.

In situations where a company's senior executives are the targets of a whistleblower report or other allegation, the responsibility for conducting an internal investigation will shift to the independent members of the board of directors (in most cases, the audit committee). In an even more complicated case where the directors might also be implicated (for example, by having approved a contract or transaction from which the alleged misconduct arises), it might be necessary for a company to appoint new directors to comprise an independent committee. In either case, a board committee typically will engage separate counsel to advise it, and will engage other investigative experts as the situation requires.

Outside investigative consultants should be evaluated with any eye toward the anticipated scope and complexity of the investigation. In addition to having a stellar reputation and a strong track record, the firm also should have a thorough understanding of the company's business, industry and risk profile. The firm should be able to provide all the required investigative resources, including forensic accountants/fraud examiners, computer forensic experts (for both electronic and structured data), economists, and, in cases involving international operations, individuals with expertise in areas including, for example: counterparty and third-party due diligence; local business customs, practices, and regulatory schemes; and asset tracing. The consulting firm will ideally also have a local presence in jurisdictions where the business in question operates.

Some investigative firms rely on subcontractors to supplement their expertise, geographic coverage or language capabilities. This can complicate proceedings and increase costs. If too many separate entities are employed, there is a risk of both overlap and gaps in responsibilities. At first blush, it may seem that a large global firm might be more expensive, but cobbling together an investigative team comprised of several smaller firms with fewer resources or limited geographic or subject matter reach likely will require even greater expenditure in the long run.

#### Develop a strategy for the investigation

Working with outside investigators and attorneys, the GC should maintain an ongoing summary of key issues, and should agree on a strategy for conducting the investigation. The strategy is highly sensitive, requiring careful consideration of possible scenarios to ensure its efficacy. It should define a timeline and expectations for future reporting and meetings for the incident management team. Issues to address could include:

#### Scope of the investigation

- What appears to have happened, and when?
- Does this appear to be an isolated case, or could it be more widespread?
- What leads us to believe it is isolated or widespread?

#### **Evidence gathering**

- What initial evidence supports or refutes the allegations?
- What additional evidence should be gathered, how do we gather it and how do we record efforts to gather evidence and log the chain of custody?
- Should we seize laptops and mobile devices?
- Could relevant evidence be destroyed, and how should it be protected? (Typically, the GC would issue a record-retention order, and the advisor's technology team would image hard drives and mobile devices as soon as possible.)

- When should the relevant individuals be interviewed, and in what order?
- How should we triage and review the evidence? (The email review hierarchy should prioritise communications most useful to the investigation.)
- What geographic or specialised issues arise from the circumstances surrounding the investigation? For example, if the investigation encompasses overseas operations, how should translations be handled, and what terms (including code words and terms of art in foreign languages or dialects) should be included in the digital search?

#### Risk and liability analysis

- What potential legal offences do the accusations raise for both the accused and the company?
- Are the accused personnel senior enough to be viewed as speaking for the company?
- What other risks (reputational, business, financial, cost, etc.) does the company face, and how should they be managed?
- How do we handle outside stakeholders, such as companies that may have been complicit in or harmed by the wrongdoing?
- How do we handle potential ongoing or future misconduct, balancing the need to stop wrongdoing with the needs of the investigation?
- Are notes or records of discussions with employees privileged?
- Whether and when do we notify insurers?
- Whether and when do we inform authorities? (See below for a more detailed discussion of this issue.)

#### Personnel issues

- How do we proceed with the tipster? For example, do we ensure that no action is taken to dissuade him/her from approaching the authorities?
- Who might be implicated among employees, management and the board?
- Do we offer independent legal advisors to witnesses and suspects?
- Whether, when and how do we suspend employees, lock them out of the premises and network, and deactivate their security passes?

#### Maintain a flexible approach in the investigation

When embarking on an investigation, it is impossible to know where it will lead or how narrow or expansive any potential wrongdoing might be. Effective investigations follow the facts wherever they lead. Sometimes companies become so focused on one issue, complaint or counterparty under suspicion that they miss other red flags along the way. It is not uncommon that new concerns or areas of focus will arise as an investigation proceeds, or that the investigators will initially see only one aspect of a more pervasive problem. It is critical to regularly assess whether the matter at hand is part of a larger phenomenon. Seasoned, professional investigators will strike a careful balance between taking an excessively broad approach (sometimes referred to as "boiling the ocean") and maintaining an exceedingly narrow focus that risks missing critical issues and findings.

#### Always assume you will litigate

Some investigations are planned from the outset with a view toward litigation – for example, a post-acquisition review of suspected accounting fraud by a target company, where the purchaser anticipates bringing an action against the sellers. Other investigations might not involve litigation as an objective or an inevitable consequence,

but instead involve circumstances in which the company or the board could be sued by shareholders or regulators. In many cases, it will be prudent to ensure that the investigative team includes subject-matter experts who are qualified and prepared to testify in court. As a matter of policy, some outside investigation firms don't testify in court. Working with them can waste the company's time and money conducting duplicative investigations to prepare for litigation. Additionally, some investigators or employees may not have the skills needed to be effective witnesses, potentially exposing the company to additional risks.

A company and its counsel should take special precautions in situations where an investigative consulting firm is both assisting counsel in the investigation and offering testifying experts for an anticipated trial. If not handled carefully, this can potentially raise conflicts, given that it is unwise (or impermissible) for the same individual to be both an advocate and an independent expert. Large consulting or advisory firms can serve both advocacy and expert roles, but care should be taken to establish a Chinese Wall between professionals working on the two separate elements of the representation. The work product of the investigative team can be used by the testifying expert, creating efficiencies. However, communications with counsel about work product may not be used by the expert without jeopardising privilege.

#### Be mindful of containment and confidentiality

People are at the heart of any investigation. While this observation might seem to be self-evident, it is also essential for the investigative team to bear this fact in mind as the investigation proceeds. Reputations, careers and livelihoods are at stake. There may be legal or other repercussions for the company if confidentiality is mishandled.

Investigators should take care to balance the need to gather information with a desire to maintain as low-profile an inquiry as possible. A carefully managed investigation helps to maintain an element of surprise when approaching witnesses and suspects. Moreover, the accused party's privacy must be respected as much as possible, given that initial suspicions may ultimately prove to be unfounded. On the other hand, if there is a government investigation, the GC may want employees and managers to understand what is happening and why, in order to obtain the broadest possible inputs and perspectives to assist him/her in preparing for interactions with regulators.

When deciding whether to suspend employees, the company should consider how a suspension could change the employee's relationship with the company. For example, how might it affect their willingness or obligation to speak with investigators? Could it pose liability for the company in the event the employee is later exonerated? On the other hand, might it send a helpful message to regulators, shareholders, customers and other external constituencies, that the matter is being dealt with seriously?

#### Consider informing the government

The issue of when to bring suspected wrongdoing to the attention of the authorities is a critical one. The company's decision should always be informed by the advice of counsel. While companies tend to prefer handling matters discreetly, we note that enforcement agencies typically advise that they should be informed as soon as a company becomes aware of credible evidence of wrongdoing. If prosecution or settlement negotiations ensue, how and when regulators initially learned about the matter at hand is always a key consideration. Companies caught waiting for regulators to discover infractions on their own or through whistleblowers often face harsher sanctions or, at the least, find themselves in a weakened negotiating posture.

When dealing with enforcement authorities, the company should be aware of the potential advantages of displaying confidencebuilding measures. Regulators' resources are limited in proportion to the mandates they execute. A company may be treated more favourably if it convinces enforcement officials or prosecutors that it is conducting a detailed investigation, that it has a credible team in place and that it is fully cooperating with them. This approach also increases the possibility that company will retain some degree of control over the investigation.

If a company is later charged and settles an enforcement action or prosecution, having taken the initiative to conduct a thorough internal investigation can be beneficial, including the potential for cooperation credit in setting a fine under U.S. Sentencing Guidelines. If the company enters into a deferred prosecution agreement, the company may avoid appointment of an independent monitor altogether or negotiate a narrower scope of the monitor's duties and authority.

#### Prepare and update investigation policies in advance

While each situation is unique, the GC is likely to benefit from a written investigation playbook, which can serve as a general guideline for conducting investigations. The playbook should be regularly updated in accordance with lessons learned and new laws. At a minimum, the playbook should address the relevant practices described in this article.

#### Conclusion

Investigations into suspicions of wrongdoing are a routine but consequential matter for any corporation. The risks are substantial, particularly given the whistleblower provisions in Sarbanes-Oxley and Dodd-Frank, and given the generally more aggressive post-financial crisis regulatory environment. Through Duff & Phelps' extensive experience helping companies and boards deal with suspected wrongdoing, we have found that companies can minimise the consequences of misconduct by encouraging employees to speak up, being proactive in addressing allegations, ensuring that investigations are handled by experienced professionals and, in accordance with the law, engaging constructively with enforcement authorities.

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### Bribery and Corruption: Investigations and Negotiations Across Jurisdictions

Aziz Rahman



#### Rahman Ravelli

#### **Bribery Allegations**

#### The Legislation

This decade has seen a significant legal change in the prosecution of bribery in the UK; namely the Bribery Act 2010. Nevertheless, it is also important to consider what the situation was before this Act came into effect.

We do this not simply as a historical exercise – but because the legislation that existed before the Bribery Act is still relevant and can still be used today. Even though the Bribery Act came into effect in 2011, the earlier legislation is still available to prosecutors.

The Bribery Act 2010<sup>1</sup> should be seen as the result of a decadeslong attempt to reform the law regarding bribery and corruption. It simplified bribery into three offences – offering a bribe, paying one or bribing a foreign official – while introducing a new corporate offence of failing to prevent bribery. Its introduction was, arguably, long overdue.

The Bribery Act replaced the pre-existing law, which was the common law offence of bribery and the statutory offences in the Public Bodies Corrupt Practices Act 1889 (as amended)<sup>2</sup> and the Prevention of Corruption Act 1906 (as amended).<sup>3</sup> Yet the old law cannot be disregarded. It applies to cases where the alleged bribery and corruption was committed before the Bribery Act came into effect on July 1 2011. Section 19 of the Bribery Act makes this clear.

If a company, therefore, is investigated over suspected bribery that occurred before July 2011, any prosecution would be brought under the old law. This is not mere theory. Bribery often comes to light years after it was committed: the case of Rolls-Royce, which we mention later, is a prime example. It is not beyond possibility, therefore, that we may see the old law used regularly as and when allegations that pre-date July 2011 come to light and are investigated and prosecuted. The old law applies to corruption committed within and beyond UK borders, unless it is committed in a foreign jurisdiction by a foreign national normally based in the UK or by a subsidiary of a UK-based company without the authority or involvement of that company. It is also worth noting that the old law, unlike the Bribery Act, does not offer a company the adequate procedures defence; meaning a corporate could be prosecuted for corruption by someone working for it even if it had done everything possible to prevent it.

The old law is still in use. In 2016, for example, printing company Smith & Ouzman Ltd<sup>4</sup> was fined £2.2m under the 1906 Act for making corrupt payments between 2006 and 2010. It is also worth noting that there could be cases which straddle both regimes because

the bribery began before July 2011 and continued after that date. It is possible that, in such cases, charges could be brought under both old and new laws, depending on when the individual offences took place. As the UK does not have any time limit on when charges can be brought regarding an offence, it is likely that prosecutions will continue to be brought under the old law.

#### **Prosecutions**

We have a situation, therefore, where prosecutions can be brought under a variety of laws. The Serious Fraud Office (SFO), which was founded in 1987, is the specialist authority that investigates and prosecutes bribery and corruption. On such cases, it often works with the National Crime Agency (NCA), whose International Corruption Unit investigates corruption involving developing countries.

The SFO receives information from many sources, which it assesses to see if it is worthy of investigation. If the SFO believes the situation undermines UK financial and corporate interests, it will accept it for investigation, involving the unique range of powers it has under Section 2 of the Criminal Justice Act 1987.<sup>5</sup>

This involves SFO teams of skilled experts investigating and, where necessary, using Section 2 to compel any individual or organisation to provide the SFO with information or documents that it believes are relevant to its investigation. The SFO has even told lawyers that they are not guaranteed a right to accompany a client that is compelled to go in for interview under Section 2. If a lawyer wants to attend a Section 2 interview with their client, they must argue why they should be allowed to attend and even agree to certain restrictions on their role in it. This is an approach that the Law Society, the solicitors' professional body, has called "inappropriate".

When, as part of an investigation into possible bribery and corruption, three senior figures in GlaxoSmithKline were asked to attend for interview by the SFO under Section 2, the trio said they wished to be accompanied by solicitors retained by the company for the investigation. The SFO refused permission for the solicitors to attend. It told the trio that the presence of solicitors that represent GSK in the interviews may prejudice the investigation.

The three men were unsuccessful in their application for a judicial review<sup>6</sup> of the decision, with the High Court of Justice Queen's Bench Division stating that the SFO's stance on Section 2 interviews was in accordance with policy in the SFO's Operational Handbook. The SFO's stance on Section 2, therefore, remains in force.

With its own range of powers and its ability to ask for extra "blockbuster" funding for major investigations, the SFO has all the resources for a thorough investigation.

The fact that Bribery Act convictions are, for the time being at least, scarce should not lull anyone into a false sense of security. Having secured successful outcomes in bribery cases, we can say that there is an appetite for bribery prosecutions, even if that has not yet transformed itself into a string of convictions.

Bribery investigations can be long, drawn-out and complex affairs. If an investigation commences into allegations relating to conduct post-July 2011, it may take months, or most likely years, before a decision is taken regarding whether to press charges. The lack of many charges being brought under the new Act should not, therefore, be taken as a sign that the SFO is not actively pursuing those it believes to be involved in bribery.

Those individuals and companies that the SFO believes are involved in bribery do not, in fairness, need to know the ins and outs of UK bribery legislation. That can be safely left to their legal teams. What they do have to know, however, is the best way to proceed if they believe they are suspected of bribery.

#### **Investigations**

If a company finds out, either officially, unofficially or even from its own staff or third parties, that it is suspected of bribery, there is a course of action that it must take. This course, while not complicated, must be commenced the instant any hint of bribery is suspected. An internal investigation has to be conducted immediately – into all aspects of the company's activities. If those within the company are not sure how to proceed they should seek the relevant legal advice. It is only by conducting a well-devised and executed internal investigation that a company can properly assess the extent of any wrongdoing.

Knowing this can help a company respond appropriately to any allegations made by the SFO. Crucially, if an internal investigation produces evidence of bribery before the authorities are aware of it, this gives the company the opportunity to self-report the problem. While this cannot be seen as a magic wand that removes legal difficulties, it is likely that any company that does self-report will receive more lenient treatment from the authorities, who will acknowledge the effort and honesty that has been involved.

The SFO has made it clear, however, that self-reporting is no guarantee that a prosecution will not follow. It will not accept a company's report of wrongdoing at face value and will want to make its own enquiries. Having taken such a stance, however, the SFO has made it clear that it encourages companies to self-report as early as possible. The SFO's approach is understandable and emphasises the fact that self-reporting has to be regarded as much more than an attempt to avoid prosecution by saying nothing illegal happened. The SFO has plenty of scope when it comes to the action it takes against those is suspects of bribery. Self-reporting gives those who believe bribery is being carried out in their name a real opportunity to start a dialogue with the SFO: a dialogue that could achieve that goal of avoiding prosecution.

But the self-reporting has to be based on an internal investigation that has been thorough, methodical and has utilised professionals with the relevant experience and expertise. Such people can include – but are not limited to – investigators, experts in data preservation and analysis, forensic accountants, economists and cultural experts.

Their efforts, as well as all other aspects of the planning and management of the investigation, have to be handled and overseen by lawyers with in-depth knowledge of bribery law, an awareness of how best to deal with the SFO and a realistic approach to the need to identify and rectify the wrongdoing, failings or areas of risk. What must always be borne in mind is that self-reporting is something

that has to be done carefully and appropriately. It is a significant step and anyone considering it will need advice from those with both the relevant legal expertise and extensive experience of dealing with the SFO.

Such expertise is necessary in order to carry out the internal investigation properly – and also ensure its findings are handled appropriately. When it comes to reporting the findings, great consideration must be given to how and when they are reported. Any self-reporting carries the risk of giving the authorities the evidence they require for a bribery prosecution: what had been intended by those under investigation as an attempt to avoid prosecution via a DPA by "coming clean" could be used against them if the self-reporting is not handled properly.

There is also the danger that legal developments can rapidly change the scope that a company has for using an internal investigation in support of its interests. The 2017 case of *SFO v ENRC (Eurasian Natural Resources Corporation)* illustrated this perfectly.<sup>7</sup>

The case relates to allegations that ENRC was involved in bribery in Kazakhstan and an African country. The judge, Mrs Justice Andrews DBE, rejected all but one of ENRC's claims that documents it had created during the self-reporting process were subject to legal privilege. The judge's findings severely restricted the circumstances in which documents can be considered legally privileged.

At the time of writing, ENRC has just been granted permission to appeal this decision. It is now likely to be heard by the Court of Appeal, but as it stands, the case is likely to have a major effect on the way that corporate internal investigations are conducted. Without the protection of privilege, companies and their legal representatives will have to proceed with extra caution so as not to simply create material that backs their case, only for it to be taken and used against them by the authorities.

#### **Negotiations**

Internal investigations, therefore, must be seen as an essential tool for any company looking to establish if bribery has been committed. They can enable a company to deduce the size of the problem. But they also help shape the company's response to the problem. The findings of an internal investigation can help determine the company's dialogue with the authorities and, crucially, form the start of discussions with the SFO or other agency about the remedies or penalties that may result. The SFO can, obviously, prosecute those it believes have committed bribery. But it is not obliged to. It has the power not to deem an instance worthy of prosecution; either by imposing no punishment at all or by resorting to a deferred prosecution agreement (DPA).

DPAs were introduced under the provisions of Schedule 17 of the Crime and Courts Act 2013.8 A DPA is an agreement reached (under the supervision of a judge) between a prosecutor and an organisation which could be prosecuted. It allows a prosecution to be suspended for a defined period provided that the organisation meets certain specified conditions. A company must admit the criminal behaviour and agree to work under certain conditions that the SFO or CPS decides to impose. Such conditions include alterations to working practices, staff changes, paying fines or introducing anti-corruption measures. If the company continues to meet these conditions for a set length of time, it avoids prosecution. If it does not meet them, it is prosecuted.

While DPAs are worth a chapter in their own right, it is worth noting here that they are another example of the scope the SFO has when it comes to dealing with bribery. Exactly what course of action the SFO takes regarding each bribery investigation may come down largely to the way a company negotiates with the SFO.

When it comes to negotiation on a bribery investigation, a number of factors are crucial when it comes to enhancing the chances of a successful outcome.

Cooperation: A company failing to self-report the wrongdoing may well have a reduced chance of obtaining the most lenient treatment. But that is not necessarily the case. A company can make up for a lack of self-reporting by cooperating fully with the authorities. In arguably the UK's most high-profile DPA, Rolls-Royce<sup>9</sup> did not report its extensive use of bribery in far-flung countries. But once the SFO was aware of the bribery, the firm went to great lengths to cooperate with it; even to the point of bringing to the authorities' attention wrongdoing that they were not already aware of. This cooperation was highlighted by the judge as a factor in approving the DPA and the lenient penalties within it.

It is vitally important, however, that any offer of cooperation is not just offered to the SFO when it looks like a charge is likely. The judge in the XYZ case<sup>10</sup> stated clearly that if those under investigation did not offer openness when investigations were under way, then they could expect little or no reward. The cooperation has to be there from day one and be genuine and ongoing. By appointing a lawyer with experience and expertise in dealing with the SFO, you can be advised on exactly how to cooperate and what it entails.

Reform: When Standard Bank<sup>11</sup> obtained the UK's first DPA, it did so having immediately reported its wrongdoing and taken a strong, proactive approach to disclosing everything it could. Its cooperation stood it in good stead, as it obtained a DPA instead of being prosecuted. But the leniency shown was in part due to Standard's efforts to swiftly put right the problems that had led to it facing legal trouble. It is no coincidence that all the DPAs that have been granted so far have been made after the corporates under investigation removed senior managers who were either implicated in the wrongdoing or should have been aware of it. The authorities welcome cooperation but they also want to see clear evidence of a corporate's commitment to changing its workplace practices to prevent any repeat problems.

Speaking at the Cambridge Symposium on Economic Crime in 2017, the SFO's General Counsel, Alun Milford, said:

"Deferred prosecution agreements are pragmatic devices aimed first at incentivising openness leading to the uncovering of financial crimes and secondly at allowing companies to account to a court for those crimes in a way that does not also punish its innocent employees, suppliers and the local community in which it operates."

While his remarks relate specifically to DPAs, they emphasise the SFO's belief – and the belief held by its counterparts in other countries – that companies are best served by self-reporting and the introduction of fit-for-purpose compliance structures. As the SFO looks towards its future, that is what it will be seeking from those looking to avoid prosecution and be treated leniently. Indeed, careful consideration of what reforms need to be made and introducing them while negotiations are ongoing can be a major factor in achieving such a goal.

But change for change's sake will never be enough. Any action to reform a company in the wake of bribery allegations being made proves an awareness of the failings and a determination to change. Corporates being investigated for bribery are battling to minimise the financial and reputational damage that can result, as well as trying to avoid being prosecuted. In such a pressured environment, it is often best to call in outside help to take a considered, impartial look at what and who need to be changed to both prevent repeat problems and convince the authorities of a corporate's determination to "turn over a new leaf".

#### **Across Jurisdictions**

We mentioned earlier how bribery investigations can be lengthy and complicated affairs. This is partly due to the often complex nature of trading arrangements. But, in many cases, it is because the deals under investigation have taken place in a number of countries; meaning they could involve investigating authorities from a number of nations - each of which has its own legal system. With such cases, it cannot be over-emphasised how important it is for anyone facing a cross-border investigation to be represented by a firm that has easy and regular access to a network of worldwide legal experts. Any multinational investigation requires a multinational response. It is no exaggeration to say that the outcome in many future bribery cases may hinge on the ability of the defence team to construct and coordinate representation in a number of countries. The bigger the company, the more likely it is to trade in more than one nation. This not only increases the risk of bribery; it places a greater onus on those at the top of the company to be aware of everything that is being done on their behalf anywhere in the world. Relying on representation from a firm whose reach does not extend as far as the allegations do is a high-risk approach. Such allegations can only be tackled by a legal firm that can command and coordinate the services of experts in the relevant countries.

#### 2016-17 Investigations

This is not a theoretical argument. The major cases of 2016–17 have shown the multijurisdictional nature of bribery investigations.

We mentioned earlier the case of ENRC. It is a case that illustrates this. The SFO opened an investigation into ENRC in 2013 over allegations that bribes were paid to win business regarding mineral assets in Kazakhstan and Africa. The SFO investigation followed roughly two years of discussion regarding whether the company should self-report. Since the investigation began, the company has been delisted from the London Stock Exchange and changed its name to ERG. The ENRC case shows the international nature of bribery allegations. But it also shows the potential damage that can be caused if there is even a hint of bribery – and that bribery is not tackled promptly.

The Soma Oil and Gas investigation<sup>13</sup> is another major case that indicates the problems that come with a bribery investigation, regardless of whether it leads to a prosecution. The investigation had been prompted by allegations made by a United Nations body called the Somalia and Eritrea Monitoring Group (SEMG), which claimed that Soma was bribing officials. Soma denied the allegations and was fiercely critical of those who had made them.

In late 2016, the SFO abandoned its bribery investigation into Soma after failing to find enough evidence to prosecute. Following a 17-month investigation, the SFO announced: "Whilst there were reasonable grounds to suspect the commission of offences involving corruption, a detailed review of the available evidence led us to the conclusion that the alleged conduct, even if proven and taken at its highest, would not meet the evidential test required to mount a prosecution for an offence."

Regardless of whether or not the allegations were true, they proved to be the death knell for Soma's attempt to develop an offshore oil industry in Somalia. New funding from investors – including a Russian billionaire – failed to materialise, potential partners (including an Italian energy giant) decided not to become involved and Soma, at one point, was down to its last half a million pounds in cash.<sup>14</sup> A multinational deal fell through because of bribery allegations that were never proven or disproven.

When the SFO confirmed, in May 2017, that it was investigating oil services group Petrofac<sup>15</sup> over its links to Monaco-based consultancy firm Unaoil, the announcement came a year after it had begun bribery investigations into Unaoil's activities on behalf of Rolls-Royce, Halliburton-KBR, ABB, Leighton Holdings and Amec Foster Wheeler.

The Petrofac investigation, therefore, was not unique, even if the company's resulting 14% fall in share value did serve as another warning about the damage that can be caused by bribery allegations. But it was notable for emphasising the importance of a proper internal investigation. The SFO investigation into Petrofac began just months after the company insisted its own investigations had found no evidence that any director of the company was aware of any alleged misconduct regarding Unaoil. A company that comes under SFO investigation after it claims that it has investigated and found no signs of wrongdoing will face an uphill battle to convince the authorities that it has taken the allegations seriously.

Such developments can only re-emphasise how important it is that – as we said earlier – an internal investigation is carried out properly. In cases that span countries, the challenge is all the harder, as it involves a number of jurisdictions and carrying out an internal investigation can be a much lengthier and complex process than it would be if the allegations involved one company site in just one country. The Petrofac case indicates the increased risks or bribery when trading in a number of countries – as do the other cases mentioned here – but it also shows the dangers of not conducting an internal investigation properly.

#### Commitment

The principles outlined above regarding investigation and negotiation are the only appropriate way for corporates to proceed if they suspect bribery is being committed. There can be no cutting of corners when it comes to taking this course of action. If corners are cut, it is likely that the investigating authority will soon realise this and take a less than charitable view of what has been done. It is understandable that corporates may find the process of investigation and negotiation overwhelming in bribery cases that cross borders. But that cannot be seen as an excuse not to do everything possible to put right the problem.

Certainly, the investigating authorities in any country will expect nothing less than a wholehearted commitment to resolving the problems before they consider any leniency. Mining company Rio Tinto<sup>16</sup> has been investigated by the SFO in 2017 over its involvement in suspected corruption in the Republic of Guinea. It said that it would fully cooperate with the SFO and any other relevant authorities. Tellingly, the SFO investigation came after Rio Tinto had conducted its own internal investigation, having been alerted to emails relating to payments to an unidentified consultant regarding a project to secure an area rich in untapped iron ore deposits.

Rio Tinto even suspended one senior executive, accepted the resignation of another and alerted US and UK authorities about millions in unexplained payments. But such measures will never be a guarantee of avoiding prosecution. If a company is the subject of a multijurisdictional investigation, it has to take advice and be guided as to the best way to proceed by those with expertise in coordinating cases that cross international borders.

One thing that all these multinational cases have in common, apart from allegations of bribery, is that they are all based on the race to secure natural resources. Whether it be oil, gas or materials that are mined, a lot of the major bribery cases involve the race to secure access to and rights to sell natural resources.

As such resources become scarcer and demand increases for them, it is likely that the chances of bribery being used to secure deals could increase. What those who are looking to secure such deals must remember, however, is that the authorities around the world are now a lot more attuned to the potential for bribery and more coordinated in their attempts to tackle it. The onus is on such companies, therefore, to make sure they do nothing that could be seen to be promoting bribery in any way. They are expected to have taken the best legal advice and to have implemented the most appropriate measures to prevent bribery and corruption.

That is the case whatever line of business a company is in, wherever it is based, wherever it trades and however large or small it is.

It is also worth noting that when a company comes under investigation for bribery, it is unlikely that the authorities will impose limits on what they are looking for. If, therefore, a company is investigated for bribery, the authorities are certain to look for evidence of other crimes. If the evidence trail then leads investigators to what appears to be other wrongdoing, those under investigation have to be able to show that they did everything possible to try to prevent it.

This means that any internal investigation must look – as we mentioned earlier – into all aspects of a company. There is little value in conducting an internal investigation solely to seek evidence of possible bribery if that investigation fails to uncover the evidence that exists of other business crime. If that other crime is then discovered by the SFO or other agency, the company will be placed in an extremely difficult position.

Any company coming under investigation can only hope to negotiate a settlement if it is open and honest about its problems – and genuinely determined to put them right.

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As founder and senior partner at Rahman Ravelli, Aziz Rahman oversees and directs the firm's expanding bribery and corruption caseload. His specialist knowledge, notable track record and growing reputation have led to his involvement in many of the major corruption investigations and a client list that includes some of the most significant corporations, professionals and high-net-worth individuals. proactive and robust defence work and his proven ability to assemble and direct defence teams has led to him and his firm becoming the logical choice for many requiring intelligent, astute representation in bribery and corruption investigations.

His ability to swiftly analyse complex issues and then plot the most appropriate tactical approach in even the most complicated international and multi-jurisdictional cases has seen him highlighted repeatedly in both The Legal 500 and Chambers & Partners. His firm has also received the highest rankings in both legal guides.

Mr Rahman is in increasing demand to carry out internal corporate investigations for clients, in order to identify wrongdoing and self-report it. This demand has been especially notable since the introduction of deferred prosecution agreements; of which he already has more experience than most. His carefully-considered but determined approach attracts corporates and individuals who want to secure the best possible outcome to a bribery investigation.

He routinely deals with the Serious Fraud Office (SFO), HM Revenue and Customs (HMRC), the National Crime Agency (NCA), City of London Police, the Financial Conduct Authority (FCA), international bodies such as the FBI, the US Securities and Exchange Commission (SEC), OLAF and Interpol and police and anti-corruption agencies worldwide.

### RAHMAN RAVELLI solicitors

Rahman Ravelli was founded in 2001. It has become one of the fastest-growing and most highly regarded legal practices specialising in the defence of serious fraud, regulatory matters, complex crime and commercial litigation.

The firm's national and international caseload continues to grow year on year. It handles the most complex and high-profile cases, which often involve a number of countries.

# Australia







Clayton Utz

Narelle Smythe

## 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

In Australia, internal investigations are not often mandated by a regulator. Rather, internal investigations are more commonly voluntarily commenced by a company in the course of fulfilling some other statutory or regulatory obligation. However, the regulators in Australia do have substantial powers to compel production of documents and information from companies, with penalties for failure to comply.

Conducting an internal investigation at an early stage, and before a regulator commences a formal investigation, carries many benefits. It allows a corporation to determine the scope of any issue and formulate an appropriate response.

Key regulators in Australia that should be considered are set out below.

Regulator	Powers	Consequences of not complying
Australian Securities and Investment Commission (ASIC)	ASIC has broad powers. In particular, they can compel the production of documents and evidence in the exercise of its enforcement or investigatory functions.	The penalty for failing to comply to provide information and/ or documents ASIC requests is \$18,000 or imprisonment for two years, or both.
Australian Competition and Consumer Commission (ACCC)	The ACCC has powers to compel companies to produce documents and undertake interviews in the exercise of its investigatory function.	Penalties for non- compliance with a s155 Notice is \$3,600 or imprisonment for up to 12 months.
Australian Prudential Regulatory Authority (APRA)	APRA has broad powers to conduct investigations into companies and entire industries, with a particular focus on the banking, insurance and superannuation industries.	Failure to notify APRA of a breach of a prudential requirement is a strict liability offence and a penalty of \$18,000 may apply.

Regulator	Powers	Consequences of not complying
Australian Taxation Office (ATO)	The ATO has the power to conduct reviews and audits as well as investigations into allegations of serious misconduct or corruption by staff. It also has formal access powers to enter any premises and have access to any documents, usually only employed when the ATO cannot obtain a cooperative approach.	Blocking the ATO from using its formal access powers is an offence and may result in prosecution.
Australian Transaction Reports and Analysis Centre (AUSTRAC)	AUSTRAC has regulatory responsibility for anti-money laundering and counterterrorism financing. It is Australia's financial intelligence agency. AUSTRAC has a range of powers including requiring an organisation to appoint an external auditor to carry out an external audit of compliance with AML/CTF laws. It also has a range of other powers including to give remedial directions and to apply for civil penalty orders.	The penalties for specific breaches can be up to \$21 million.
Office of the Australian Information Commissioner (OAIC)	OAIC's functions include those relating to privacy. It has powers to commence investigations (amongst other things) and handle complaints.	A range of penalties can apply and OAIC can make determinations in certain circumstances.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Legal advice should almost always be sought in advance of any internal investigation to assist in scoping the issues to be investigated and determine whether there has been any contravention of the law.

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Steps should also be taken to prepare a protocol to ensure that legal professional privilege is maintained where it is appropriate to do so.

When commencing an internal investigation, a company should also develop a "Regulatory Engagement Strategy" which considers what information can and should be shared with the regulator and at what stage of the investigation. The scope of regulatory engagement will depend on the issue being investigated and whether the internal investigation has been voluntarily commenced or is in response to some form of regulatory action.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Companies should have a whistleblower policy which outlines the processes to be followed when a whistleblower comes forward. The policy should comply with the Australian Standards "Whistleblower Protection Programs for Entities". The policy will help companies to determine whether the issue raised by the whistleblower is credible, which in turn enables the company to assess the credibility of the individual who has come forward.

The *Corporations Act 2001* (Cth) recognises and protects individuals who meet the legislated criteria of a "whistleblower". The *Corporations Act* contains protections for whistleblowers who meet the criteria, including:

- protection of information provided by whistleblowers;
- protections for whistleblowers against litigation; and
- protections for whistleblowers from victimisation.

These protections encourage people within companies, or with special connections to companies, to alert the company (through its officers), or the regulator, to illegal behaviour.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

This will ultimately be determined on a case-by-case basis, depending on the way in which the internal investigation was initiated, and the extent to which any regulator might be involved. To the extent that there is regulatory involvement, the Regulatory Engagement Strategy (see question 1.2) should clearly identify who the client is.

Outside counsel should carefully consider the issue being investigated and the stakeholders in that investigation. Regard should be had to the individuals involved in the issue and where necessary, advice should be provided to exclude identified individuals from the process. Consideration should be given to whether that exclusion relates to the whole investigation, or only particular parts of it.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

The ACCC, ASIC and ATO also all have cooperation policies in place for companies who voluntarily disclose any breaches or misconduct. Although disclosure by a company will not necessarily preclude enforcement action by regulators in Australia, such action is undertaken at the discretion of the regulator and so cooperation is usually encouraged from a relationship perspective.

Some regulatory bodies in Australia also have leniency or immunity policies for companies who voluntarily disclose information to a regulator. For example, the ACCC has a formal immunity policy for a company who is the first to come forward about involvement in cartel conduct, protecting the company from any criminal or civil action against them. There are various requirements the company must meet in order to be eligible for immunity including being the first to report such conduct, being involved in the conduct but not coercing the other parties to undertake the conduct, having ceased involvement in the conduct, and providing full and frank disclosure to the ACCC.

In some cases, there are obligations to report breaches to the regulators within specific time periods. For example, licensed financial services providers have an obligation to report certain significant breaches or likely breaches to ASIC as soon as practicable or in any event within 10 business days after becoming aware of the breach or likely breach.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

This needs to be determined on a case-by-case basis. The formulation of the Regulatory Engagement Strategy (see question 1.2) will help to determine this issue.

As set out in question 2.1 above, in some cases, there are obligations to report certain breaches to regulators within specific time periods.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

Reporting requirements of an internal investigation will be determined on a case-by-case basis, and with regard to any statutory and regulatory requirements. In some cases, the nature of the outcomes of the investigation will mean that reporting requirements are triggered by law. In other cases, a decision to report will be made voluntarily in the interests of transparency and having regard to the relationship with the regulator.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

There is no obligation for an entity, which is the subject of a government investigation, to liaise with local authorities before starting an internal investigation. However, it may be prudent for an entity to do so. This depends, primarily, on the entity's regulatory engagement strategy (see question 1.2) and should be decided on a case-by-case basis depending on the sensitivity of the conduct being investigated, the likelihood that such conduct will be the subject of an external investigation by local authorities and whether any such conduct is ongoing or restricted to the past.

There are advantages in proactively engaging with local authorities, particularly if an incident is high profile and likely to be the subject of investigation in the future. ASIC, for example, encourages voluntary engagement through policies that may reward the early notification of misconduct. This engagement will often be relevant to ASIC's consideration of potential enforcement action.

One disadvantage to engaging with local authorities prematurely is that it may give rise to enquiries from local authorities before a company is ready to address them.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations?

What level of involvement in an entity's internal investigation do they prefer?

The preferences of law enforcement entities for oversight are determined on a case-by-case basis depending on the issue. For example, the Australian Federal Police (AFP), which enforces Commonwealth criminal law, considers a matrix of factors when determining its involvement in a matter, including the incident type, impact on Australian society, importance of the matter and resources required to undertake the matter. The AFP is content for entities to engage in their own line of enquiries, though recommends that entities should proceed cautiously and preserve evidence in their internal processes. The AFP recommends that entities consult with it if they conclude that criminal acts may have occurred.

Generally, if a law enforcement entity is aware of an issue, it will typically permit internal investigations to proceed without being actively involved, provided progress and findings are reported in a suitable way. In such cases, a third-party expert will often be involved at the insistence of a regulatory body to report on a process, providing assurance that due process has been followed.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Typically, yes. Defining the scope of an investigation and how to assist a regulatory body to do so, should form part of a company's regulatory engagement strategy (see question 1.2).

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Enforcement authorities are increasingly coordinating with authorities in other jurisdictions. See the answer to question 6.3 below for further details.

For companies facing investigation in multiple jurisdictions, it is critical to coordinate the response across those multiple jurisdictions. That will typically require the appointment of a dedicated individual or team to coordinate the responses and consolidate the strategy. Having clear compliance and management plans in place will also help prepare an entity for a multi-jurisdiction investigation.

#### **4** The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

There are no jurisdiction-specific challenges faced by entities when conducting an internal investigation. The challenges faced by companies in Australia in conducting an internal investigation are the same as in other jurisdictions.

### 4.2 What steps should typically be included in an investigation plan?

An investigation plan should include the following steps:

- 1. Scope identify and define the scope of the issue.
- 2. Regulatory engagement strategy see question 1.2.
- Resource identify resources required both internally and externally (legal, forensic accounting, other professional services firms, etc.).
- Custodian identification identify key custodians of information, documents, data necessary for the internal investigation, having regard to the nature of the investigation and any real or perceived conflicts of interest and the importance of independence.
- Evidence review of data and documents, including witness interviews.
- 6. Report preparation.
- Report delivery the report should be delivered, reviewed and responded to in a timely manner and include recommendations for next steps, including consideration of regulatory notification.
- 4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Legal advice should be obtained at an early stage (see question 1.2), and depending on the issue involved this should include outside counsel. Outside counsel who are familiar with the business will provide efficiencies in the investigation process.

Forensic consultants can generally be used in two ways: firstly, to assist with conducting an internal investigation (either to complete scoping exercises, assist in data analytics or assess data tampering) or to provide an independent assessment of the reasonableness of an investigation conducted if this is required by a regulator.

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#### 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Legal professional privilege in Australia (otherwise known as client legal privilege) is generally protected under both common law and legislation.

Under the common law, legal privilege covers the written and oral communications between the client and their lawyer (and in some instances a third party) which refer to the lawyer/client relationship and are confidential in character.

Under legislation, legal professional privilege extends to two categories of communications:

- communications brought into existence for the dominant purpose of obtaining or giving legal advice; and
- communications brought into existence for the dominant purpose of preparing for existing, or reasonably anticipated, litigation.

It is not sufficient for an entity to simply assert legal privilege. The entity claiming the privilege bears the onus of demonstrating the basis for that privilege.

A client who asserts legal privilege over communications needs to ensure that the privilege is not waived, by either an express or an implied waiver. A client is deemed to have waived privilege if the client acts in a way that is inconsistent with the confidentiality which the legal professional privilege is supposed to protect. This deemed waiver of privilege may occur in circumstances where, for example, the substance of legal advice is publicly communicated.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Legal privilege may extend to third parties in circumstances where the dominant purpose test is met, in circumstances where a third party is engaged to produce, for example, expert evidence. It should be noted that the privilege remains a client legal privilege. Forensic accountants, who are often engaged to assist in internal investigations, do not have their own privilege.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Although in-house counsel are protected by legal privilege, careful consideration needs to be given to their role and purpose for communication.

For legal privilege to apply to in-house counsel, the relevant communications must meet the requirements identified in question 5.1 and must be made in counsel's role as a lawyer. Legal privilege may not apply where in-house counsel participates in commercial or business decisions and for this reason, in-house counsel needs to be careful in separating legal advice from other matters of the business in which they may be involved. Where a communication

over which privilege is asserted is deemed to be for mixed purposes, rather than for the dominant purpose of legal advice or litigation, privilege will not protect the communication.

Additionally, a claim of legal professional privilege may fail where in-house counsel has not acted with sufficient arm's length from their client, and consequently, lack independence; for example, in cases where in-house counsel prepares documents on the directions of the management team.

#### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Entities can protect documents that are subject to legal privilege by ensuring that the documents meet the requirements relating to legal privilege identified in question 5.1. Early legal involvement is important to ensure these requirements are met and that a protocol is in place to ensure that privilege is appropriately claimed and not waived.

#### 5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Disclosure to regulators needs to be undertaken with some care if there is a desire to keep the results of the investigation confidential. While organisations can seek to provide information to regulators on a confidential basis, in practice it will be very difficult to restrain a regulator from further investigation and potential publicity.

Further, if an organisation has undertaken an internal investigation and voluntarily discloses the results of the investigation to the enforcement agency (as distinct from compulsory disclosure), the entity should first consult lawyers to ensure that such disclosure will not amount to a waiver of privilege.

Regulators may have special procedures relating to voluntary disclosure of information subject to privilege. For example, ASIC may "elect to accept" voluntary confidential disclosures of privileged information in particular circumstances and a disclosure on these terms does not amount to a waiver of any privilege.

#### 6 Data Collection and Data Privacy Issues

#### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The Privacy Act 1988 (Cth) including the Australian Privacy Principles (APP) at Schedule 1 to that Act. Under that Act, amongst other things, if an entity holds personal information about an individual that was collected for a particular purpose, the entity must not use or disclose the information for another purpose unless an exception applies. Exceptions include:

- (a) where the use or disclosure is required or authorised under an Australian law or court/tribunal order;
- the use or disclosure is reasonably necessary for the establishment, exercise or defence of a legal of equitable claim;
- (c) the entity has reason to suspect unlawful activity or misconduct of a serious nature that relates to the entity's functions or activities has been, is being or may be engaged in and the entity believes the use or disclosure is necessary for the entity to take appropriate action in relation to the matter; and

(d) the entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.

Obligation of confidence can also arise in connection with particular relationships such as that of banker and customer.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

It is not common practice or a legal requirement in Australian jurisdictions to prepare and issue document preservation notices. However, there are common law and legislative duties and obligations in relation to document destruction, including an obligation not to destroy a document which is or is reasonably likely to be required in legal proceedings.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Documents located in multiple jurisdictions raise complex issues.

One relevant question is the extent to which production of documents outside Australia can be compelled in Australia. Factors relevant include the extent to which the documents are in the control of the entity in Australia and the jurisdiction in which the documents are held

Regulators can make international requests to foreign regulators and receive requests from foreign regulators in relation to various activities such as investigations, compliance and surveillance. For example, the Australian corporate regulator, the Australian Securities and Investments Commission (ASIC) is a signatory to the International Organisation of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding and other memoranda of understanding with regulators from other countries such as the United Kingdom, Belgium, China, Germany and the United States. The memoranda generally outline the obligation for ASIC and the counterpart regulator to use reasonable efforts to provide mutual assistance to each other including providing and exchanging information and depending on the memoranda; this could extend to confirming and verifying information and questioning or taking testimony.

Regulators can also rely on the Mutual Assistance in Criminal Matters Act 1987 (Cth) (for criminal matters) or the Mutual Assistance in Business Regulation Act 1992 (Cth) (for civil matters, only Commonwealth Regulators can request for mutual assistance). Both Acts regulate government-to-government assistance where the Attorney-General is responsible for approving and making requests to foreign countries to assist in such investigations.

Finally, before documents in Australia which contain personal information are disclosed to third-party overseas recipients, the discloser must, subject to limited exceptions, take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the APPs (other than APP 1) in relation to the information (APP 8).

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

This will depend on the type and nature of the investigation. Documents that could be collected include internal reports, documents evidencing processes, management assurance or internal auditing/supervision, standard forms, customer files and data, other internal data, phone recordings, correspondence, financial records, records regarding complaints such as complaints registers, sales and marketing material and staff training manuals.

Depending upon the investigation, the provision of information, as opposed to documents (including in the form of written statements), can be compelled.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

This depends on the investigation and its scope. Overall, there needs to be an understanding of the types of documents and data held. It is important to have a documented process and plan for the identification and collection of relevant documents including the resources, timing and steps (such as searches) to be undertaken and undertaken to locate the documents (see question 4.2). Specialist IT and data analytics resources are often required. Consideration should also be given, depending on the investigation, to third-party verification of data.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Australia has taken a cautious approach to the use of predictive coding techniques. The case of *McConnell Dowell Constructors* (*Aust*) *Pty Ltd v Santam Ltd & Ors* (No 1) [2016] VSC 734 was the first instance in which an Australian court specifically considered its use. In this case, the Victorian Supreme Court decided to approve the use of predictive coding techniques in the process of reviewing approximately 4 million documents for the purpose of discovery. Following this, the Victoria Supreme Court issued Practice Note SC Gen 5 – Technology in Civil Litigation on 30 January 2017, which expressly endorses the use of predictive coding techniques in larger cases. Similar practice notes in the courts of other jurisdictions do not expressly endorse the use of predictive coding techniques but appear broad enough to permit such use.

The Australian corporate regulator (ASIC) has indicated that it is increasingly adopting strategies that use tools such as predictive coding (Report 476 ASIC enforcement outcomes: July to December 2015).

While it appears that there may be a growing acceptance of predicting coding techniques in Australia, ultimately the use of such techniques must be appropriate for the context, jurisdiction and purpose for which it is used. The best practice for reviewing documents in internal investigations depends on the nature, scale and timing of the investigation. It could involve developing review platform/databases and/or predictive coding for segmenting the review into issues and/or performing keyword searches over those documents to prioritise the review and selecting a team of reviewers to efficiently conduct the review.

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#### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There is no particular statute directed to interviews. Whether, and if so, which, authorities entities need to consult depends upon the type of investigation undertaken.

However, in light of employment laws, employers will need to follow the rules of natural justice and procedural fairness when dealing with employees, otherwise they are exposed to claims by aggrieved employees. For example, if an employer fails to afford procedural fairness and takes action against the employee, the entity may be subject to action by the employee.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Australian law recognises a requirement for a current employee to promptly and fully participate in an internal investigation arising from a lawful direction for the employer to comply. An employer could be subject to adverse action if it does not comply with such a direction.

However, if an employee refused to do so because it exposed them criminally, the employer is not entitled to terminate the employee's employment for the refusal (although employment may be terminated for misconduct).

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

An entity is not required to provide legal representation to witnesses. However, in some cases, independent legal representation is advisable and can be facilitated by the entity.

An employer is required to allow a person accused of wrongdoing to have a support person with them (although it need not be legal representation).

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

Again, it depends upon the witness interview.

As set out above, natural justice and procedural fairness should be afforded, in particular for employees.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

This is not applicable in our jurisdiction.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Regard must be had to the protections afforded to whistleblowers – see question 1.3. In particular, care must be taken to ensure that it cannot be said that the whistleblower has been victimised in any

way. Consideration should be given to affording the whistleblower their own legal representation to ensure that their interests are appropriately protected.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Regard must be had to the protections afforded to whistleblowers – see question 1.3. In particular, care must be taken to ensure that it cannot be said that the whistleblower has been victimised in any way. Consideration should be given to affording the whistleblower their own legal representation to ensure that their interests are appropriately protected.

### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

As a matter of policy, it can be appropriate to grant immunity or amnesty to employees during an internal investigation, particularly in a whistleblowing context. However, organisations cannot grant immunity or amnesty to employees from criminal or civil offences. It is an offence to reach an agreement with a person to forebear from reporting a serious crime to police in return for them cooperating.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

In short, generally, yes. For reasons of procedural fairness, as described above, it is usual practice to allow employees to check records of interviews or settle any written statement.

#### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

A report in written form is usually provided at the end of an internal investigation. There are a number of benefits to a written report, in that it provides a clear and effective means of communicating with relevant stakeholders and other interested parties. Depending on the nature of the investigation, entities may also be bound to keep a written record of their findings or working papers for a period of time. In some instances, a meeting may also be held to communicate the findings of the report, which may present an opportunity for greater stakeholder engagement.

However, whether communicated in oral or written form, entities need to consider legal privilege and ensure that the presentation of a report does not amount to waiver of any legal privilege they wish to maintain.

### 8.2 How should the investigation report be structured and what topics should it address?

This will depend on the issue being investigated and the audience of the report. In some investigations, it may be appropriate to have multiple versions of the report, with varying degrees of detail, having regard to who the report is to be provided.



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Ross McInnes is recognised as a class actions and investigations specialist. Ross has been intimately involved in some of Australia's most recent large-scale consumer remediation programmes. He has been involved with the initial strategic management of investigations and enforcement issues, and has worked to develop and implement remediation programmes and give ongoing strategic advice once they are operational. He is an experienced litigator whose in-depth knowledge of class action law has seen him successfully defend a range of Australia's largest class action claims, including in the areas of: financial services; shareholder class actions; anti-trust claims; pharmaceuticals; and medical devices.

Complementing this is Ross' work with clients in the pharmaceutical and medical device industries on regulatory, pricing, and contentious issues

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Narelle Smythe is a leader in financial services regulation, investigations and enforcement

She has over 25 years' experience in financial services regulation, in both non-litigious and litigious matters. She has acted for domestic and international financial services providers on complying with financial services regulation up front, as well as in regulatory investigations and enforcement proceedings.

She has extensive experience in complex and large-scale projects and investigations. Her experience extends to financial services (Chapter 7), credit, privacy, anti-money laundering, fraud and bribery and corruption. She is particularly adept in managing large-scale, multi-faceted investigations and litigation and in devising and rolling out effective remediation programmes.

As her practice is both litigious and non-litigious, she brings to regulatory investigations not only litigious expertise but a deep understanding of the regulation and business environment to which the investigations relate and to upfront compliance projects, a comprehensive understanding of regulatory issues that may arise and how to manage them. She is uniquely positioned to pro-actively identify and advise on the full spectrum of legal issues that arise in a financial services project or a regulatory investigation or enforcement.

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Clayton Utz is also a leader of Australian law firms in *pro bono* practice and social responsibility programmes. These are important parts of who we are as a firm.

# Belgium

Hans Van Bavel



Stibbe Baker Tilly Belgium

Frank Staelens



#### 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

There is no specific legal framework for internal corporate investigations. However, any internal investigation must comply with the rules on privacy and employee protection, which are set out in or derived from Belgian privacy law, telecommunication law, and employment law. As one must observe the right to privacy, personal integrity and individual freedom, an entity may not use force in any way for the purpose of finding evidence. Only law enforcement agencies are allowed to use force on or compel individuals for the purpose of finding evidence to the extent permitted by law, and only in a proportional manner to achieve a legitimate aim.

Internal investigations that are conducted with the consent of the employees are possible, however. The entity may interrogate its employees on condition that no force or acts of intimidation are used. Moreover, different collective bargaining agreements ("CBAs") allow for the possibility to take certain investigative measures when deemed necessary, e.g.: CBA no. 89 concerning body search; CBA no. 81 concerning email and internet monitoring; and CBA no. 68 concerning video surveillance. Any breach of these CBAs constitutes a criminal offence.

Internal investigations often imply the processing of personal data. In this respect, the Belgian Data Protection Act of 8 December 1992 ("BDPA"), Collective Bargaining Agreement no. 81 of 26 April 2002 on the protection of the private life of employees with regard to the monitoring of electronic online communication data ("CBA no. 81") and, as of 25 May 2018, the General Data Protection Regulation (the "GDPR"), applies. Further to the BDPA and the GDPR, personal data may only be processed proportionately and transparently and for well-defined purposes. If the data was collected legitimately and the processing of the data in the context of an internal investigation is justified, the data processing could still violate Article 4 BDPA or, once applicable, Article 5 GDPR, if it turns out that the data was not processed proportionately and transparently. An entity could be held criminally and civilly liable and could incur administrative sanctions once the GDPR becomes applicable, if it processes data in violation of the BDPA.

Unlawfully obtained evidence is in principle inadmissible in a civil lawsuit or criminal trial. Nevertheless, evidence obtained unlawfully can be admitted under any of these conditions: (i) if it has not been obtained in violation of formalities prescribed by law under pain of nullity; (ii) if the reliability of the evidence is not affected; or (iii) if using the evidence does not contravene the right to a fair trial.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

An entity should bear in mind that it could be held criminally liable for offences that are either committed on its behalf or intrinsically linked to its business activities. However, a defence that the entity can use to avoid criminal liability is proving the absence of *mens rea* in the offence committed. It can do so by proving that it has exercised proper due diligence in its hiring and supervising tasks and that no defective internal systems and verification procedures led to the commission of the offence.

If the entity decides to proceed to a dismissal of the employee, it must bear in mind the three-day deadline for immediate dismissal. Dismissal on grounds of urgent cause is possible if the employee's serious misconduct impedes further professional cooperation with the employer immediately and permanently. The employer may proceed to dismissal for urgent cause only within three days after it has discovered the facts that substantiate the need for the dismissal. However, case-law states that this three-day period only starts to run after the employer has obtained certainty about the facts, for example, by way of conducting an internal investigation.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

The credibility of a whistleblower's complaint must be assessed on a case-by-case basis because it depends on many circumstances, such as the whistleblower's position in the entity, the level of detail of the complaint, etc.

In Belgium, there is no specific legal framework that applies to whistleblowers. However, Belgian credit institutions are obliged to set up an appropriate internal whistleblowing procedure to report breaches of rules and codes of conduct of the institution (Article 21, §1, 8° of the Act of 25 April 2014 on the status and supervision of credit institutions).

Furthermore, the Belgian Privacy Commission issued a recommendation on this topic in 2006. The recommendation explains how a whistleblowing procedure can be established in compliance with the Belgian Data Protection Act (Recommendation no. 01/2006 of 29 November 2006).

Moreover, an FSMA circular letter of 2007 requires financial institutions to put in place appropriate procedures that allow employees to express their good-faith and legitimate concerns regarding any unethical and illegal behaviour within the institution. (Circular PPB-2007-6-CPB-CPA.)

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

Again, this is an assessment that can only be made on a case-by-case basis. As a general rule, it is for the entity to determine who it must report directly to or who the client is. It is, of course, always safer to receive instructions from a director or a high-ranked employee who is not connected with the decision or the department in which the internal investigation will have to take place. Outside counsel can assume that no conflicts of interest are present unless the case materials reveal otherwise.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Voluntary disclosure of the results of a properly conducted internal investigation can be taken into account by law enforcement authorities when they decide whether to prosecute the corporate entity itself rather than the individual(s) involved. This is because a legal entity can only be punished under criminal law if it has acted with the required *mens rea* or guilty mind. Voluntary disclosure of the results of an internal investigation could be an element – albeit *post factum* – in showing that the entity seeks to distance itself from the event in question.

Voluntary disclosure will, at least in principle, have an effect on the severity of the penalty imposed.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

As a general principle, no one can be obliged to incriminate oneself. Therefore, there is no duty for anyone to report any criminal offence that he has committed.

Furthermore, there is no general duty to report criminal offences committed by third parties, except for crimes against public safety or against the life or property of an individual.

However, the law imposes specific duties with regard to the reporting of certain facts, such as the duty to report to the Financial Intelligence Processing Unit ("CTIF-CFI") about indications of money laundering.

Entities are not obliged to report themselves if they discover internal wrongdoing that could constitute competition law violation, but they can do so and benefit from the leniency programme (book IV of the Code of Economic Law).

Moreover, the Criminal Code imposes several specific duties of cooperation once the competent magistrate orders that certain information must be provided (*cf.* duties imposed on telecommunication services providers or financial institutions). Failure to cooperate is criminally sanctioned.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

The law does not prescribe the format in which an internal investigation should be reported.

A written report entails the risk that any written acknowledgment of the flaws in the entity's monitoring or verification procedure can and will be used as evidence against the entity. However, if an outside counsel supervises the internal investigation and acts as an intermediary, all correspondence he or she makes is protected by professional secrecy. Legal privilege can therefore counter this risk to a certain extent.

Belgian criminal proceedings are based on a documented file called the "dossier" rather than witness statements that are given orally. If the corporate entity wishes to use the investigation report in the criminal proceedings, the findings of the investigation should, as a general rule, be added to the criminal file so that they can be submitted to and debated by the parties if it is used in court. The same is true for civil proceedings. The report should be submitted to the parties in writing. However, in both types of proceedings, it is also possible to suggest that an employee, or the person who carried out the investigation, is summoned as a witness.

The internal investigation report has no specific evidentiary value. The judge can assess the evidence freely and at his or her own discretion.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

The entity is not required to liaise with local authorities before starting an internal investigation. Whether or not it should liaise with local authorities depends on the specific case and circumstances. But liaising with them can be considered as an element of good faith on the entity's part, or at least as a mitigating circumstance should the entity be sanctioned.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

There is no involvement of law enforcement entities in internal investigations. As a general rule, the internal and external investigations are all conducted separately. However, if law enforcement entities are aware of the internal investigation taking place, they will likely ask for the findings to be disclosed. If the entity refuses to disclose the report findings when it is requested, law enforcement agencies will be able to seize it.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Under Belgian law, the entity does not have the right to help define or limit the scope of the investigation, which is entirely defined by the authorities. However, in a criminal inquiry, the entity can apply to have additional inquiries carried out, and the investigating judge can either grant or refuse the application (almost) to his or her full discretion.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Yes. Whenever necessary, law enforcement authorities will apply the international legal procedures that are in place (joint investigation teams, mutual legal assistance (within the European Union), letters rogatory, application of bilateral or multilateral treaties, etc.).

If an entity faces investigations in multiple jurisdictions, they can coordinate via, amongst others, an outside counsel. The best strategy for an entity in such scenario is to appoint one single point of contact to coordinate all investigation activities and responses required by the authorities.

#### 4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

Most of the challenges derive from the fact that employees are very protected under Belgian law. Rules on privacy, which are particularly severe as far as telecommunications and data protection are concerned, must be observed. If an employee's wrongful conduct is detected, the employee may only be dismissed "for urgent cause" within a three-day deadline.

Moreover, some of the legal obligations imposed on employers contain criminal sanctions. In Belgium, legal entities are punishable under criminal law.

### 4.2 What steps should typically be included in an investigation plan?

Step 1: secure the data that are subjected to the internal investigation; step 2: assess whether the use of outside forensic auditors is

important to ensure the credibility/independence of the investigation report; step 3: if evidence is found during the investigation, secure the access to the company's buildings, intranet and bank accounts; step 4: if the investigation concerns an employee, assess whether the investigation findings are sufficient to dismiss him or her for cause; and step 5: assess whether it is useful to file a criminal complaint.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Companies should seek the assistance of outside counsel or outside forensic consultants when the entity intends to use the report and intends to submit it to the authorities. The credibility and independence of outside counsel is an important factor in this respect. Especially if electronic evidence has to be gathered, it is crucial that data are secured. In Belgium, this is often a reason to call on forensic auditors.

#### 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Legal professional privilege includes attorney-client privilege, which protects communications between a client and his/her attorney and between an attorney and third parties with a view to advising his/her clients. All information that the attorney obtains from or shares with a client in the performance of his/her profession and in his/her capacity as a lawyer will benefit from the legal privilege to the extent that the client has an interest in the confidential nature of the information. The attorney's notes and preparatory documents are protected as well. The obligation of attorneys to maintain professional secrecy is set out in Article 458 of the Criminal Code. In principle, attorney-client privilege prohibits any disclosure at any time, even during the pre-trial stage. This legal privilege also applies to criminal investigations. A breach of the obligation can be criminally sanctioned. As a principle, the information that is protected by legal privilege may not be seized.

However, there are some major exceptions to the obligation to maintain professional secrecy. First, when a judge calls an attorney to the stand as a witness or orders him/her to produce documents, the attorney can decide whether to set aside the professional secrecy after having made a balance of the competing interests. Second, the privileged communications and documents can lose protection if the attorney is a party to a criminal offence. This implies that these communications and documents may be seized and used in court. Furthermore, the lawyer may disclose the privileged information in certain cases in which there is an imminent threat to the physical or psychological integrity of a minor or vulnerable person (Article 458bis Criminal Code). If the conditions of Article 458bis Criminal Code are not fulfilled, other legal grounds can in principle be relied on to set professional secrecy aside (e.g. in the event of an "emergency situation" – "noodtoestand").

Next to professional privilege, correspondence between lawyers in Belgium is confidential (Article 6.1 of the Belgian Rules of Professional Conduct). Therefore, such correspondence may not be

disclosed without the consent of the President of the Bar. Some exceptions exist, however (e.g. official letters exchanged between lawyers).

Best practices: an outside counsel should supervise the internal investigation and act as an intermediary between the auditor and the representatives of the entity. In that way, all communications will be protected by professional privilege. However, the legal privilege may not be used in a purely formal way. This would indeed amount to an abuse of justice.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

No, they do not.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Belgian law recognises legal professional privilege for in-house counsel also. The legal basis of the legal privilege of a Belgian registered in-house counsel can be found in Article 5 of the Act of 1 March 2000 pertaining to the establishment of an *Institute for In-House Counsels*. This Article 5 reads: "An in-house counsel's advice that has been given for the benefit of this counsel's employer and within the framework of his/her position as legal counsel is confidential."

The Brussels Court of Appeal, in its judgment of 5 March 2013, confirmed the confidential nature of the advice given by the inhouse counsel. The Court held that legal professional privilege also covered the request for the advice, the correspondence about this request, the preliminary drafts of the advice, and the documents that have been drafted in preparation of the advice.

Only in-house counsel who are employees (in the sense of "being subordinate to an employer") and who are registered with the Belgian Institute of In-House Counsels benefit from the legal privilege. The advice must be given for the benefit of the employer. The advice must be given within the framework of his/her position as legal counsel, so advice that does not normally require the intervention of a legal professional is not protected, even if it has indeed actually been given by an in-house counsel.

#### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

See question 5.1 regarding best practices.

5.5 Do enforcement agencies in your jurisdiction keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

In principle, the enforcement agencies do not keep the investigation results confidential. The findings must be submitted to the contradiction of the parties if the case is brought before court.

#### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

Internal investigations often imply the processing of personal data or electronic communications. Therefore, the following laws or regulations apply, where applicable:

- Belgian Data Protection Act of 8 December 1992 ("BDPA"). Personal data may only be processed proportionately and transparently and for well-defined purposes. To the extent that there is a clear, legitimate basis for the processing, different bases are exhaustively listed in Article 5, BDPA. As data processing should always be proportionate to the envisaged purposes, it is important to strictly target the data and documents to those that are strictly necessary for the investigation. As indicated above, the GDPR will become applicable as of 25 May 2018 and will replace the BDPA. However, the foregoing analysis equally applies under the GDPR.
- Articles 124–125 and 145 of the Belgian Act of 13 June 2005 on Electronic Communications (because internal investigations will often include electronic communications). These articles prohibit the following actions if they are done without the consent of all directly or indirectly involved persons, with fines of up to EUR 400,000: "(1°) intentionally obtain information about the existence of any information that has been sent by electronic means and that is not personally addressed to him, (2°) intentionally identify persons involved in the transmission of the information and the contents thereof, (3°) notwithstanding articles 122 and 123, intentionally obtain information concerning electronic communication and concerning another person, (4°) modify, delete, disclose, conserve, or use otherwise the information, identification, or data that have been obtained, intentionally or not."
- Article 314bis of the Belgian Criminal Code, which prohibits anyone from knowingly and willingly monitoring, gaining knowledge of, or registering the contents of (tele) communications that are not available to the public, unless all participants to the communication have given their permission for it.
- Collective Bargaining Agreement no. 81 of 26 April 2002 on the protection of the private life of employees with regard to the monitoring of electronic online communication data ("CBA no. 81"). This CBA no. 81 allows such monitoring only if it serves one or several of the justified purposes listed in this CBA, i.e.: (i) the prevention of unlawful or defamatory facts; (ii) the protection of economic or financial interests of the company; (iii) the security and/or proper technical functioning of the IT network systems of the company; and (iv) the compliance in good faith with internal policies and rules regarding the use of online technologies.
- 6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Under Belgian law there are several general corporate law duties to retain certain types of information (such as trading records, documents used by an auditor, etc.). In addition to general corporate law requirements, Belgian legislation on specific types of services (such as financial services, telecommunication services, medical services, etc.) identifies certain additional document retention requirements. However, there is no requirement for issuing a

document preservation notice to individuals who could have documents which are relevant for the internal investigation.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Data protection laws should be considered, especially the rules on the transfer of personal data (within and outside the EU).

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

All types of documents that can contribute to establishing the truth are regarded as important. These can include: data recovered from hard drives by the use of forensic software; email communication including archives; full accounting data sets for testing by use of forensic data analytics; system logs with information on the nature and timing of certain events; and hard copy documents such as contracts for analysis by use of text mining software.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

The nature of the resources used depends on the nature of the documents collected. If server data are required, these will be IT resources. If payment data are required, these will be finance resources. If the company has audit, inspection or compliance positions, those holding these positions can be the most efficient in handling firm-wide document collections.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Yes, authorities do permit the use of predictive coding techniques. They use these techniques themselves when they have to search through volumes of documents. In a competition law case, the Court of Appeal of Brussels provided the competition authorities with some guidelines in order to ensure that the search through the data would be proportionate (5 March 2013, as mentioned in Cass. 22 January 2015, AR C.13.032.F). The authorities should use at least two specific keywords that are clearly linked to the object of the search. The soundness of those keywords should be tested before initiating the thorough search. Information that is not selected through the use of the keywords should not be saved.

Entities do use predictive coding techniques, such as keyword searches. However, if the entity is confronted with sensitive data, due diligence can prove to be a better option, as long as this is not too intrusive

When a criminal complaint is lodged against the entity, the judicial or enforcement authorities will not make their investigation depend on the outcome of the internal investigation. The authorities use their own techniques. The use of predictive algorithms is only useful if a large number of historical cases are present. The use of machine-learning techniques such as anomaly detection and behavioural profiling can be useful if the scope of the internal investigation is very broad. For focused investigations, the use of forensic data

analytics and rules engines usually suffices in reviewing volumes of datasets.

#### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Belgian law does not contain specific legislation on interviews in the framework of an internal investigation.

According to case-law, interviews should be conducted in a way that guarantees the voluntary nature of the statements that will be made. They should also guarantee the reliability of the statements made. The person being questioned may not be deprived of his or her liberty, nor may he or she be physically or psychologically compelled to answer any questions raised during the interview/interrogation. Therefore, if the person concerned wants to leave the interview, he or she may not be compelled to stay. It is also forbidden to obtain statements through cunning and guile. Therefore, the entity (or its representatives) may not incite someone to confess by promising that no legal proceedings will be initiated against him or her. This will be considered to be disloyal and unfair.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

The employer has the right to ask for full cooperation from the employee, and the employee has the right to refuse cooperation. Employees are normally required to cooperate, but they may not be compelled in any way. Sometimes employees invoke the alleged non-compliance with privacy regulations by the entity as grounds to justify their refusal to cooperate or participate in a witness interview.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

Providing legal representation is no requirement, neither prior to nor during the interviews.

7.4 What are best practices for conducting witness interviews in your jurisdiction?

A best practice for conducting witness interviews is to have two interviewers present and to use/draw up a written and signed declaration.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

No legal framework applies in this respect.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

By having outside interviewers present and making written declarations.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

An entity can confirm that they will not lodge a criminal complaint against an employee, but this does not mean that total immunity or amnesty can be guaranteed: those committing criminal offences can always be prosecuted if the public prosecutor demands this. As far as civil proceedings (like a claim for damages) are concerned, it may sometimes be appropriate to grant "immunity" or "amnesty".

#### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Though there is no legal obligation in this respect, it is best practice to give employees the possibility to revise and withdraw statements that they have made.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

No, it does not.

#### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

It is common practice to prepare a written declaration and have it signed by the interviewee. It is more difficult for the employee to withdraw statements he or she has made once they are in writing and signed by him or herself. At the same time, a written declaration provides better guarantees for upholding the whistleblower's rights. It is also common practice that the findings of the other investigative steps could end up in a written investigation report. Written investigation reports can be transmitted to the appropriate levels within the entity and/or can be submitted to the authorities or in court proceedings. Objective reporting on an investigation starts with a written report on the investigation.

### 8.2 How should the investigation report be structured and what topics should it address?

An investigation report should include a full description of the data and analysis techniques used, the declarations made by the interviewees/whistleblowers, and an overview of the findings. Moreover, it is useful to include an executive summary. An investigation report should not contain conclusions or any other personal opinions of the investigator.



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With almost 25 years' experience, Hans has a deep knowledge of the criminal justice system and its impact on businesses. His extensive practical experience enables him to secure the best possible outcome for his clients.

Hans' practice covers all aspects of company-related criminal law. He has assisted clients in many different sectors such as diamond, banking, transport, petrochemical, insurance and telecommunications. He represents companies and their directors before Belgian courts including the Supreme Court on criminal matters and before the European Court of Human Rights. In addition, he has significant experience in cases relating to internal fraud.

In the recent past, Hans has successfully represented corporate clients in class action-type litigation before the criminal courts. He has also assisted several clients in negotiations with the public prosecutor.

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Frank Staelens has 25 years of experience in the following areas: global investigations into fraud allegations; misappropriation of company assets; non-compliance with corruption, sanction, money laundering and competition regulations; data theft and corporate espionage; dispute resolution; and litigation support.

He also has 10 years of experience with the development and use of advanced risk analytics solutions from transaction, process, business partner analysis up to anomaly detection, behavioural profiling, network analytics and text mining.

Frank is the honorary President of the Institute of Fraud Auditors and co-founder of the Network for Investigation and Litigation Support (NILS).

He is a certified fraud examiner (ACFE), a registered forensic auditor (IFA), a certified security advisor and a certified mediator in commercial affairs

### Stibbe



Stibbe is a European law firm with its main offices in Amsterdam, Brussels and Luxembourg; and branch offices in Dubai, London and New York. Stibbe offers full legal service, both advisory work and litigation, in all areas of law that are relevant for companies and public institutions.

As a specialist firm, our lawyers work in multidisciplinary teams with the aim to deliver pragmatic advice. We build close business relationships with our clients that range from local and multinational corporations to state organisations and public authorities. We realise that understanding their commercial objectives, their position in the market and their sector or industry, allows us to render suitable and effective advice.

In addition to our own international presence, we collaborate closely with other top-tier firms for cross-border matters outside our home jurisdictions. These relations are non-exclusive and enable us to assemble a tailor-made, integrated team of lawyers with the best expertise and contacts for each specific matter. This guarantees efficient coordination on cross-border transactions throughout a multitude of legal areas, whatever their complexity and nature

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At Baker Tilly Belgium, we offer a complete and integrated range of investigation and litigation support services. Our multidisciplinary cross-border teams of certified fraud examiners, forensic analytics experts and cyber security specialists use the latest technologies to cover risk analytics, process mining, anomaly detection, behavioural profiling, computer forensics and E-discovery.

# Brazil

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- 1 The Decision to Conduct an Internal Investigation
- 1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

There are no specific regulatory obligations in the Brazilian legal system concerning internal investigations. This means it is possible for companies to launch internal investigations whenever they deem it appropriate and necessary, as long as the procedure does not harm any current legislation, from the Brazilian Constitution to Codes - such as the Civil and Criminal Codes - and Extravagant Laws, e.g. the Anticorruption Law (Law no. 12.846/13). Despite these intrinsic limits, internal investigation standards are mostly ruled by practice; in this regard, it is of essence that the whole procedure remains confidential - which includes its conduction and its products - at least at first. This considered, there are no automatic consequences for a company that fails in complying with these practical standards. On the other hand, it is possible to support that there are legal benefits for a company that decides to conduct an internal investigation. Since 29 January 2014, the Brazilian Anticorruption Law has provided the possibility for companies directly or indirectly involved in corruption acts to enter into Leniency Agreements with public authorities, as long as a list of obligations is fulfilled. Amongst them, there is the obligation to be the first to admit the company's participation in the potential offence, to cease the illegal conduct, to help identify any other parts involved, to provide corresponding documentation, when possible, and to fully cooperate with the investigation. If the company accomplishes all conditions set forth in the Leniency Agreement, it may benefit, according to Brazilian Decree no. 8.420/15, from a series of factors which include, among other benefits, the reduction of the applicable fine and the exemption or mitigation of the administrative sanctions applicable to the case. In connection with these sanctions, the Anticorruption Law also states that the determination of the amount of the penalty imposed on a company must consider the existence of compliance mechanisms put in place by it, which leads to the conclusion - considering all aspects described above - that the conduction of internal investigations may bring legal benefits to a company.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

The decision to launch (or not) an internal investigation is entirely up to the interested company. The same applies to a potential report of the results to the competent authorities. In any case, a company should consider that the best option in any scenario is to gather all relevant information concerning a potential wrongdoing before the authorities – so it will not be surprised by any legal measures eventually taken. If the company is the target of an official probe without having initiated an internal investigation, it will be harder to negotiate Leniency Agreements and even collaboration agreements concerning individuals, in the criminal sphere. Also, reputational matters may be taken into consideration, especially if the company under investigation is a multinational.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

If there are sufficient indicia that a violation has occurred, the company should decide to investigate the complaint. Later on, it is important that all facts brought to the company's knowledge are double-checked, by means of document review – physical and electronic – and also through the conduction of interviews with the related parties. There are no legal implications for dealing with whistleblowers.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

As a general rule, once outside counsel is hired, the client to be considered is always the company itself. More specifically, one must agree with one's client whom one has to report to. All people eventually involved in the procedure (from employees to directors and Board members) must be properly advised that external lawyers

represent the company and not them. In regard to internal conflicts, if apparent, it is important for the outside counsel to document every single product linked to the investigation, in case it faces any pressure to change or direct its final products. Anyone who attempts to interfere in this regard may be excluded from access to the investigation once this intent is known. Independence of outside counsel is of essence and, if not respected, the contract should be terminated.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Yes. As noted in question 1.1 above, potential penalties may be reduced or even cancelled if the company voluntarily discloses the results of a properly conducted internal investigation, as well as accomplishes all conditions of the settlement with the authorities. Common legal conditions involve the company admitting its participation in the offence, its commitment to immediately cease the illegal conduct and to permanently cooperate with the official investigation. In addition, the maintenance of an effective compliance programme is also taken into consideration.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

If the company decides to do so, disclosure should only be made once the internal investigation is finished. However, it is important to bear in mind that one of the most important conditions for the success of Leniency Agreements is that the interested company must be the first to seek the authorities in order to report its findings - which requires internal investigation procedures to be launched as soon as the company becomes aware of a potential illegal act. On the other hand, poorly conducted investigations may expose the company to even greater risks. For making a disclosure, the first step is to contact the authorities, which should be ideally made by outside counsel. If the competent authority shows interest in the facts gathered by the company, the next step should be the presentation of the main findings - which does not necessarily lead to the delivery of any written products. In this regard, confidential products, such as the investigation's final report, for instance, should not be necessarily disclosed in the first place.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There is no specific provision that establishes the format in which findings must be disclosed; written reports or oral communications are acceptable. As for the risks, once you deliver written material, evidence is documented and it may harm the company if a wider set of information is exposed to the authorities (far from what was initially intended) and also if the information provided is leaked to the press – a common occurrence in Brazil – despite the secrecy assured by law.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

There is no legal obligation for a company to liaise with authorities without being officially required to do so. Thus, an internal investigation can be initiated without authorities being informed. It is not recommended to contact the authorities without a formal request, considering the risk of self-incrimination. On the other hand, it is highly recommendable for a company to start gathering information as soon as it is aware of possible misconduct related to it, in order to duly cooperate with the authorities in case official requests are made.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

Brazilian enforcement entities generally do not get involved in internal investigations conducted by private companies. It is possible, however, that they might request information on the findings when they deem it relevant for official investigation procedures.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

In Brazil, there is no possibility for a company to define or limit the scope of a government investigation.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

In the past few years, especially after "Lavajato", cooperation with foreign jurisdictions has become a reality in Brazil. Authorities have been progressively engaging in cooperation agreements with other countries, which are managed by specific departments linked to the Brazilian Ministry of Justice. In this regard, companies that face investigations in multiple jurisdictions should be aware that information gathered in a Brazilian procedure may be shared with foreign authorities, making it urgent for the target company to retain specialised legal assistance in each and all countries potentially involved.

#### 4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

The main challenge faced by companies is that internal investigations are still a novelty in Brazil. Thus, there is no specific legislation to

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regulate the matter, which brings a certain degree of uncertainty for the investigated companies, especially when it comes to report (or not) to authorities.

### 4.2 What steps should typically be included in an investigation plan?

Firstly, it is highly recommendable to retain a firm to help conduct the procedure with impartiality and set the scope of the investigation. If needed, expert forensic consultancy should also be retained. Preliminary review of available documentation is of paramount importance for fact-checking. Then a company should conduct an electronic review, if applicable, and list potential individuals to be interviewed during the procedure, including whistleblowers, alleged violators and mere witnesses. Finally, a report may be produced to be delivered under confidentiality protection to the company. If the company decides to waive its privilege, the findings may be presented to the competent authorities – if and when cooperation best suits the interests of the company.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

As explained in question 4.2 above, it is always recommendable for a company to retain the assistance of both outside counsel (and forensic consultants), for reasons of confidentiality, independence, impartiality and technical expertise. On the other hand, the decision on whether to hire external assistance is entirely up to the company, it being based on its judgement to conclude whether it has the capacity to launch an investigation on its own. If it decides to do so, the credentials to be sought are experience in conducting investigations, reputation and reliability.

### 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

In general, the work produced by an attorney for his client is always protected, unless it is proven that the attorney is himself involved in misconducts along with the client. On the other hand, although attorney-client and attorney work product privileges are recognised by Brazilian legislation, this protection is not so strongly established in practice. This means that internal investigation products remain under privilege until the interested company decides to waive it. However, it is not certain that these products will never be accessed by authorities just because of the attorney work privilege, since it is regular practice in Brazil to retain confidential documents in the context of search and seizure procedures - the option of challenging this practice in the justice system remaining to the target company. For the highest preservation of privileges, best practices involve placing disclaimers in all documents, products and communications intended to be confidential, once they are exchanged between attorneys and respective clients.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

There is a general type of protection in Brazil that covers all information considered sensitive for a company. In the face of public authorities, however, there is no specific legal protection for communications and deliverables produced by non-attorney parties, such as accounting and consultancy firms, it being strongly recommendable for a company to always engage lawyers for communications with other third parties engaged in the firm's assessment during internal investigation procedures.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Yes, there is no distinction in this sense under Brazilian law.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Best practices involve placing disclaimers in all documents, products and communications intended to be confidential once they are exchanged between attorneys and respective clients. Also, when dealing with non-attorney third parties, it is recommendable for a company to always engage lawyers for communications between the company and any third party.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Brazilian law provides no guarantee in this regard. It is common practice, however, that once an official investigation is launched based on the information voluntarily provided by the entity, all sensitive findings remain under secrecy until charges are pressed by Prosecutors (if so) against the individuals potentially involved in illegal acts. In addition, it is important to mention that, during official procedures involving the company, access to all files must be assured for its attorneys, by force of the Brazilian Constitution.

#### 6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

Data protection in Brazil is provided by several legal instruments, from the Constitution to the Criminal and Tax Codes and general legislation. In this sense, all written, telematics or telephone communications are inviolable and can only be accessed by means of a court order granted during official criminal investigations; still, tax, banking and financial information is also protected. Despite that, it is important to note that, in the context of internal investigations conducted within private companies, there are precedents in the sense that all information exchanged through tools or contained in equipment owned by the employer (computers and mobile phones, for instance) can be accessed and used as evidence by the company itself.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Yes. Although it is not a legal requirement, it is common practice for companies to issue a hold order once an investigation is launched, preferably to all its employees. In general, the preservation notice involves all documents related to the facts under investigation, physical or electronic. For compliance, there is no need to describe the investigation in large detail. In addition, to guarantee that the notice has reached all recipients, the company may use return receipts.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

An entity must consider that multiple jurisdictions involve multiple laws and regulations, and it is therefore extremely recommendable for a company to retain specialised legal assistance in each country in which documents are located. It also should take into consideration local data transfer laws.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

Generally, contracts, bank transfers, payment orders and receipts, and corporate communications (mostly by email and mobile devices) are deemed important to collect for an internal investigation.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Companies generally retain specialised forensic consultancy firms to collect, host, preserve and process relevant documentation (mostly electronic). Considering that these firms may own e-discovery software solutions licences, this is certainly the most efficient way for a company to gather all information it requires in order to fulfil the conditions for a compliant and complete investigation.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Yes, the use of predictive coding techniques is not only allowed, but also common in internal investigation procedures. Best practices involve retaining forensic experts, as mentioned in question 6.5 above. Also, for document review, it is highly important to have a team of lawyers (preferably external) well trained for the task.

#### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There is no need to consult the authorities before initiating witnesses' interviews and there are no specific regulations on the matter. It is important to note that no employee or third party is obliged to participate in interviews, considering the Brazil Constitution protects the right to non-self-incrimination.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Employees are usually invited for the interview and may freely decline to cooperate with their employer's internal investigation. Despite the fact that there is no obligation to cooperate, a company may decide to terminate an employee if he or she refuses to provide help, since overall cooperation may be defined as a company compliance policy to be respected by all employees. However, it is important to observe that Brazilian Labour Courts do not tend to consider this refusal as a just cause for termination, though companies are allowed to terminate with no cause.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

There is no legal requirement in this sense. On the other hand, the company should make the interviewee aware that he or she can retain legal assistance if he or she is willing to do so.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

First, the company should retain the assistance of, preferably external, local attorneys when dealing with confidential and sensitive matters. Once interviews are already being conducted, as explained in question 7.3 above, it is important to make interviewees aware that the lawyers represent the company and that they are free to retain their own legal assistance if they are willing to do so. Witnesses shall never be harassed or compelled to cooperate. Also, interviews must, as a general rule, be documented, not only to support the investigation, but also to protect the firm. In this sense, interviewees should be allowed to take notes once it is clear that all subjects discussed must remain confidential.

### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Brazilian Labour Courts are generally highly protective of workers' rights. Thus, harassment issues must be a central preoccupation, it being important to ensure that employees cooperating with the investigation are doing so freely. It should be taken into account that Brazilians are very emotional and sensitive to this kind of approach, which is why one should avoid making threats. Also, there can be no retaliation against employees willing to participate, whatever the content of their statements.

# 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Having outside counsel assisting the procedure is the safest way to protect the companies' interests. Also, whenever the company verifies a situation of potential conflict of interest between whistleblowers, complaining parties and the firm, it should make all these parties aware of the possibility for them to be assisted by their own counsel.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Despite the fact that the company is allowed to grant "immunity" or "amnesty" to employees as a business decision – and according to the level of their cooperation – there is no way for a company to control official investigations, which means that those employees may still be subject to a potential lawsuit if they are involved in any illegal acts.

## 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Yes, employees may request to review their statements, but the decision to provide them or not is up to the company.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

There are no specific laws or regulations that require the presence of enforcement authorities or legal representatives. However, it is highly recommendable that interviews are conducted by a local counsel (preferably an outside counsel), for reasons of confidentiality and reliability.

#### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Yes, preparing written investigation reports is common practice in Brazil. Even though there is a risk of the information described in the report being seized by authorities (or even leaked to the press), it is recommendable for a company to have the products of its investigation written down, for the sake of the reliability of all steps taken and information gathered, as well as to avoid future misinterpretations and challenges.

### 8.2 How should the investigation report be structured and what topics should it address?

The report should cover: the scope of the work; an introduction to the case and background information; an executive summary containing the main findings; a brief description of all documents reviewed, detailing those considered most important; a list of all interviews taken during the procedure, as well as a summary of the interview notes; an analysis of the potential legal violations raised; and conclusions thereon. Also, the report may contain an assessment on possible actions to be taken by the company to repair the damage, if existent, and to improve its compliance mechanisms.



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# Canada







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### 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Canadian companies are subject to an array of laws and regulations governing their business and affairs, the potential breach of which may warrant an internal investigation. These include Canada's Corruption of Foreign Public Officials Act ("CFPOA"), its Competition Act (which controls, among other things, anticompetitive behaviour and price-fixing), provincial securities legislation governing the conduct of public companies, as well as Canada's Criminal Code provisions relating to white-collar crime. Non-compliance with these regimes can result in significant sanctions, monetary penalties, and criminal prosecutions and convictions against the company and its employees, directors and officers.

As further described in question 2.1 below, certain enforcement regimes offer the possibility of reduced sanctions to organisations that conduct internal investigations and self-report their findings, while others offer no certainty that doing so will provide any tangible benefits. Nevertheless, an internal investigation can provide remedial, reputational and legal benefits for an organisation, and is often the first step when an issue arises.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

In deciding whether to conduct an internal investigation, organisations should determine whether the triggering event gives rise to a real legal or reputational risk that warrants further investigation. It is often appropriate for in-house counsel to conduct an initial screening in order to gather readily available information and identify the credibility and persuasiveness of the evidence in support of the allegation. However, an initial screening should not be conducted by anyone potentially implicated.

Although investigations led by counsel generally engage privilege protections, organisations should also consider the risk that certain documents and communications created during an investigation

may not be protected by privilege. It may not be in an organisation's interests to create a record of wrongdoing that might end up in the hands of enforcement authorities, prosecutors or adverse parties in any ensuing litigation (see Section 5 below).

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

In assessing the credibility of a whistleblower's complaint, organisations should examine whether the evidence is first-hand or hearsay, as well as the level of detail provided. It may also be important to consider a whistleblower's potential motivations in bringing forward an allegation. A complaint may be less credible if the whistleblower's employment has recently been terminated by the organisation or if they have other reasons to be hostile towards the organisation or any individuals implicated.

Several federal and provincial laws and regulatory regimes prohibit employers from retaliating against whistleblowers and impose penalties for doing so. For example, Canada's *Criminal Code* imposes up to five years of jail time and unlimited fines for such conduct. Similarly, Ontario's *Securities Act* was recently amended to prohibit reprisals against whistleblowers who report potential securities violations to enforcement authorities. That Act now allows the province's securities commission to take enforcement action against public issuers that do not comply with these new provisions. Some provincial regulatory schemes provide monetary incentives for whistleblowers.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

Outside counsel's "client" or primary point of contact within an organisation will typically be the body or committee charged with overseeing the investigation. This in turn tends to be determined by the seriousness of the alleged conduct. Board oversight and direction will typically be required in situations involving serious allegations against senior corporate officers, where serious criminal or reputational issues have been raised, or where the implications

arising from an allegation would be potentially material for an organisation. In these situations, it is common for the board to delegate the oversight of an internal investigation and the retainer of external counsel to a board committee – often a special committee of independent directors or the audit committee.

Where the matter is not serious enough to warrant board oversight, it is often appropriate for another group within the company, i.e., in-house counsel, to direct the investigation and therefore be the primary point of contact with outside counsel if such counsel is retained.

Outside counsel should exclude from an investigation anyone whose conduct may be in question, as doing so will maintain the integrity and independence of the investigation. This will also help guard against waiver of privilege, which belongs to the company or board committee and not to any individual employee, officer or director (see question 7.4 below).

#### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Whether law enforcement authorities in Canada will recognise an entity's willingness to disclose the results of an internal investigation depends on the applicable regulatory regime. For example, the federal Competition Bureau maintains formal immunity and leniency programmes which provide organisations with significant incentives to self-report information obtained through internal investigations; full immunity will be granted if the company is the first to disclose its non-compliance. Likewise, certain provincial securities commissions offer major benefits, such as a reduction in sanctions, to public companies that self-police, self-report and self-correct potential breaches of securities laws. By contrast, the CFPOA currently offers no formal benefits for conducting an internal investigation or self-reporting any findings of illicit conduct, although courts have viewed a corporation's independent internal investigation as a key factor in justifying a reduced penalty following a guilty plea. However, in September 2017, the federal Government of Canada requested comments from the public with respect to the development of a regime of deferred prosecution agreements ("DPAs") in Canada. If implemented, DPAs would provide an alternative resolution vehicle that could be used by corporations to self-report wrongdoing without exposure to uncertain criminal liability. In addition, a recently introduced Quebec bill, Bill 107, proposes to allow prosecutors to stay tax, disciplinary and civil proceedings against cooperating witnesses.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

When disclosure should occur depends on the circumstances of a given case. Depending on the laws at issue, an organisation may effectively be pleading guilty to a criminal offence by self-reporting. It may be in an organisation's interest to wait at least until it has the full results of an investigation before contacting authorities. This may be different if the authorities are already aware of a potential breach (see also question 2.1 above).

The steps that should be followed for making disclosure will again depend on the circumstances. In each case, an organisation should consider whether it will lose privilege over the findings of an investigation or documents produced in connection therewith by voluntarily disclosing them (see question 5.5 below).

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

See question 8.1 below.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

Organisations are generally not required to liaise with local authorities before starting an internal investigation. Whether it is in an organisation's interest to do so will depend on the situation and such factors as the applicable regulatory regime and the persuasiveness of the evidence in support of the alleged conduct. For example, if an organisation is certain that there was wrongdoing (by a rogue employee, for instance) there will likely be greater benefits to cooperating with the authorities from the outset.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations?

What level of involvement in an entity's internal investigation do they prefer?

As a general matter, internal investigations are conducted without the oversight or involvement of law enforcement entities. Whether law enforcement authorities should be included will depend on the circumstances. Counsel should be cautious, however, because involving authorities in an internal investigation may result in a waiver of privilege (as discussed below in question 5.5).

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

An entity under government investigation may have some ability to define the scope of the investigation by cooperating with law enforcement authorities. Voluntary cooperation may provide an opportunity for negotiation about the investigation's scope and direction as it progresses.

5.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Authorities in different jurisdictions increasingly cooperate with one another when conducting investigations, though authorities in the jurisdiction with the closest connection to the subject matter of the investigation often take the lead. For instance, Canadian officials recently laid charges under the *CFPOA* following an investigation that began with a tip from the U.S. Federal Bureau of Investigation.

As a result of increasing cooperation between authorities, a decision to self-report in one jurisdiction may amount to self-reporting in all relevant jurisdictions. Close cooperation between the target organisation's counsel in different jurisdictions is therefore desirable. Counsel should also consider the different legal regimes in the various jurisdictions, as, for instance, the immunities available for self-reporting in some jurisdictions may not be applicable in others.

#### 4 The Investigation Process

#### 4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

Canada is divided into 10 provinces and three territories, each of which has unique rules and regulations governing corporations, in addition to federal laws. Understanding and navigating cross-jurisdictional differences may be particularly challenging for entities conducting internal investigations spanning multiple provinces or territories. Different provinces also have different regulatory and enforcement authorities in many cases.

### 4.2 What steps should typically be included in an investigation plan?

An investigation plan will typically include, and specify the main actions to be completed in connection with, the following steps:

1) initial messaging to key employees, including the circulation of document hold notices; 2) an assessment by counsel of initial legal considerations, such as any immediate legal obligations; 3) document and data collection; 4) document review and analysis; 5) witness interviews; 6) an assessment of the need for further investigation; and 7) reporting of findings and recommendations for remediation.

An investigation plan should specify due dates and note the party responsible for the completion of each action. The decision to include any step or action as part of the plan should involve a critical assessment of whether it furthers the goals of the investigation.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Retaining outside counsel or other outside resources is most appropriate for more serious issues that require experienced investigators or where senior officers of an organisation are alleged to be involved in the wrongdoing. In these circumstances, organisations have a heightened imperative to ensure the independence and impartiality of the investigation and to lend it credibility in the eyes of enforcement authorities and other third parties.

In order to mitigate the risks that may arise from an improper investigation, organisations should ensure that outside counsel has specialised investigation experience. They should also consider whether their regular counsel has provided previous advice on the matters at issue, as this may make them potential future witnesses in the investigation and create a risk that their independence will be

tarnished. In these situations, retaining new counsel to assist with the investigation may be warranted.

Organisations should also consider retaining local outside counsel if there is a risk that local laws have been violated. Such counsel may work with internal or non-local external counsel to advise on local issues impacting an investigation, such as privacy laws applicable to data collection, and assist with coordinating local witness interviews, liaising with local organisation personnel, and dealing with potential translation or cultural issues.

### 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Privilege will generally be maintained over counsel's work product, as well as communications between counsel and the organisation, so long as the investigation is being conducted by legal counsel for the dominant purpose of existing or contemplated litigation (litigation privilege) or the provision of solicitor-client advice (solicitor-client privilege). For solicitor-client privilege to apply, the work product or communications in question must also be intended to remain confidential, and privilege can be waived by sharing with third parties.

In order to preserve these privileges, care should be taken at the outset of an investigation to ensure it is directed and conducted by legal counsel. Organisations should also protect privilege by limiting the group involved in communications with counsel, and counsel's work product should be clearly identified as "privileged and confidential". Further, organisations should carefully assess which investigation findings are committed to paper or other saveable formats and take care to control how that information is distributed within the organisation.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Communications by clients with non-lawyer third parties are generally not afforded the protection of legal privilege. However, litigation privilege protects communications with third parties where they are made for the dominant purpose of existing or reasonably contemplated litigation. This is often easier to establish if outside counsel retains the third party for the purposes of providing legal advice to the client or preparing for litigation.

In narrow circumstances, solicitor-client privilege may extend to communications by or to a third party, such as an accounting firm, if it serves as a channel of communication between the client and counsel and in situations where the third party uses its expertise or skill in assembling information provided by the client and in conveying or explaining that information to counsel. In these cases, courts have held that the third party's role must be "essential" or "integral" to the operation of the solicitor-client relationship. That said, organisations should keep in mind that there is limited case law in support of this extension of solicitor-client privilege in Canada and that any attempt to rely on it carries some risk of waiver.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Both litigation and solicitor-client privilege apply to documents and communications produced by in-house counsel. However, for solicitor-client privilege to apply to such records, in-house counsel must be acting in a legal rather than a business capacity in creating them. Canadian courts tend to scrutinise in-house counsel involvement closely as a result, and this "dual role" issue can be avoided by engaging outside counsel where privilege protection is crucial.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

See question 5.1 above.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Whether an enforcement agency will keep the voluntarily disclosed results of an internal investigation confidential depends on the agency and regime in question.

Certain enforcement authorities are obligated to keep confidential any information provided to them under the applicable enforcement regime. For example, the Competition Bureau must not disclose any information voluntarily provided to it under the *Competition Act*, except to a Canadian law enforcement agency, or for the purposes of the enforcement of that Act.

The doctrine of limited waiver of privilege may also prevent some enforcement authorities from revealing information voluntarily provided by organisations that is otherwise privileged. In the criminal context, certain Canadian decisions have held that the doctrine extends to such disclosure, while others have held that it only applies to disclosure required by statute. Canadian courts have not articulated an approach in the civil context, and it is unclear how they would decide the issue.

Canadian courts have emphasised that the intention of the privilege holder is paramount to any assessment of whether limited waiver applies. Therefore, when voluntarily disclosing findings to enforcement authorities, organisations should make clear that they are knowingly disclosing privileged material for the limited purpose of assisting with the investigation and intend to maintain privilege for all other purposes.

#### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

Certain private sector organisations in Canada are subject to the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*"), or in some cases other legislation or common law obligations. However, these do not tend to apply in the context of internal investigations. For example, while *PIPEDA* restricts the collection, use and disclosure of personal information without consent, exemptions include: collecting of personal information if it was produced in the course of a person's employment, business

or profession and its collection is consistent with the purposes for which the information was produced; and using an individual's personal information without their consent if the organisation has reasonable grounds to believe it may be useful in investigating a potential breach of Canadian laws.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Recognising that confidentiality may be important in some circumstances, it is generally good practice following a triggering event for organisations to issue a document hold notice to inform any employees, directors, officers or third parties who may possess records relevant to an investigation that they are not to dispose of any such records.

The hold notice should describe the investigation and its purpose at a high level, being careful with respect to preservation of privilege where third parties are involved, and the documents or data sought should include all emails, drafts, documents, agreements, files, calendar records and voicemails and any other written or electronic records that might be relevant to the matter being investigated.

Organisations should make sure to keep track of all individuals to whom a hold notice is sent and maintain a record of any subsequent correspondence with such individuals, including any documents received that are relevant to the investigation.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

All applicable legislation, including privacy laws and procedural requirements, should be considered when documents relevant to an internal investigation are located in multiple jurisdictions. For example, some jurisdictions may have more stringent employee data privacy protections. This underscores the need for an entity with operations in multiple jurisdictions to retain local counsel in each jurisdiction relevant to the investigation, and for local counsel to cooperate with each other. Furthermore, mutual legal assistance treaties allow Canadian law enforcement authorities to request searches and seizures, and the production of documentary or other physical evidence, from other countries, and allow authorities in other countries to request the same from Canada.

#### 6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

This will depend on the circumstances, including the conduct in question. For example, in situations involving data breaches, IT records relating to an organisation's systems and controls will likely be central to any investigation. In other situations, e-mails and records of telephone correspondence may be most relevant.

Generally, electronic records have become the most significant type of document sought in connection with internal investigations, and organisations should be prepared to retrieve all such records that are relevant and conduct appropriate data analysis (see question 6.5 below).

## 6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Document and data collection will typically be carried out by external or internal forensic IT specialists, who will create images of hard drives of relevant parties and identify and dichotomise between categories of documents that need to be preserved and collected. Although best practice is to use external forensic experts, the use of internal specialists may be efficient for organisations with robust internal IT capabilities.

Organisations can pre-emptively ensure a more efficient document collection process by establishing proactive policies and procedures for evidence preservation in anticipation of potential triggering events warranting internal investigations, and identifying third-party vendors in advance.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Search analytics is a permissible practice in Canada and is an effective way for organisations to ensure that they spend their time and resources on records relevant to an investigation. This technology can also assist organisations in identifying abnormalities as well as relationships between complex sets of documents, which can in turn help organisations determine whether wrongdoing occurred

It is important for outside counsel to monitor the document review process to ensure compliance with document retention policies or investigative mandates. It is often effective for collected documents to be organised and recorded in a similar fashion to that used in traditional litigation.

#### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Certain statutes and common law rules afford protections to employees and third parties that may apply in the course of interviews as well as internal investigations more generally.

While these specific protections vary across Canada's provinces and territories, organisations should be aware of causes of action for unwarranted breaches of privacy (see question 6.1 above), human rights violations, defamation, and intentional or negligent infliction of emotional distress.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Employees have an employment obligation to respond to reasonable employment-related requests, which includes a requirement to attend an interview if they have knowledge of or were involved in the matter in question.

Nevertheless, an organisation may wish to exercise judgment in allowing such employees to decline to participate in interviews. While a hard stance may be necessary if an employee's refusal to comply is negatively impacting an investigation, a more lenient approach may be warranted where an employee's role in or knowledge of the matter is less significant. In these circumstances, an organisation's desire to preserve a good faith relationship with the employee may outweigh the potential benefits of their evidence.

Further, if employees wish to terminate interviews in order to obtain legal advice, investigators should allow them to do so. As noted in question 7.3 below, allowing an employee facing personal liability to obtain legal advice will assist in preserving privilege.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

Witnesses do not have an inherent right to receive independent legal representation prior to or during interviews.

However, from a practical standpoint, it may be in an organisation's best interests to arrange for such counsel for an employee facing personal liability in connection with the investigation. Otherwise, an organisation may risk losing a good faith relationship with that employee going forward.

Further, an organisation may wish to arrange independent counsel for witnesses in order to make clear to them that they are not represented by the organisation's counsel. A joint retainer, if later found by a court, would compromise an organisation's ability to unilaterally waive privilege over the results of an investigation.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

As in other jurisdictions, face-to-face interviews are generally preferable to those conducted over the telephone, as they allow interviewers a higher level of interaction with witnesses and give them the opportunity to review their body language and assess their credibility.

Detailed investigation outlines or scripts should be prepared in advance of all witness interviews. At the beginning of each interview, employees should be provided with an overview of the investigation's purpose, and should be made aware of their rights and obligations if they are contacted by regulators or prosecutors. It is important to provide witnesses with a form of an "Upjohn warning", which informs them: that the investigators represent the organisation and not the witness personally; that the interview is privileged and this privilege belongs to the organisation; and that the organisation may, at its sole discretion, elect to waive this privilege.

To ensure accurate memorialisation of witness interviews and to provide for a witness in the event of a subsequent dispute regarding the interview, the lead questioner should be accompanied by a note-taker whose notes can form the basis for a written summary of the interview. The content and form of this summary may vary, but should highlight the important points of the interview and include the impressions of counsel to better assist with the preservation of privilege.

### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Interviewers should be aware that Canada is an officially bilingual country, and in some parts of the country, primarily the province

of Quebec, business is conducted at least partially in French. As a result, depending on where the entity operates, interviewers may require proficiency in both languages.

#### 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

If the whistleblower desires to remain anonymous, that decision should generally be respected. Entities may consider providing an anonymous tip hotline for whistleblowers, hosted by an independent third party, to preserve confidentiality. Where the whistleblower's identity is known, the entity and investigators should maintain open communication with the whistleblower so that the whistleblower knows his or her concerns are being taken seriously and being acted upon. Whistleblower bounty programmes, and class action firms that seek out potential whistleblower clients, are becoming increasingly common. This makes keeping open lines of communication with whistleblowers particularly important.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

An organisation cannot grant an employee immunity or amnesty from prosecution. Whether an organisation should grant the employee immunity from the employment consequences of his or her conduct will depend on the circumstances. For instance, immunity may be appropriate where an employee who cooperates with internal investigators was an innocent "dupe" in a larger scheme of wrongdoing. The organisation may also consider granting immunity to a whistleblower who discloses a larger scheme of wrongdoing. As mentioned previously, the employer should consider the applicable laws that prohibit threatening or retaliating against whistleblowers.

#### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Employees can request to review or revise statements they have made to investigators. Whether to permit the employee to revise his or her statement will depend on the circumstances. Maintaining the integrity of the investigation is crucial. As a result, it is a better practice to take a second (or subsequent) statement from the employee rather than permit the employee to review or revise a previous statement.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

See question 7.3 above.

#### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Written reports are regularly prepared in Canada at the end of an internal investigation. The key benefit of a written report is that it allows for clear documentation of the process followed, conclusions reached and remediation steps required. This assists directors in discharging their obligations and with the implementation of a remediation strategy and can also help an organisation in its subsequent dealings with enforcement authorities. The main drawback is that a written report may constitute a written record of criminal or improper conduct which, while generally privileged if prepared for the provision of legal advice or for the dominant purpose of litigation, may be sought by enforcement authorities, prosecutors and adverse parties in any ensuing litigation. The creation of a written report also increases the risk of leakage and thus the loss of confidentiality and privilege.

Counsel may choose a middle ground by providing detailed reporting of the investigative steps taken and recommendations for remediation, while orally reporting on the specifics of any illicit conduct. This approach allows an organisation to reconstruct the investigative process at a later date while reducing the risk of leaks or loss of privilege.

### 8.2 How should the investigation report be structured and what topics should it address?

The specific structure of an investigation report will vary, but will generally contain the following sections: 1) an introduction; 2) a summary of facts and assumptions; 3) a discussion of legal considerations; 4) investigation and methodology; and 5) conclusions and recommendations.

If witness interviews are conducted, they may also be summarised in the report. Further, the content of any written report will be subject to an organisation's decision to report the specifics of any findings orally (see question 8.1 above).



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Iris Fischer has a diverse litigation practice that includes a specialisation in white-collar crime and crisis/reputation management. She has extensive experience advising clients on domestic and foreign anti-corruption legislation. This includes clients in a broad range of industries, such as medical device and pharmaceutical, financial services, mining, and food and beverage.

Iris's expertise includes anti-corruption compliance and training, and assisting clients with anti-corruption due diligence for commercial transactions. She has experience conducting internal investigations and has been involved in matters relating to everything from allegations of fraud to Canadian election and sanctions legislation. Iris also advises clients on responding to search warrants and production orders.

As a complement to her white-collar crime practice, Iris draws on her extensive expertise litigating in the areas of media and defamation law as well as her experience in cybersecurity, access-to-information and privacy matters to regularly advise clients in crisis.

Blakes-

Blake, Cassels & Graydon LLP (Blakes) is a leading Canadian business law firm. For more than 150 years, Blakes has proudly served many of Canada's and the world's leading businesses and organisations. The Firm has built a reputation as both a leader in the business community and in the legal profession – leadership that continues to be recognised to this day. Our integrated network of 11 offices worldwide provides clients with access to the Firm's international capabilities in virtually every area of business law. Whether an issue is local or multi-jurisdictional, practice areaspecific or interdisciplinary, Blakes handles transactions of all sizes and levels of complexity. We work closely with clients to understand all of their legal needs and to keep them apprised of legal developments that may affect them. We also provide relevant legal services expertly, promptly and in a cost-effective manner to assist clients in achieving their business objectives.

# China



Tiana Zhang



#### Kirkland & Ellis International LLP

Jodi Wu

## 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Unlike jurisdictions such as the U.S., there are no current statutory or regulatory obligations in China that require companies to conduct internal investigations. However, Chinese enforcement authorities such as the National Development and Reform Commission and the State Administration for Industry and Commerce have the authority to demand and seize documents as part of government investigations. Thus, companies benefit from conducting internal investigations in response to an enforcement action. In addition, multinational companies that operate in China must still comply with the statutory and regulatory obligations of other jurisdictions that require internal investigations (*e.g.*, Sarbanes-Oxley).

In addition, the Chinese government may issue *ad hoc* directives to require companies in a specific sector to conduct "self-inspections" and to report non-compliant activities. For instance, the China Food and Drug Administration issued an *ad hoc* directive in July 2016 that required medical device companies to conduct self-inspections regarding licence and administrative approvals, to disclose misconduct discovered during the inspection, and to voluntarily correct the problems to receive a mitigated punishment. The failure to comply with the *ad hoc* directive could have resulted in the revocation of certain licences for operation.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Although not required under Chinese laws, conducting an internal investigation is important for companies to identify and address issues before a formal investigation is initiated. Before initiating an internal investigation in China, it is important to consider how to keep the internal investigation confidential. As discussed in question 5.1 below, China does not recognise attorney-client privilege or work product privilege, including in the internal investigation context.

Documents, including internal investigation reports, can be seized by Chinese authorities as part of formal investigations.

To protect privilege over an internal investigation conducted in China from global investigators, including U.S. authorities, it is often important to engage external counsel from a jurisdiction that recognises legal privilege (*e.g.*, the U.S. or U.K.) to conduct the internal investigation.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

A company should have a policy that outlines how to respond to a whistleblower's complaint. Depending on the nature of a whistleblower's complaint, a legal and compliance team should be consulted regarding how to respond, including whether or not to initiate an internal investigation into the whistleblower's allegations. When assessing the credibility of a whistleblower's complaint, one should take into consideration the totality of circumstances, including the identity of the whistleblower (anonymous vs. known identity), the specificity of the allegations, evidence the whistleblower can provide (e.g. documents, audio/video recordings, witnesses, etc.), the whistleblower's relationship with the company or the implicated employees, etc.

Chinese regulations, including the "Several Provisions of the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Finance on Protecting and Rewarding Whistleblowers of Duty Crimes" ("the Provisions"), provide protection from retaliation to whistleblowers who report crimes such as bribes and embezzlements committed by government officials or employees of state-owned enterprises. There is no additional statutory protection that protects whistleblowers who report other types of allegations, such as those involving wrongdoing at private companies. Private enterprises are nonetheless advised to implement whistleblower policies that prohibit retaliation for reporting alleged improper conduct as a matter of good governance. In addition, although not explicitly included in written law, Chinese labour tribunals tend to consider an employer's potential retaliation against its employee as strong evidence against the employer.

In practice, companies need to deal with whistleblowers with caution. It is commonplace for hostile whistleblowers to record conversations with the company without notice. Under the current Chinese law, these recordings can be admissible in courts under most circumstances.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

Who "the client" is for the purposes of conducting an internal investigation must be made on a case-by-case basis. Among other factors, outside counsel needs to consider corporate governance requirements, local law requirements, conflicts of interest, and the needs of a client when determining to whom they should report. To avoid internal conflicts, outside counsel should determine the investigation's scope based on available information and exclude individuals that may potentially be implicated in, or influenced by, the investigation from the reporting line. Outside counsel must exercise scrutiny when senior employees might be implicated or misconduct appears to be widespread.

#### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

In China, law enforcement authorities can give lenient treatment to an entity that self-discloses its non-compliant conduct, but the certainty and the extent of leniency varies across different subject areas. Chinese criminal law and antitrust laws explicitly provide for leniency for self-disclosure. However, authorities retain discretion regarding the extent of leniency that can be given to a company. Anti-bribery administrative laws are more vague regarding whether leniency can be granted for self-reporting.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

It is recommended that a company develop an adequate understanding of the reportable conduct through an internal investigation before making the disclosure. Further, a company should analyse the implications of self-reporting under the applicable laws before determining whether a disclosure should be made and, if so, to whom the disclosure should be made. Companies should consult outside counsel regarding the impact of self-disclosure on parallel investigations in other jurisdictions. Self-reporting procedures vary for different subject matters and often lack clear statutory guidance. In general, disclosure to Chinese authorities must be accompanied by supporting evidence, the forfeiture of illegal gains, and the cessation of improper conduct.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There is no standard format for self-reporting in China. The format of a self-report is generally dictated by the government authority on a case-by-case basis. Under most circumstances, initial reporting is done orally. Following an initial report, a company can expect to be required to provide additional information to authorities.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

Generally speaking, Chinese law does not require an entity to liaise with local authorities before starting an internal investigation even if the entity is aware that it is the subject or target of an investigation. However, if an entity is already a subject or target of a government investigation, it is often prudent for an entity to engage with the local authorities. The Chinese government retains broad discretion with regard to managing investigation proceedings and assessing penalties. Managing the relationship with local authorities appropriately is crucial to achieving a favourable result for a company. Due to the lack of statutory guidance and broad discretion retained by Chinese enforcement authorities, it is important for an entity to obtain assistance of experienced counsel when engaging with local authorities.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

Chinese enforcement authorities generally do not maintain oversight over the internal investigations conducted by the entities. Under most circumstances, Chinese authorities rely on their own investigations that may run parallel to a company's own internal investigation. However, some enforcement authorities, such as the National Reform and Development Commission, may rely on a self-reporting company's internal investigation without initiating a parallel investigation. An enforcement authority may require the company to provide updates regarding the status and steps of the investigation to ensure that their own investigation is not hindered.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Entities can work with government authorities to define or limit the scope of a government investigation. Generally, efforts to define or limit the scope of a government investigation are best achieved through cooperating with authorities. During the cooperation process, entities can provide information and legal analysis to persuade the authorities to accept an appropriate scope for the investigation.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Enforcement authorities in China are increasingly coordinating with authorities in other jurisdictions, including enforcement authorities in the United States.

In a case of multi-jurisdictional investigations, it is critical for the entities to have outside counsel with a global presence to coordinate responses across multiple jurisdictions. This is especially important when resolving an enforcement action in one country that may impact investigations in other jurisdictions. Companies should pay careful attention to different rules of legal privilege and privacy laws that restrict the disclosure or transfer of evidence in different jurisdictions.

#### 4 The Investigation Process

#### 4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

As discussed in question 5.1 below, China does not recognise the principles of attorney-client privilege and the work product doctrine. However, a company can conduct an internal investigation in China that is protected by privilege if outside counsel from the U.S. (or other jurisdiction that recognises legal privilege) conducts the investigation for purposes of compliance with U.S. (or U.K.) laws. Nevertheless, a company may still be required to produce documents related to the internal investigation to Chinese authorities.

As described in Section 6 below, China's state secrets laws and the new Cybersecurity Law provide restrictions regarding whether collated data may be transferred outside of China or reviewed offshore by remote access to an information platform established in China. Entities are advised to retain counsel and forensic consultants to identify potential documents involving state secrets and cybersecurity law issues.

In addition, China's employment laws provide significant hurdles to terminating employees suspected of improper conduct. Terminated employees often bring claims against the company and are often successful in front of employee-friendly labour arbitration tribunals and courts, which may order reinstatement, in addition to economic compensation. As part of internal investigations in China, entities should properly plan and document the investigation to generate adequate evidence to justify the termination of an employee.

### 4.2 What steps should typically be included in an investigation plan?

A typical investigation plan will include the following steps:

- 1. Identifying the scope of an investigation.
- Gathering resources to conduct the investigation, including leveraging internal resources (in-house counsel, internal audit, finance, etc.) and engaging outside counsel.
- Identifying custodians and collecting and reviewing documents.
- Conducting witness interviews with the employees and third parties.
- 5. Completing and documenting the investigation's findings.
- 6. Assessing legal implications and determine remediation steps, including potential self-disclosure.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Outside counsel should be engaged at an early stage of an investigation. In China, it is important to engage outside counsel who have experience handling both local Chinese authorities and authorities in other jurisdictions, such as the U.S. and/or U.K. This is especially important for investigations that may involve multijurisdictional issues and complicated privilege and privacy issues. An outside counsel with local language capability and familiarity with Chinese laws and culture is also essential in an effective internal investigation in China.

Outside resources such as forensic consultants can be retained to assist in document preservation and collection and complex forensic accounting analysis. To preserve privilege, forensic consultants should work under the direction of legal counsel when possible.

#### 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

China does not recognise the principles of attorney-client privilege and the work product doctrine. The PRC Lawyers Law requires lawyers to preserve clients' trade secrets and clients' private information. However, the requirement to protect confidential client information is <u>not</u> equivalent to the doctrine of attorney-client privilege or the work product protection. In China, lawyers and their clients <u>can</u> be forced to disclose information that would otherwise be protected by attorney-client privilege to Chinese government authorities or in Chinese judicial actions. In addition, lawyers are obligated to report facts and information related to the commission of a crime to authorities.

Internal investigations conducted in China that implicate compliance with laws in other jurisdictions may be afforded privilege protection by non-Chinese authorities so long as an outside counsel from that jurisdiction directs and conducts the investigation. For example, an internal investigation in China that implicates compliance with the U.S. Foreign Corrupt Practices Act may be afforded privilege protections so long as a U.S.-barred attorney conducts and directs the investigation. Chinese authorities, however, may still demand production of internal investigation reports drafted by outside counsel.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Under Chinese law, there are no privilege rules or rules of confidentiality applicable to interactions between the client and third parties engaged by outside counsel. As discussed above, privilege protections over internal investigation conducted in China are rooted in privilege laws of other jurisdictions, such as the U.S. or U.K.

# 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

As discussed above, China does not recognise legal privilege by either in-house or outside counsel.

#### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

As discussed above, Chinese authorities do not recognise protection of privileged documents. To preserve privilege over documents that may be recognised as protected by other jurisdictions, it is important to involve the legal department or outside counsel in the direction of the internal investigation and to limit distribution of privileged documents.

#### 5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

There is no written law or regulation in China that requires enforcement agencies to keep voluntarily disclosed information confidential. As a result, a company must act with caution when deciding whether to disclose investigation results or any privileged documents to the Chinese government. In practice, a cooperating company can request confidentiality of certain information during its settlement discussions with a government authority, and governmental authorities have discretion to agree or disagree with such a request.

#### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

China has multiple laws and regulations governing the protection of personal information, including primarily, but not limited to, the Cybersecurity Law (which came into effect on June 1, 2017) and the Provisions on Protecting Personal Information of Telecommunications and Internet Users. Entities should process personal information properly during an internal investigation, including obtaining express written consent from employees whose documents will be reviewed and taking security measures to prevent personal information from disclosure.

China also has multiple laws that prohibit the migration of certain data outside of China. As described in question 6.3 below, state secrets laws and the Cybersecurity Law mandate that a broad category of documents cannot be transferred outside of China.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Chinese law does not require entities to issue a document preservation notice when conducting an internal investigation. However, generally it is good practice to issue such notice at the outset of the investigation. Individuals who have knowledge of, or involvement in, the subject matter of the investigation should receive a document preservation notice. A reasoned judgment must be made as to what documents and electronic information and data must be preserved, erring on the side of preservation. The document preservation notice should inform the general circumstance of the investigation, but should avoid detailing the specifics of the investigation. IT specialists or forensic firms can conduct data analysis to verify whether any documents have been deleted after the preservation notice was issued.

# 6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Chinese data protection and cybersecurity laws impose significant restrictions on the cross-border transfer of data from China to other jurisdictions. Before transferring documents outside of China, entities should consult outside counsel regarding whether the documents may contain state secrets, personal information, implicate cybersecurity laws, or involve information that is otherwise subject to Chinese regulations. Considering China's increasingly strict restrictions on data migration, it is advisable to consider reviewing all documents collected within mainland China before transferring documents out of the country.

Multiple laws in China prohibit the transfer of state secrets outside of China without prior approval by the government. For instance, the Law on Safeguarding State Secrets of the People's Republic of China expressly prohibits transferring any documents containing state secrets out of China in any form without the approval of the relevant competent government authorities. However, the definition of "state secrets" is very broad and vague. Violation of state secrets laws is a serious criminal offence. In practice, if an investigation involves a sensitive subject area, such as national security, energy, banking, or touches on dealings with government and state-owned entities, it is advisable to engage counsel to screen documents collected within China for state secrets before migrating them overseas.

China's new Cybersecurity Law and its implementing regulations and standards also have restricted data transfers outside of China (including remote access to an information platform established in China). In particular, the Cybersecurity Law imposes a data localisation requirement for certain companies and types of data and prohibits cross-border transfer of data unless certain conditions are met. Under the law, "critical information infrastructure operators" ("CIIO"), personal information and "important data" collected and generated during a company's operation in China are required to be stored within the territory of China, unless certain statutory requirements are met, including having a genuine and legitimate business need to export the data overseas and satisfying a government-led security assessment of the data transfer. Further, the Cybersecurity Law does not clearly define CIIOs and "important data", which makes it difficult for entities to assess whether they are subject to the data localisation requirement. It is also unclear whether conducting internal investigation is considered a permissible ground for exporting data under the law.

In addition, although still in draft form, China's regulation on cross-border data transfers requires all network operators to conduct a security assessment (by government authorities if certain conditions are met) before transferring personal information and "important data" collected and generated in China outside of the country. "Network operators" is broadly and vaguely defined to cover nearly all companies and organisations. Entities are advised to consult experienced counsel regarding the impact of cybersecurity and data privacy issues on the cross-border transfer of data outside of China.

## 6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

What documents must be collected during an internal investigation depend on the circumstances of the investigation. Documents that are generally deemed important to an investigation can include electronic devices (*e.g.*, computers) that potentially store relevant information, emails, contracts, promotional materials, reimbursement documents, and financial records.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Depending on the nature and scope of an investigation, entities can choose to leverage their internal IT resources or retain forensic consultants to assist with document collection and data analysis. For investigations involving a large number of custodians or that might need to be disclosed to government authorities, it is most efficient to develop a documented plan for the identification and collection of relevant documents and to engage a forensic consultant. It should be noted that forensic consultants should work under the direction of legal counsel to ensure privilege is protected.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Chinese authorities are silent on whether the use of predictive coding techniques of electronic data is allowed. That being said, document review and production requested by Chinese authorities tend to have a much shorter life-cycle than those in the U.S. or U.K., and settlement discussions with Chinese authorities usually start before document production is completed. In practice, predictive coding for Chinese language documents is still relatively new. More generally, for investigations involving extensive document review, entities often retain forensic firms which will provide an electronic review platform that allows reviewers to perform key searches, review targeted documents, and mark documents by using coding panels.

#### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There are no particular laws or regulations pertaining to witness interviews in China. Entities are not required to consult authorities before initiating witness interviews. However, witness interviews should be conducted in a professional manner, otherwise entities may be subject to labour arbitration risks.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Under Chinese law, there is no statutory requirement for employees to cooperate with an internal investigation. However, failing to participate in, or to cooperate with, an investigation often violates an employer's internal compliance policies.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

There is no general obligation for an entity to provide legal representation to witnesses prior to interviews. Entities should make it clear at the beginning of the interview that lawyers conducting interviews are acting on behalf of the company, not the individual. In addition, an entity should avoid making any misrepresentation to the employee during the interviews.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

Interviews in China can take many different forms. The strategy and format of an interview should be adjusted according to the totality of circumstances, including, but not limited to, the goal of the interview, the identity of the interviewee, and the subject matter involved. It is important to adopt a tailored strategy with the above background information and relevant culture and language issues in mind. Generally speaking, it is often helpful to clearly set the ground rules at the outset of the witness interviews by explaining the general subject matter of the investigation and communicating confidentiality, and non-retaliation policies. It is often crucial to conduct the interview in the subject's native language.

#### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Interviewers should be aware of potential labour disputes and whistleblower risks when conducting interviews in China (see question 4.1 above). A company should consider attempting to obtain an employee's written waiver of certain privacy issues, a signed acknowledgment of his/her own misconduct, or a disinterested party's written testimony supporting any disciplinary decisions to mitigate labour dispute risks.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Entities are advised to adopt a whistleblower policy that explicitly protects whistleblowers from retaliation and to communicate this policy during an interview with a whistleblower. In addition, entities should clarify that legal counsel is acting on behalf of the company and not the individual.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Entities may grant "immunity" or "amnesty" to employees for violation of internal policies, particularly to whistleblowers or employees who cooperate with the company, admit to improper conduct, and have a low probability of becoming a repeat offender. However, entities should never promise "immunity" or "amnesty" from government authorities.

#### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Whether to allow an employee the opportunity to review and revise statements is usually up to the discretion of the entity conducting the internal investigation. Employees are generally allowed to review or revise interview statements if they are requested to sign a witness statement. In labour disputes, employees often argue against the admissibility of internal investigation interview notes if he/she was not given an opportunity to review and/or revise the statement.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

There is no such requirement under Chinese law.

#### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

The form of the final investigation report is generally determined on a case-by-case basis depending on the nature of allegations, the complexity of issues, the level of disclosure risks, and the recipients of the report.

The benefits of a written investigation report include: (1) documenting the procedures and findings of internal investigation; and (2) ensuring that the findings in the report are effectively communicated to key stakeholders, including senior management or the board of directors.

In China, the main drawback of a written report is that it would not be recognised as privileged by Chinese authorities and could be seized as part of a government investigation. As an alternative to a written report, the findings of an investigation can be communicated orally to management and key stakeholders.

### 8.2 How should the investigation report be structured and what topics should it address?

An investigation report typically includes a description of the allegation, the investigation process, the investigation's findings, and the potential remediation measures, if any. The structure of the investigation report and the topics to be included should be determined on a case-by-case basis. There is no one-size-fits-all formula for a well-written investigation report.

#### Acknowledgment

The authors would like to acknowledge the third author of this chapter, Agnes X. Li.

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# England & Wales



Jake McQuitty



**Eversheds Sutherland** 

Adam Berry

- The Decision to Conduct an Internal Investigation
- What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

The UK statutory and regulatory regimes contain no express requirements for commencing an internal investigation. Nevertheless, there may be a corporate imperative to do so, such as the need to identify and respond to risks associated with a potential criminal offence, or a duty to shareholders to make appropriate enquiries.

A failure to commence an enquiry where a breach is suspected or to complete those enquiries in a timely manner can heighten the risk of commencement of formal regulatory investigation or enforcement. This is particularly the case for regulated firms in the financial services sector where the regulator may also bring a case against the firm and its senior management for failing to investigate with the necessary skill and care.

For firms regulated by the Financial Conduct Authority (FCA), these risks are compounded where a matter falls within the scope of the Senior Managers & Certification Regime (SMCR) where there are certain regulatory expectations and requirements surrounding the completion of investigations into, and subsequent reporting of, breaches of the FCA's Conduct Rules.

What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

The entity will need to determine at the outset the level of seriousness of the allegations and allocate cost, resource and expertise accordingly to investigate. The more serious the issue, the greater the need for skilled specialist support and advice, including legal and forensic expertise. The nature of the allegation will also influence the resource required - for instance, a cyber-breach will invariably require specialist IT analysis.

Before commencing an enquiry, it is important to consider the probable output (will there be a written report?) and how the results will be used (does the entity intend to implement a remediation programme in response?). These are important considerations when dealing with regulators and enforcement authorities because they can create or mitigate the risk of follow-on action.

How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Normally, the priority will be to obtain further information to verify the substance of the whistleblower's allegations and the context that led to their decision to blow the whistle. An interview with the whistleblower is usually the best way of progressing matters. Failing that, the best next option is to ask the whistleblower to provide any evidence they may have to substantiate their allegations.

Throughout the interaction with the whistleblower, investigators should keep in mind two over-arching principles: (1) the whistleblower's identity should be protected insofar as possible; and (2) there must be no impression given that the whistleblower is at risk of suffering any detriment from their actions.

These principles are enshrined in UK law: first, in the Public Interest Disclosure Act 1998 which protects workers from detrimental treatment or victimisation from their employer if, in the public interest, they blow the whistle on wrongdoing; and second, for regulated financial services firms, in rules introduced by the FCA and PRA in September 2016, which include requirements to appoint a Senior Manager as "whistleblowers' champion".

How does outside counsel determine who "the 1.4 client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

Ordinarily, the "client" will be the person or group of persons tasked with governance and oversight of the investigation, with requisite authority to make decisions critical to the direction, scope and outcome of the investigation. They should be sufficiently senior to be accountable for the conduct of the investigation and to make sensible, responsible decisions.

Critically, the client must be independent and objective, meaning: they are sufficiently separate from the staff and issues under investigation to ensure that no actual or perceived conflicts of interest arise; and they demonstrate the ability to reach decisions on the information provided, free from bias and uninfluenced by personal feelings or opinions. Should a conflict of interest arise on a particular matter, then the relevant individual should recuse themselves from the decision-making process for that matter and an alternative be appointed in their place.

Observing the overarching principles of independence and objectivity can be challenging where allegations are made against a senior individual in a firm, such as the chief executive. This is particularly the case where that individual is ordinarily part of the investigation governance structure. In those circumstances, it may be appropriate to invite one of the company's Non-Executive Directors to act in the place of the affected individual until the investigation has concluded.

#### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

In the UK, prosecuting authorities have taken an increasingly aggressive stance in relation to the production of materials created by an internal investigation, such as investigation reports. As such, voluntary disclosure is now routinely considered by certain authorities, such as the Serious Fraud Office (SFO), to be the norm and any deviation from it will most likely be an influencing factor in determining whether to prosecute and/or whether a Deferred Prosecution Agreement (DPA) is appropriate. This can create particular difficulties where a legally privileged report has been prepared by external counsel.

That said, voluntary disclosure is one of a number of factors which the prosecutor will consider in determining whether the prosecution is in the public interest, and these must be considered fairly, in the round. Other relevant factors include the seriousness of the offence, the harm caused to victims, any history of corporate misconduct, the nature and extent of controls in place to prevent the offence and any subsequent remedial response.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

For firms in financial services, there are a range of disclosure obligations to consider, including: the duty to be open and cooperative with regulators; the specific requirements concerning incidences of potential market abuse which may require immediate notification; and then the broader reporting obligations relating to financial crime, such as the submission of suspicious activity reports (SARs). In all instances, a proactive approach is beneficial and will assist in managing the risk of follow-on enforcement action. Conversely, a failure to self-report to a regulator is likely to be perceived as an indicator of cultural or control weaknesses.

In the case of corporate crimes, particularly bribery and corruption, early disclosure may be in an entity's best interests if it intends to enter into a DPA. However, a failure to self-report is not a complete bar to a DPA and the prosecutor may take into account other factors

such as the extent of cooperation given during the investigation and whether the entity waived its rights to legally privileged material.

Once a decision to voluntarily disclose has been made, an entity should proceed to do so in a timely manner. Any unreasonable delay may prejudice a subsequent claim that the entity has been cooperative or is suitable for a DPA.

Aside from the requirements noted above, there is no specific format for making a voluntary disclosure; an entity is free to choose whether to do so verbally or in writing.

In making a voluntary disclosure, an entity should be alive to the risk of breaching the duties of confidentiality and privacy owed to employees and third parties, such as a firm's customers. Care should also be taken in relation to legally privileged materials and the extent of any waiver given, so as to avoid inadvertently waiving the entity's right to privilege over materials not disclosed or intended to be disclosed.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There is no required standard for the format and content for reporting investigative findings. As such, the entity's view of the risks involved in preparing a record of findings will invariably influence the content and format. Of particular significance in preparing a report is the need to avoid prejudice to any legitimate defence of future litigation, prosecution or other regulatory action. That may mean engaging external counsel, for instance, to prepare the report so as to ensure the contents are legally privileged and thereby protected from disclosure in any subsequent court proceedings. Such an approach must, however, be counterbalanced with the benefits to be gained from openness and cooperation with authorities.

Where an entity chooses to provide a verbal briefing to UK authorities on its findings, it is highly likely it will then receive a request for a written report or, in its absence, the underlying evidence on which the investigation relied to reach its conclusions.

#### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

The degree of cooperation provided by an entity during the course of an enforcement or regulatory investigation can materially influence the outcome for the entity concerned, including considerations as to prosecution and early settlement. If a matter is sufficiently significant, therefore, it will invariably be in the entity's interests to engage in dialogue with local authorities before commencing an internal investigation.

Equally, where an entity is aware of an existing external investigation, it is prudent to liaise with relevant authorities at the earliest opportunity before embarking on an internal enquiry. Not to do so may risk the entity "trampling over the crime scene", potentially prejudicing the authority's own investigation and thereby increasing the risk of exposure to separate proceedings for obstruction of justice or failure to cooperate.

#### 3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

In the UK, it is generally expected that firms will engage in an ongoing dialogue with their regulator or relevant enforcement authority where an internal investigation is ongoing. This will ensure the focus and output of any enquiry continuously meets the expectations of the regulator or authority. For financial services firms and individuals, these expectations are enshrined in rules such as the FCA's Principles for Businesses which requires firms to be open and cooperative.

Whilst the regulator or authority can seek to influence the direction and scope of an internal investigation, their involvement generally tends to be more in the form of "listening mode". Where an authority does seek to influence, it is the entity's decision whether to accede to it. If an entity chooses not to do so, it is critical the entity is able to show good reason: for instance, a material risk of a class action litigation against the entity which affects the way in which the entity chooses to record its findings, contrary to the regulator's expectations.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Frequently, it is in an entity's best interests (and in some instances a regulatory obligation) to be open and cooperative with enforcement authorities. Consequently, there is everything to be gained in engaging an authority in dialogue around the nature and scope of the available evidence which is relevant to the investigation. In turn, this will enable the entity to guide the scope of enquiries and may help limit some of those enquiries where they are likely to be disproportionate or of limited evidential value to the issues in the case

However, on occasion, an authority will choose not to engage in such a dialogue where it is fearful the entity may seek to influence the outcome of its enquiries.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Where the conduct concerned is of a cross-border nature, UK regulators and authorities routinely utilise mutual assistance agreements and organisations to coordinate with authorities in other jurisdictions.

When faced with investigations in multiple jurisdictions, it is important to understand the competing priorities and requirements for the authority of each jurisdiction, how these overlap and what risks could arise. Particular care should be taken to the production of protected information, such as legally privileged materials, which could be liable to made public if shared with another jurisdiction which lacks the relevant protections.

Whilst it will be for each local authority to determine the scope of its enquiries, an entity can help influence the focus of cross-border enquiries by ascertaining where critical evidence is held and witnesses reside, and then determining if and how to make these available, in what form and to which authority.

#### 4 The Investigation Process

#### 4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

Regulators and enforcement agencies in the UK are increasingly focused on early deployment of investigators, at the expense of a firm-led internal investigation. The introduction of the Senior Managers regime for financial services firms and a new strategic approach to investigations led by the Head of Enforcement at the FCA has also created challenges, with investigations commenced increasingly earlier and routinely taking place concurrently against both the firm and its senior management.

### 4.2 What steps should typically be included in an investigation plan?

An investigative plan should set out the proposed scope of the investigation and the detailed steps proposed to meet the agreed objectives, along with an associated timetable. The plan should be maintained throughout the investigation as a record of decisions made and key actions taken.

The plan should identify: what questions you are seeking to answer; and then, to that end, what evidence you wish to access and where it is located, if known; the potential witnesses; the potential custodians for the purposes of retrieving relevant evidence; and the specific actions proposed in relation to each of these.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

The appointment of outside counsel or outside resources can reinforce the perception of independence and demonstrate that a firm is committed to an objective determination of the facts. Legal counsel can be particularly important to the entity if it wishes to avail itself of the benefit of legal privilege to ensure an appropriately sensitive, confidential environment to complete its enquiries and determine its response to any future enforcement.

Before appointing outside counsel, it is important to confirm they have the requisite expertise and knowledge, such as a developed understanding of the applicable laws and regulations.

## 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

It is a well-established principle of English law that a person (i.e. the client) should be able to communicate freely with a lawyer without fear that those communications may later be disclosed to a court. This is the principle of legal professional privilege (LPP). In the context of internal investigations, LPP is often limited to two categories: legal advice privilege; and litigation privilege.

Under the rules of legal advice privilege, the "client" is limited to a narrow group of employees of the firm who are charged with seeking and receiving legal advice on its behalf. In practice, this means the "client" tends to comprise those individuals in the firm with oversight and responsibility for the legal team and decision-making in relation to the investigation.

A communication can only be privileged if it is also confidential. Unauthorised or inappropriate dissemination of privileged documents can fundamentally undermine the confidentiality of those documents such that they lose their privileged status.

In addition, an entity may be entitled to claim privilege over materials created both internally and by third parties for the purposes of the investigation <u>if</u>, at the time that material is created, there is a reasonable prospect of litigation or other court proceedings against the entity <u>and</u> the materials were created for the dominant purpose of the litigation.

This privilege should be invoked cautiously where the only proceedings reasonably contemplated are of an enforcement nature. In these circumstances, for litigation privilege to be effective, a prosecution must be a real prospect, meaning the investigation will need to have established there is some truth in the accusations or at least some material to support the underlying allegations. This is problematic from the perspective of companies seeking to claim litigation privilege, who are generally undertaking such investigations in order to assess these very factors.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Unless the entity is able to claim the right of litigation privilege then materials or communications generated between the client or external counsel and a third party will not be protected from subsequent disclosure in the event of a disclosure order from a court or authority exercising its statutory powers. This is despite the fact the communication may be confidential.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

English law draws no distinction between in-house or outside counsel for the purposes of LPP, save in the case of competition investigations involving the European Commission. For these, different rules apply – the critical difference being that any communications with internal lawyers will not be protected by legal privilege. However, communications with external EU-qualified lawyers can still benefit from privilege.

#### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Where legally privileged materials are considered relevant but created <u>prior to</u> the commencement of an investigation, these should be stored separately from other evidence, and readily identifiable as privileged. In the event of an order requiring disclosure of these materials, for each document care should be taken to determine whether it is appropriate to waive privilege and produce the document, the grounds on which such waiver is appropriate and whether such waiver could prejudice the right of privilege over other, similar materials.

For legally privileged materials created in the course of the investigation, a similar approach to segregation of documents will apply, but in addition it will be important to ensure there are appropriate protocols established and observed for the recording and storing of those materials. For instance, by marking them as "subject to legal professional privilege".

#### 5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Typically, the results of an internal investigation will be confidential as between the authority and the entity unless the authority is required by virtue of a statutory gateway or memorandum of agreement to share the results with another agency or regulator. This applies both at a domestic and international level where regulators and authorities may utilise mutual assistance agreements to gather information for the purposes of investigative activity. Where this is a risk, the entity concerned may wish to seek assurances and, possibly, an undertaking from the relevant agency that they will not provide the information or the results of an internal investigation without prior consultation with the entity.

#### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

In the UK, the Data Protection Act 1998 provides the framework for protection of personal data. This requires personal data to be secured, protected and processed lawfully, taking into account the rights of the data subject (i.e., the individual identified by the data).

Those rights may be subordinated where an investigation is necessary for legal proceedings, legal advice or to establish or defend legal rights. However, investigators still do not have unrestricted right of access to all information about workers under investigation.

As a general guide, the risks of a breach will be minimised if all access is demonstrably necessary, proportionate, reasonable and transparent (insofar as possible). It is unlikely to be permissible to access communications or other material that a firm has good reason to believe relates solely to personal matters, even where the information exists on business equipment.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Whilst it is not a legal requirement to issue a document preservation or "hold" notice, it is invariably good practice. Where there is material risk of follow-on enforcement or regulatory activity, then not to do so may create unnecessary risk for the entity.

As a rule of thumb, all identified custodians should receive a hold notice unless there is a risk that issuing the notice is likely to "tip off" the recipient that you are conducting an investigation which involves them and whether they might take steps to destroy or manipulate evidence. In those circumstances, the investigation should consider other available routes for securing the evidence.

The scope of the hold notice will depend in part on the nature of the allegations under investigation, but as a minimum it should encompass hard copy and electronic data held by the custodian, including any new records they create which are relevant to the issues under investigation.

It is also prudent to remind recipients that: the scope includes business material held elsewhere than on the firm's systems, such as data on personal devices; their duty of confidentiality; and the requirements of any existing document retention policies. The recipient should also be asked to confirm they have understood and agree to the contents of the notice. This confirmation will then be available in the event an entity needs to demonstrate it took reasonable steps to preserve evidence.

#### 6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

At the outset of an investigation, it will be important to identify where relevant evidence is held, how it is held and whether jurisdictional issues arise – such as risks around the extract and transmission of data across borders. Specific, relevant expertise should then be sought in each of the affected jurisdictions before proceeding to engage in any substantive data or document extraction exercise.

Even if there are no restrictions on the extraction of data, there may be restrictions on the production of data and information to a third party which needs to be considered – particularly where to do so could engage banking secrecy laws and inadvertently result in the entity committing a criminal offence.

# 6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

There are three broad sources of material which the authorities will expect the entity to consider for collection, each bringing with them different challenges: digital material on company network; digital material off network; and hard copy documents.

For material on company network, investigators will likely need to have meetings with company IT staff to understand the range of relevant data and the steps necessary to preserve it.

Sources of material off-network may include hard drives, flash drives, company phones, and personal devices (where these have been used for company purposes). For many of these items, it may be advisable to take forensic copies. This will allow data to be analysed on a secure system, eliminate the risk of loss of data in the original devices, and allay any concerns over data integrity and tampering.

Certain types of record, such as minutes of board meetings, are likely to be the subject of specific regulatory requirements for safekeeping of records and will be protected from destruction for a fixed period of time. In those circumstances, it is advisable to note the destruction date so that you are prepared to request preservation should an external investigation or regulatory scrutiny into the matter materialise.

Where investigators take possession of hard copy documents, they should ensure that a chain-of-custody is maintained, with a record kept of where the item was found, by whom and at what time.

## 6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

For most investigations involving the collation and review of data, it is typically the case that investigators will utilise document review or e-discovery platforms and technologies to enhance the efficiency of their analysis of the evidence. The engagement and utilisation of sophisticated computer forensics and document analytics is commonplace now given the challenges brought about by "big data". Of particular significance is the utilisation of predictive coding techniques designed to filter large volumes of data for relevant documents at materially faster speeds and lower costs than traditional first-level document reviews.

# 6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Most judicial and enforcement authorities endorse the use of predictive coding. Where an entity utilises these technologies, it is critical that the investigator prepares and maintains a detailed document review plan setting out the methodology for the review, including search parameters, output efficiency and rationale for any decisions not to look at specific data (which a regulator may later deem relevant).

Predictive coding has an incredibly high efficiency rate but should always be supplemented by quality controls and assurance to ensure consistency and reliability of output, as well as to reassure an authority that the review was conducted appropriately and with the requisite level of professional oversight.

#### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Frequently, the terms of an employment contract will contain a requirement to comply with any enquiry or investigation undertaken by an employer whilst the employee remains employed. In some instances, former employees may be subject to similar terms where these form part of any severance agreement. Third party contractors and service providers, such as external consultants and auditors, may also be subject to similar conditions. In any such cases, the obligation to comply or assist may include an obligation to attend an interview.

Where an employee is also an independently regulated person, they may be expected to comply with and provide assistance to an internal investigation to demonstrate they meet the necessary regulatory standards of integrity and openness.

Where an employee is interviewed, then the interview must be conducted in accordance with a firm's internal policies and procedures, as well as with due regard to applicable employment rights

Under the financial conduct regime, where an individual is the target of investigation, the firm will have certain obligations to notify the FCA of this fact, although this does not technically need to occur before the interview has taken place.

Where a notification has already been made to an authority that an investigation has commenced, it is generally prudent to appraise the authority of the individuals intended to be interviewed and allow the authority an opportunity to respond before commencing interviews.

# 7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

If an employee fails to cooperate without reasonable excuse, then they may be the subject of disciplinary proceedings on the grounds there was a breach of their employment terms or, alternatively, that they failed to discharge their duty to act in good faith towards their employer.

In addition, an FCA-regulated individual is required at all times to act with integrity and honesty – which would include, in an interview, providing their employer with a full and truthful account of what happened. Not to do so, or declining to attend, could result in a negative assessment of the individual's fitness and propriety to continue in a regulated role.

#### 7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

There is no statutory obligation on an employer to provide legal representation to witnesses in an internal investigation. It is, however, important to check an employee's terms of employment as well as relevant company policy and procedures which may provide such a right. Directors' and Officers' insurance should also be considered where it could provide cover for legal expenses, particularly for senior management.

Where legal representation is provided, care should be taken to ensure that the grounds on which it is provided are applied consistently and fairly to all witnesses concerned.

In serious, complex or significant cases, it may be prudent to offer legal representation to enable a witness to adequately prepare for interview, properly advised by independent counsel. This is particularly the case where there is a potential conflict of interest between the employer and employee which needs to be managed appropriately; for instance, where the employee may face individual prosecution alongside their employer.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

At the start of the interview, it is good practice to provide a variant of the "Upjohn warning", outlining the basis on which the interview is to be conducted; for instance, is it for the purposes of providing legal advice to the employer? The witness should also be provided with: an outline of the scope of the evidence to be covered; a statement as to the importance of answering questions in a clear and open manner; a reminder that the interview is confidential and should not be discussed with other colleagues; and finally a warning that the employer may choose to disclose the contents of the interview to the authorities.

Note-taking should be in the form of a summary of the evidence, ideally confirmed with the witness after the interview to ensure accuracy as well as allowing the witness an opportunity to clarify or provide context to any statements made. This is particularly advisable where there is no claim to legal privilege over the notes of the interview – which will be in the majority of cases.

#### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Interviews should be conducted in an open and transparent manner – an internal investigation is a fact-finding exercise and should not be an adversarial or accusatory process. Nor is it a substitute for a disciplinary hearing. However, where there are allegations concerning a witness' behaviour or conduct, these should be put to the witness to allow them an opportunity to explain themselves.

An interviewer must also be familiar with the relevant whistleblowing rules and laws applicable to the entity, not least its own internal whistleblowing policy.

#### 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

When dealing with a whistleblower, it is imperative that there is no detrimental treatment towards them. At the outset of the interview, it will be important therefore to reconfirm the whistleblower's status and the protections he or she is afforded accordingly. The interviewer should also remind the whistleblower that their evidence may form part of any subsequent report to the authorities, particularly if that is necessary to discharge the entity's own legal or regulatory obligations, but that any such report will seek to maintain the individual's anonymity.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

An employer, particularly a regulated firm, should very carefully consider its position before granting any request for immunity or amnesty. Only in very rare circumstances will it be appropriate to provide this level of employee protection, and there are critical factors militating against granting it. For instance, the fact the employer may not yet know the nature of any misconduct by the employee and therefore whether there are legitimate grounds for dismissal which could no longer be pursued. By granting immunity, an employer may also create unnecessary regulatory or legal risk for itself – such as fettering its ability to dismiss the individual because he is no longer fit and proper.

#### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

As outlined in question 7.4 above, it is good practice to provide the employee with an opportunity to review and provide any clarifications to the summary of their evidence. Employees should also be given the opportunity to provide further information or evidence post-interview, if they consider it significant.

#### 7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

No such requirement exists in the UK. However, regulators have been known to insist on interviews being conducted in a certain manner, e.g. by tape-recording the evidence for an internal investigation. Such conditions are rare and ordinarily the authorities

will permit an entity to complete its internal investigation before reaching a view on whether to commence a formal investigation and compel witnesses to attend interviews.

#### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

At the outset of the investigation, it is important to identify the objectives and what the final output will look like. This includes consideration on whether to produce a final written report documenting the investigation's findings. A decision on this question and the format for the report should be kept under review throughout the investigation.

In deciding whether to produce a report, it is also important to consider whether the report is likely to be used for multiple purposes. For instance, it might be used to make a disclosure to a regulator or to assist a manager in deciding whether to commence a disciplinary process.

This question can be particularly relevant where the report attracts legal professional privilege. This protected status of a report can be affected where it is subsequently used for a different purpose than the one originally envisaged.

Generally, it is best to adopt a practical approach that balances the need to maintain protection over legal advice (where this applies) with an intention to make the facts available, in some circumstances, to internal and external parties.

Regulators and enforcement agencies in the UK have increasingly emphasised the importance of providing a written report of the investigation's findings, particularly where an entity wishes to secure credit for cooperation.

### 8.2 How should the investigation report be structured and what topics should it address?

As a matter of best practice, an investigation report should include the following key sections:

- 1. A brief background describing how the issue came to light.
- 2. The key issues investigated.
- 3. A summary of the investigation's key steps.
- 4. A brief chronology of events.
- A summary of the key internal policies and procedures which applied to the matters under investigation, as well as any relevant laws and/or regulations which applied.
- 6. A conclusion summarising your assessment of "what happened" based on the evidence and applying the internal policies to the facts. Any conclusion covering breaches of law or regulation may be best set down in a separate legally privileged document.
- A record of recommendations in response to the investigation's findings, along with any suggested immediate next steps.

Always include contact details in the report so the reader knows who to contact in the event of questions or enquiry (or if the report is mislaid). And always ensure the report contains appropriate markings on each page to indicate the confidential nature of the report including, where appropriate, marking the report "Legally Privileged".



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Jake was formerly the Head of Investigations & Enforcement for Barclays Bank for Europe and the Middle East where he oversaw a portfolio of global investigations and enforcement matters in both the retail and wholesale banking businesses, including the highly publicised cases against Barclays in respect of benchmark fixing (gold and FX) and client custody and assets rule breaches.



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### E V E R S H E D S S U T H E R L A N D

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# Finland



Juha Pekka Katainen



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### 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Internal investigations are not regulated separately by Finnish law. There are, however, a number of specific rules and regulations that should be taken into account. In particular, data protection and employment laws may limit the means available for an investigation.

The board of directors and the managing director of a Finnish limited liability company are responsible for ensuring that the company is compliant with laws and regulations and that its accounting and finances are properly arranged. Internal investigations are often conducted to ensure that this is the case and, if not, to obtain evidence that the management has acted diligently and to give guidance to the management or stakeholders regarding possible next steps. Often, internal investigations are also conducted to find evidence that the management or some members of the management have not acted in accordance with their statutory obligations.

Publicly listed companies should also take into account the possible reporting obligations under the securities markets legislation and the rules and recommendations in the Finnish Corporate Governance Code issued by the Securities Markets Association. For example, the Corporate Governance Code recommends that the board of directors conducts an annual evaluation of its operations and working methods. If a listed company conducts an internal investigation, it should pay specific attention to listed companies' obligation to disclose information.

There are also several sector-specific rules and regulations relating to internal investigations. For instance, companies operating in the financial field are strictly regulated, also in respect of internal investigations.

If an entity does not comply with these regulations, the entity or its management may face civil and/or criminal liability. Further, administrative sanctions such as fines, public warnings or penalty payments may be imposed by, e.g., the Financial Supervisory Authority ("FSA") or by the competition authorities.

The measures taken in internal investigations could be seen as proof of the due care of the board of directors or other management, as they can show that they have taken suspected violations seriously and investigated the matter. In cartel cases, one significant benefit from carrying out an internal investigation is the possibility to obtain immunity or a reduction of fines by informing and cooperating with the authorities.

There are new legislation projects pending, and the regulation concerning internal investigations is constantly being developed.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Often the most important factor that should be taken into account is the risk of civil and/or criminal liability in case the entity does not conduct an internal investigation and leaves the matter unclear. Further, the risk of negative publicity should be considered.

On the other hand, companies should be aware that internal investigations are often costly and time-consuming and may require significant internal and external resources. When deciding to carry out an internal investigation, companies should be prepared to make the required resources available and to take necessary actions based on the investigation report.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

The credibility of a whistleblower's complaint depends on the circumstances in each specific case. For example, the level of detail in the complaint and what the possible reasons behind the complaint are should be considered. Also, the credibility of the complaint in general, the possible risks of not investigating, the possibility to let the authorities investigate, the possible benefits from investigating, and costs and resources required for investigating, are factors worth considering.

When dealing with whistleblowers, it should be noted that Finnish employment law is more protective of employees than in many other jurisdictions. Termination of employment is only allowed in certain, rather limited, situations.

The legal status of a whistleblower is somewhat unclear and without specific regulation. The rights and obligations of whistleblowers have, however, been the subject of much debate and we anticipate more specific regulation; for example, a system for anonymous and confidential reporting of suspected corruption within enterprises, to be implemented in the near future.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

Preferably the client's contact person should be as senior in the organisation as reasonably practicable to avoid any conflicts of interest. The group of people representing the client should be limited to only the necessary persons and due care should be taken with regard to confidentiality. The team should be defined at the beginning of the process in order to avoid any misunderstandings.

Typically the client appoints a contact person and it is only in very exceptional cases that outside counsel may feel a need to bypass the contact person and inform his or her superior.

#### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

The law enforcement authorities do not consider an entity's willingness to disclose the results of an internal investigation as such, but the entity's willingness to disclose information in general may affect the authorities' consideration.

For example, a company's willingness to voluntarily provide information to the competition authorities in competition restriction cases may, under certain circumstances, lead to the company's immunity from or reduction of fines ("leniency"). Full cooperation with the authorities is required, and immunity may not be granted to a company that has pressurised others to join a cartel.

Another example of sector-specific regulation is the FSA's right not to impose an administrative fine or public warning if the party who has breached relevant financial sector regulation has taken appropriate and immediate action to rectify the breach and reports it to the FSA without a delay. While such leniency does not extend to certain aggravated breaches, still the fact that a party has voluntarily informed the Financial Supervisory Authority may be taken into account as a mitigating factor when determining the administrative sanctions.

In criminal cases, the offender's attempts to prevent or remove the effects of the offence, or his or her assistance in clearing up the offence, may reduce the punishment or mitigate the penal latitude imposed for the offence.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

As regards past breaches, there are no specific rules regarding the timing of a disclosure and, generally, disclosure is not mandatory. The evaluation should therefore be case-specific.

As regards ongoing breaches, disclosure is not generally mandatory but may be required under certain circumstances. For example, in the event of a reasonable suspicion that an order or transaction in any financial instrument could constitute insider dealing, market manipulation or the attempt of either, it should be reported to the competent authorities without a delay.

It is noteworthy in this context that external auditors of regulated financial institutions are under the obligation to report breaches of financial regulations that have come to their attention.

In competition law, full immunity is available only to the first applicant informant and the reduction is scaled down for subsequent applicants. Thus, it is particularly important to be the first to provide information to the competition authorities on a specific competition restriction.

In criminal matters, there are more possible benefits if details are disclosed before the authorities have started investigating the matter.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There are no specific general requirements for the report format. Generally, written reports are preferred for practical reasons. The possible risks are described under question 8.1 below. As legal privilege applies only to external legal advisors, it is advisable that any written report is prepared by an outside counsel.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

There are no such requirements in general. However, it is noteworthy that information received during a police investigation may be covered by a non-disclosure obligation if so determined by the police. All documents and information concerning criminal proceedings are, in general, confidential until the prosecution has presented its case in court.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

In general, law enforcement authorities do not have a right to maintain oversight of internal investigations.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

The entities are generally not entitled to define or limit the scope of an investigation performed by the authorities. In practice, however, the entity can try to help define or limit the scope of an investigation by cooperating with the authorities. 3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Finnish authorities commonly coordinate with authorities in other jurisdictions. There are specific rules about cooperation; for instance in police and execution authority. If an entity faces investigations in multiple jurisdictions, it should stay updated about the ongoing processes and preserve all its rights in the various jurisdictions. Acquiring outside counsel's advice in each of the jurisdictions is advisable.

#### 4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

It is noteworthy that the Finnish laws on data protection and employees' rights tend to be stricter than similar laws in other jurisdictions. It should also be noted that, with certain exceptions, all documents disclosed to authorities are or will become public.

### 4.2 What steps should typically be included in an investigation plan?

There are no specific legal requirements. The plan should be carefully drafted and it should guarantee a neutral and objective investigation process and outcome. Purpose, scope, timeline (including milestones), resources (including investigators and potential outside advisors), methods (including a plan for collection of documents and interviews), communication and reporting are examples of typical topics.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

It is generally advisable to always contact outside counsel when an internal investigation is considered necessary. If documents are produced without the assistance of outside counsel, enforcement authorities and possible counterparties may obtain access to such documents, as legal privilege does not apply to in-house counsel. The need for forensic consultants should be assessed on a case-specific basis.

Outside counsel should already have been contacted when contemplating whether an internal investigation should be carried out, as they can help in assessing what the best practice is to approach the matter in question. When choosing an outside counsel, special attention should be paid to the knowledge and experience of similar cases, as well as the availability of sufficient resources for the performance of the investigation in a timely manner.

#### 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

There is no specific regulation regarding internal investigations in this respect.

At the outset, an internal investigation report will most likely be considered to contain trade secrets and will, as such, have to be kept confidential by the relevant company, its employees and others. However, when things go wrong, law enforcement authorities do have rather broad powers to confiscate documents, including materials produced in connection with internal investigations. Also, possible counterparties in court proceedings may have a right to obtain such documents by requesting a court to order document production.

The best way to mitigate this risk is to retain an outside counsel. Authorities cannot order an attorney to testify in respect of what the client has entrusted to him unless the client consents to such testimony or the client is charged with a crime punishable by imprisonment for six years or more, which is seldom the case in respect of corporate offences. Further, a document may not be confiscated or copied to be used as evidence if it can be assumed to contain attorney-client material. It is advisable to state clearly on all relevant documents that they contain confidential attorney-client material.

It is important to note that legal privilege does not apply to in-house counsels.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

According to Finnish law, legal privilege does not apply to interactions between the client and third parties, regardless of who has engaged such third party. Should a third party be engaged during an internal investigation, all possible interaction between the client and such third party should preferably be made through an outside counsel in order to minimise the risks involved in possible lack of legal privilege.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

No. Legal privilege does not apply to in-house legal counsel in Finland. According to EUCJ practice (C-550/07 P – Akzo Nobel Chemicals and Akcros Chemicals v Commission), the applicability of client-attorney privilege requires that the attorney in question is required to be external and fully independent from the client.

#### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

The best way to protect privileged documents is to retain an outside counsel and ensure that such documents are considered attorney-client confidential.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

According to the principle of transparency, documents disclosed to authorities are public, unless specifically provided otherwise. Willingness to provide information does not create an exception to the principle of transparency.

Documents may be held confidential by enforcement authorities, for example to the extent they contain trade secrets, or to protect ongoing investigations by authorities. A corporate statement given to Finnish competition authorities as part of a leniency application under the Competition Act is always treated as fully confidential.

#### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The General Data Protection Regulation ("GDPR") of the EU applies to the processing of personal data in connection with internal investigations from 25 May 2018 onwards. The process of implementing GDPR into national legislation is still ongoing. Before the GDPR and new national legislation, the Personal Data Act and Information Society Code need to be taken into account in connection with internal investigations; for example in relation to the handling of personal data, confidentiality of messages and traffic of data. Furthermore, when internal investigations are carried out, particular legislation regarding data protection of employees also applies, which may also be amended before 25 May 2018 in connection with the renewal of other data protection legislation.

Further, the guidelines and recommendations issued by the Data Protection Ombudsman should be taken into account.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

There are no specific legal rules regarding it, but a company may issue such a notice to its relevant employees and the employees are obliged to comply with such a notice based on the employer's right to direct and supervise the work of the employees. The content, scope and recipients of the notice should be considered on a case-by-case basis.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

The laws relating to collection of documents and other information as well as delivery of the same to third parties and/or abroad differ between jurisdictions. Thus, specific advice on the relevant laws in each applicable jurisdiction is needed.

In Finland, there are no generally applicable statutes preventing delivery of information abroad. However, the current relatively strict laws applying to personal and sensitive data set limits on the collection and processing of such data in Finland.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

Provided that the data protection laws are followed, all types of documents that may contain relevant information can be collected, e.g. company policies, procedures, press releases, contracts and all types of written communications including electronic communication, audit reports, accounting records, tax reports, trade records and account statements.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

The resources used to collect documents in an internal investigation vary from case to case.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

The Finnish national legislation does not contain restrictions on the use of predictive coding as such, but the laws relating to data protection set limits on the material on which it can be performed and the process. Judicial authorities do not use predictive coding techniques. Enforcement authorities may use predictive coding techniques depending on the case.

#### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Employers are generally entitled to require that employees cooperate and disclose all relevant information in interviews, excluding situations where the information could lead to the employee's personal criminal liability.

Former employees are under the same regulations as any third party would be. Third parties are not under the duty of loyalty and are not obligated to participate in the interviews initiated by an entity; their participation is based on their willingness to participate. Sometimes obligations to participate are included in an agreement on the termination of employment.

Usually there is no need to consult any authorities before initiating interviews.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

If the employer has established a practice where employees are required to cooperate and participate in interviews, all employees are required to cooperate, unless they could be protected under the right not to incriminate themselves. The employer has a general right to direct and supervise work and, correspondingly, employees have an obligation to follow the orders issued by the employer as

long as they have a direct link to the employment relationship. Therefore, the employer is able to require employees to participate in interviews.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

An employer may offer legal representation for employees, but it is not mandatory.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

Often the process begins with lower level inquiries and then rises up in the organisation in order to avoid, for instance, the opinions of the directors affecting the employees' points of view.

### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

As interviews are often executed in a reliable and amicable atmosphere, the interviewees often share information that they would not bring forward on their own initiative.

#### 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

There are no specific rules about this in Finland.

On a practical note, an objective process is important both to the entity as well as to the whistleblower. Giving the whistleblower a genuine possibility to express their concerns and provide information when investigating the matter normally leads to the best outcome, as it often reduces the whistleblower's anxiety to go to the authorities or express a negative opinion of the entity in public.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

An employer may grant immunity to an employee as protection against dismissal and claim for damages. The employer has to act in accordance with the obligation of equal treatment of employees, meaning that employees shall be treated equally in comparable situations, unless the difference in treatment can be deemed justified.

#### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

If an internal investigation produces documents, such documents are generally the property of the company and the employees do not have a general right to access them.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

There are no such requirements in Finland.

#### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

In general, written reports are preferred, but all risks regarding written reports should be considered with an outside counsel before starting an investigation.

On a general level, the main benefit of producing a written report is that, should the authorities or media take an interest in the case, the entity will be able to provide evidence that it has taken the matter seriously and investigated it thoroughly on its own initiative and taken relevant actions based on the report.

The main disadvantage of producing a written report is the risk of it ending up in the wrong hands. As has been stated above, one way to mitigate this risk is to retain an outside counsel. Documents prepared by outside counsel containing confidential advice are generally protected by legal professional privilege. However, even so, authorities may see it as their right to briefly examine documents to ensure that they are subject to legal professional privilege, and it can never be fully excluded that the confidential status of a document could be disputed for some reason.

In civil cases, it is possible that the court orders a party to present a document, if the counterparty is aware of the existence of such a document and asks the other party to present it. The court assesses whether the document is of significance as evidence in the case and whether the person in possession of the document should present it in court. The counterparty does not have a right to obtain documents protected by legal privilege.

### 8.2 How should the investigation report be structured and what topics should it address?

This depends on the purpose of the investigation. Background information, a general description of the process and the outcome are generally the main elements. Listing the material collected and attaching the (main) material and the interview transcriptions is often useful. The tone and emphasis of the report depends on its purpose.

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Krogerus regularly represents Finnish blue chips in criminal proceedings both as injured parties and defendants. We have a strong record in regulatory investigations and related administrative procedures for the financial, communications and pharmaceutical sectors, among others. Krogerus is also experienced in conducting internal investigations for a broad range of companies.

# France



Christian Dargham



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## 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Internal investigations are a recent phenomenon in France. There are no explicit statutory or regulatory obligations pertaining to internal investigations. However, the law relating to transparency, the fight against corruption and economic modernisation of 9 December 2016, otherwise called "Sapin 2", has achieved a milestone in the development of internal investigations in France since it introduced a new settlement system named "judicial agreement of public interest" ("CJIP").

The CJIP does not expressly refer to internal investigations, but such investigations will certainly help (i) decide whether a settlement should be entered into with the Public Prosecutor, and (ii) better negotiations of such settlement.

More generally, when deciding to conduct an internal investigation, an entity should pay attention to data privacy, labour laws, influencing witnesses and legal privilege (which does not apply in France to in-house counsel) rules. French law also prohibits transferring any information or document to foreign authorities except through international treaties/conventions channels. Breaching this law known as "blocking statute" is a criminal offence.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

The approach depends on the nature of the allegations or the incident at stake. The entity should first assess the seriousness of the allegations and their potential consequences (legal, financial, reputation...). If it considers conducting an internal investigation, the company should assess the likelihood that this investigation becomes public and triggers media and the authorities' attention.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

The entity should always ensure that alerts are gathered properly by a referent and dealt with by people who are experienced in this area. Not all complaints deserve an internal investigation. A *prima facie* assessment of the credibility of the complaint, sometimes after further exchanges with the whistleblower when possible, will enable the company to select those which should be further investigated.

Whistleblowers' protection was reinforced by Sapin 2: whistleblowers are protected when they report in a disinterested manner and in good faith a crime, a misdemeanour, a serious and manifest violation of an international treaty to which France is a party or of the law and regulations, or any issue that poses a threat or a serious harm to the public interest.

The entity must ensure that whistleblowers' identities remain confidential.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

The general counsel of the entity is generally the outside counsel's main contact. It is recommended to set up a special committee composed of a limited number of relevant functions to whom the outside counsel will report findings. This will enhance independence and help preserve confidentiality and legal privilege. The members of this committee or any instance that will coordinate the investigation need to be fully independent and must not be potentially involved in the allegations. Rules should be carefully set up where the investigation covers facts which could potentially involve the top management, to avoid any risk of the top management trying to influence or stop the investigation process.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Companies have no obligation to disclose violations of anti-bribery laws or associated accounting irregularities to the Prosecutor (however, external auditors have a duty to disclose to the Prosecutor any crime they become aware of in the course of their audit).

With the new CJIP settlement, self-disclosure to the Public Prosecutor is now an option. However, the relevant law does not refer to the impact of cooperation and/or self-disclosure on the penalties that will be imposed. No official guidelines are available at this stage but it is likely that, when proposing the penalty, the Public Prosecutor will take into account voluntary disclosure of the findings of a properly conducted internal investigation. The remediation of wrongful conducts could also be taken into account.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

The first key step is to have full visibility of the misconduct before taking any decision to self-report. For example, a sole whistleblowing alert is in itself insufficient to prompt a selfreporting decision.

Extensive internal investigations should be carried out to determine the seriousness and extent of the misconduct, the individuals involved, the legal risks and the jurisdictional issues.

When there is a high risk that the matter may become public (e.g., through a whistleblower) before the internal investigation is sufficiently advanced, the company may decide to prompt contact with the authorities to self-disclose.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There are no legal requirements regarding the format of the findings of an internal investigation. The findings may be disclosed either orally or provided in a written report. A written report could be seized by the authorities or even required by an adverse party in civil litigation if it is not subject to legal privilege.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

A company is not required to liaise with local authorities before starting an internal investigation. When the authorities have already targeted the company for an investigation, and if the latter has decided to conduct an internal investigation, it may be useful in some cases to liaise with the authorities to try to persuade them that the company will conduct a proper and independent internal investigation, and that the authorities should soften their own investigations. Since French authorities are not yet fully used to internal investigations, such an attempt may not succeed.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

In the absence of any guidelines or even reference in the law as to the involvement of the Public Prosecutor's office in possible internal investigations, it is difficult to assess the authorities' expectations, not to mention that these concepts are relatively new in France. One could, however, anticipate that authorities may want to have a close oversight or at least be closely informed of the evolution of an internal investigation.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

An entity does not have the ability to limit the scope of a government investigation. However, it can try to convince the authorities to do so by providing additional evidence/information that it considers helpful. When an investigating judge has been appointed, the entity could also file a request for additional investigative steps.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

There is increasing cooperation with authorities of other jurisdictions. In cases where an entity could face investigations in multiple jurisdictions, it should carefully weigh its decision to self-report since a voluntary disclosure in one jurisdiction may amount to self-reporting in other relevant jurisdictions.

#### 4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

In addition to the strict data privacy regulations and the so-called blocking statute, cultural issues could be a real challenge since many actors in France are not used to internal investigations for the purpose of cooperation with authorities.

4.2 What steps should typically be included in an investigation plan?

The following steps should be included in the investigation plan: definition of the scope of the investigation; decision on the immediate measures and protective steps to be taken; identification, preservation and collection of relevant information; identification

of individuals who know relevant facts and/or who may have been involved; document review and analysis; interviews to be conducted; and a report of findings and recommendations for remediation.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Hiring an outside counsel is crucial to benefit from legal privilege. It is also preferable to be assisted by an outside counsel when there are interactions with authorities and/or when the investigation covers several jurisdictions, which requires familiarity with various applicable laws. When the investigation is potentially intended to be shared with authorities, one key criterion is that outside counsel and forensic be experienced in conducting internal investigations in a way which is compatible with authorities' expectations.

### 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

To the extent that a French outside counsel (*avocat*) conducts an internal investigation as part of rendering legal advice to the entity under investigation, French "professional secrecy" applies. Under this rule, exchanges between outside counsel (*avocat*) and his/her client benefit from such protection.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Communications between the client and third parties engaged by outside counsel such as forensic accountants are not covered by the attorney-client privilege. In order for this privilege to apply, communication should be directed through the outside counsel.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Legal privilege does not apply to communications with an in-house counsel.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Documents created internally, including by in-house counsel, will not be privileged. Only communication with and material created by outside counsel will benefit from legal privilege. Such communication and material should be clearly marked as privileged and should not be forwarded to third parties.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

If a CJIP settlement is reached with the Public Prosecutor but it is not approved eventually by the President of the court, the Prosecutor cannot provide the investigating bodies or the criminal courts with statements or documents provided by the company during the course of the negotiations.

Conversely, if no agreement is reached and, afterwards, a judicial process or an enforcement action is initiated, the results of the internal investigation may not remain confidential as they will be part of the criminal file.

#### 6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The main data protection legislation is the law of 6 January 1978 on Information Technology, Data Files and Civil Liberties (the "Data Protection Act") and Decree No. 2005-1309 implementing it.

In addition, the following data protection laws and guidelines could apply:

- the General Data Protection Regulation ("GDPR") will enter into force in May 2018. GDPR creates an obligation for companies to appoint a data protection officer, who will be the adviser for data protection matters in the event of internal investigations;
- the National Commission for Data Protection and Liberty ("CNIL") and Anti-Corruption French Agency ("AFA") Guidelines on the implementation of whistleblowing programmes in compliance with the French Data Protection Act; and
- CNIL Decision (Single Authorization AU-004), that authorises the processing of personal data in a whistleblowing programme that meets the requirements set out in the Decision.
- 6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

There is no general legal requirement to prepare and issue a document preservation notice in connection with internal or external investigations. However, it is a common and recommended practice among professionals experienced in conducting internal investigations.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

One key point is that the entity must comply with all relevant local laws, failing which, both the company and investigators could be exposed to criminal risks.

The most relevant restrictions to consider in France are the so-called blocking statute, bank secrecy and data privacy.

#### 6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

There are no specific guidelines governing document collection in internal investigations. Any documents of relevance to the potential issues and underlying activity should be collected, such as e-mails, memoranda, accounts, presentation, ledgers, policies and procedures, internal audit reports, etc.

# 6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Depending on the size of the investigation, document and data collection would generally be carried out by internal or external forensic IT specialists. IT's role in this respect is crucial, since it is essential to be able to locate and preserve the data.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

There are no specific legal restrictions on using technology-assisted reviews or predictive coding techniques to assist and simplify an investigation. However, one should keep in mind that these techniques are still new and enforcement authorities may not be used to them yet. When reviewing voluminous document collection, data for review should be collected on a data processing platform.

#### 7 Witness Interviews

#### 7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There are no specific laws or regulations that apply to interviews of employees or third parties in internal investigations. However, the Paris Bar has published guidelines for the conduct of such interviews by outside French counsel (*avocat*) in the course of internal investigations.

In addition, investigators should keep in mind that they do not represent official authorities and that they are not entitled to extort admissions under pressure.

There are no requirements to consult any authorities before initiating interviews.

#### 7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

It is generally assumed that employees are required to cooperate with an internal investigation. An employee can be compelled to deliver documents which are the company's property but cannot be compelled to speak at an interview.

#### 7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

An entity is not required to provide legal representation to witnesses, although a witness cannot be prevented from seeking legal advice. However, it might be in the interest of the entity in some cases to arrange for such counsel.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

One key point is to avoid influencing the witness. The Paris Bar guidance on witness interview recommends that outside counsel explain their role and its non-coercive nature. They should also specify that: (i) they represent the company's interests and not the witness'; and (ii) the company is not bound by the attorney-client privilege, so that any statement or information gathered during the investigation could be used by their client.

In its guidance, the Paris Bar also recommends that the outside counsel conducting the interview informs the witness that he/she may be assisted or advised by his/her outside counsel when it appears, prior to or during the interview, that he/she may be held accountable for any wrongdoing at the outcome of the investigation.

### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

French actors are not yet used to private investigations. When the internal investigation's findings are intended to be shared with authorities, some people may find it odd to provide authorities with facts and evidence that will lead them to issue penalties against the company and some of its employees, including top executives.

#### 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

The company must ensure that whistleblowers' identities remain confidential. Sapin 2 introduced measures to ensure the confidentiality and non-liability of whistleblowers.

In this regard, whistleblowers' identities shall only be communicated to judicial authorities with the whistleblower's consent.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

An entity cannot grant "immunity" or "amnesty" to employees in relation to potential criminal charges, but it could undertake not to take disciplinary sanctions. If the employee is a whistleblower in the sense of Sapin 2 (see above), he/she cannot be subject to dismissal or retaliation by the entity.

#### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

In its guidance, the Paris Bar recommends that an interviewee should be able to review and sign his statement if a *verbatim* transcript has been made. Otherwise, there is no obligation to do so. 7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

There are no such requirements.

#### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

It is common practice to prepare a written report at the end of an internal investigation. The key benefit of a written report is that it

allows the clear documentation of the process and clients generally prefer a written document in complex matters in particular. The key downside is that a written report could be required/seized in civil or criminal proceedings except if it is legally privileged.

### 8.2 How should the investigation report be structured and what topics should it address?

There are no formal requirements as to how the report should be structured. It will generally contain: the process that has been applied for the investigation; a description of the document preservation; collection and review processes; a description of the relevant facts and the results of the document reviews and of the interviews; a summary of the applicable legal and regulatory framework; a summary of the conclusions as to individual responsibilities and qualifications; and recommendations as to further remedial steps to be taken by the entity.



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# NORTON ROSE FULBRIGHT

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Norton Rose Fulbright's global compliance, regulatory and investigations practice includes 800 lawyers in more than 50 offices around the world.

# Germany



Dr. Thomas Schürrle



Debevoise & Plimpton LLP

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### 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Corporate investigations are governed by several rules, which include corporate law, criminal and administrative offences law, workplace safety, trade regulations, employment and data protection laws

Corporate law requires the management of a German company to establish and maintain an adequate compliance management system ("CMS"). The extent and specific shape of the CMS falls under the discretion of the management under the business judgment rule. As part of the set of obligations, the management is required to get to the bottom of compliance deficits and violations. The extent, effort and means for an investigation have to be commensurate to the expected problem. Failure to conduct an adequate investigation can result in civil liability *vis-à-vis* the corporation, or criminal liability.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Management is required to investigate; it is not an option.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Whistleblower allegations are to be checked and verified to the greatest extent possible. This is usually done in separate, protected proceedings which may require the whistleblower to be forthcoming with evidence without revealing its identity.

There is no specific law protecting whistleblowers except in banking laws: employees of institutions falling under the supervision of the Federal Financial Supervisory Authority ("BaFin") are protected against criminal or employment law consequences, unless the allegation *vis-à-vis* BaFin was wrong intentionally or by gross negligence. The statute does not specifically provide for dealings with whistleblowers.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

This is not determined by outside counsel, but experienced counsel usually recommends that the investigation is led by a corporate organ or body that carries the necessary power in the circumstances to support and enable (and to terminate) the investigation. Another factor is possibly if the management is actually implicated, which may require the investigation to be hinged on a higher or more independent body, such as the supervisory board or subcommittees thereof. Caution needs to be applied before excluding any corporate function from the investigation management or the reporting of its results: the management of a German corporation can only be excused from participating if there is reliable evidence that the person is implicated and no longer expected to contribute impartially or even expected to interfere.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

There are no sentencing guidelines in criminal cases but the authorities have – within specifically applicable legal limits – discretion and may reduce criminal sentences if the subject of the investigation has shown good reasons from which it can be inferred that compliance is remedied, has been properly maintained and the company is demonstrably determined to avoid compliance violations in the future. Self-reporting alone is one element but – with exceptions (see below) – generally not the decisive factor in current practice. It is more important to show that the compliance deficit has been pursued and remedied, the damage has been repaired and the compliance management has been strengthened.

BaFin guidelines on fines expressly provide for voluntary selfdisclosure and cooperation in the proceedings as a mitigating factor. The Federal Cartel Office can grant cartel participants immunity from or reduction of fines if they uncover the cartel or cooperate with the Office.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

A German corporation is, apart from tax evasion and the suspicion of money laundering, under no duty to disclose wrongdoing. Cooperation with enforcement authorities has proven helpful in reducing sentences, and as part of that, the strategic decision of if and when to disclose will take into account how the disclosed information will improve enforcement as well as the position of the corporation, e.g., with a view to participation in future public tenders which may be impaired if the company readily admits to having tolerated bribery.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There is no regulatory requirement concerning the form of reporting and an authority may also accept an oral report. Reports are often made *verbatim* with slides and evidence production, but rarely by submitting written reports. The more important factor is that the report is complete and forthcoming in due time. A written report is often not really necessary since German authorities actually have to collect evidence and conduct their investigations independently. In addition, it bears the risk that it can be accessed by other authorities or may be inadvertently disclosed to media, competitors or others.

## 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

Authorities have to assess a case independently from a corporation and its own internal investigation. While there is no statutory requirement to liaise with an investigating authority, coordination is recommended to avoid the allegation of obstruction of justice or suppression of evidence. Prosecutors generally appreciate the opportunity to take first accounts of key witnesses.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

German law enforcement authorities have no oversight over internal investigations. As part of cooperation – when agreed – they expect to be fully and timely informed about the progress of the internal investigation. Failure to follow up with previous promises "to fully cooperate" can lead to adverse reactions on the part of the authorities, such as additional searches and dawn raids.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Law enforcement authorities determine the scope and the depth of an investigation *ex officio*. The corporation, as part of its cooperation, can assist the authority in the definition of the scope of the government investigation, but the government investigation has to come to an independent result.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

German authorities cooperate very well with law enforcement authorities in other jurisdictions and grant legal assistance on the basis of a multitude of mutual legal assistance treaties.

### 4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

Characteristic challenges for an internal investigation conducted in Germany follow from statutory co-determination rights of the Works Council, resulting in them having a strong position during the investigation. In particular, Works Council agreements may determine compliance and the conduct of internal investigations. Data protection laws apply to any processing of personal data of natural persons, including the securing, the collection, the review and the transfer of personal data. German employment laws are very strict when it comes to dismissal and other sanctions.

### 4.2 What steps should typically be included in an investigation plan?

In the investigation plan, the corporation determines the scope, the timing, the responsibilities and the type of reporting. It addresses the involvement of the data protection officer and the Works Council. The plan provides for the securing and a review of data and interview plans. It includes a strategy for communication and disclosure of the results to internal and external stakeholders.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

The selection decision is guided by the availability of internal resources, experience, technical equipment and budget, the requirement to conduct the investigation free of conflict of interests and the need to protect the results from government access. Another factor may be the expectation of foreign authorities that the investigation is conducted by an independent law firm experienced in investigations. The criteria for retaining outside counsel are its experience with internal and international investigations, familiarity with the industry and the business culture, personal resources,

personal interaction skills, and its ease to communicate with the government and other stakeholders in an investigation. Outside lawyers can often conduct sensitive investigations better than inhouse personnel.

## 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

German law protects communication between an attorney and its client. It follows the civil law concept of imposing secrecy obligations on the part of attorneys and safeguarding professional secrecy with procedural rules, providing for a right to refuse testimony. Professional secrecy protects any kind of documents containing attorney-client communications.

Professional secrecy attaches, in particular, to documents created by and communication with outside counsel, if the documents reside in the custody of the outside counsel. Communications with and documents created by in-house counsel are not generally privileged, unless drafted for the purpose of defence by outside counsel.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Third parties engaged by outside counsel are protected by the counsel privilege, and members of a regulated profession with professional secrecy can rely on their own privilege.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Criminal law privilege does not protect communications with inhouse counsel. If the corporation seeks to protect the results of an investigation, outside counsel should direct the investigation.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Corporations can keep privileged documents with outside counsel.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Enforcement agencies are under a duty to maintain professional secrecy and keep the results of an internal investigation confidential like every other piece of evidence gathered in a government investigation, irrespective of whether the documents were offered voluntarily. An aggrieved person showing a legitimate interest may have a right to inspect the files, unless the corporation has a prevailing interest in their confidentiality.

### 6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The German Federal Data Protection Act governs the collection, use and transfer of personal data relating to individuals in internal investigations conducted in Germany. Starting May 25, 2018, the European General Data Protection Regulation and the German Data Protection Adaptation and Implementation Act will replace the regime of the Federal Data Protection Act.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

It is common practice, but not a legal requirement, to issue document preservation notices to individuals holding physical or electronic documents relevant to the investigation in their custody. In an employment context, the employer directive to preserve documents does not require an extensive description of the investigation. The notice and the acknowledgment of its receipt should be documented in a manner that permits its use as evidence in case of the custodian's non-compliance.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

To preserve the evidentiary value of documents collected in an internal investigation and to avoid interference with the investigation process, the mode of collection and use of information has to be made in accordance with various laws, including criminal procedure, employment laws and data protection laws. Business secrets may be protected by bank secrecy laws or confidentiality agreements; other documents may contain classified information subject to military secrecy duties. An analysis for every jurisdiction where the documents reside and are supposed to be used is key.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

In Germany, government investigations and internal investigations are separate proceedings in principle, and the corporation does not necessarily collect documents for the enforcement agency. It is the government investigation that determines the relevance of documents. If the government investigation seeks to demonstrate management involvement in corporate wrongdoings it may also seek to seize minutes of board meetings.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

In case of voluminous data collections, experienced vendors are an important resource for the collection of emails and other electronic

documents and, if required, the conversion of physical documents into electronic machine-readable formats.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

It is the corporation, not the judicial or enforcement authority, that decides on the use of predictive coding techniques.

### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Labour laws govern interviews of employees. Former employees have a duty to comply with an interview request only if strong investigation interests prevail. There are no specific rules governing the interviewing of third parties. No authority needs to be consulted before interviewing witnesses. Prior to conducting interviews with employees, coordination with the Works Council about the methods used in the interviews is recommended.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Employees are required to cooperate with interviews as part of their employer's investigation if the investigated facts are work-related.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

The corporation is not required to provide legal representation to witnesses prior to interviews, but it has become a recommended practice to make interviews more efficient.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

Best practices include thorough preparation with an outline and evidence readily available during the interview. Interviews should be scheduled well in advance and provide for a convenient setting. The interview should start with an explanation of the purpose and a clarification that the interviewing counsel's privilege is with the corporation which may waive the privilege. The introduction should also remind of the labour law duty to answer questions truthfully and comprehensively and to keep the interview and its content confidential.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

There are no specific cultural factors of which an interviewer should be aware. 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

The whistleblower does not enjoy specific rights that have to be respected in an interview.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Granting "immunity" or "amnesty" to employees can be an appropriate means to incentivise honest forthcoming and thus promote the investigation. The corporation determines within the boundaries of corporate law and employment law which type of amnesty, including waivers for damages or cost coverage for representation, is adequate.

7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

The employee can request to review or revise statements if the corporation includes the interview notes in the personal files of the employee. Best practice suggests avoiding sharing notes prepared by a lawyer with anybody, and to rather invite the employee to prepare his/her own notes.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

Internal investigations are separate from government investigations and there is no statutory requirement that enforcement authorities be present during the witness interview. Legal assistance for a witness is not required, but may support the process.

### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

It is common practice to prepare a short investigation summary report at the end of an internal investigation. Detailed reports are usually given in special meetings with the relevant departments, including all relevant evidence used for further measures.

8.2 How should the investigation report be structured and what topics should it address?

The structure and content of the investigation report should reflect the mandate and the purpose of the investigation. The characteristic elements of a report should be: a definition of the scope of the investigation; a description of the investigative process; an assessment of the evidence; and a summary of the findings. A legal assessment and recommendations for remedial measures are optional.



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# Debevoise & Plimpton

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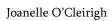
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The team also routinely counsels clients regarding preventive measures, compliance programmes and the collateral consequences of criminal proceedings.

# **Ireland**







Arthur Cox

Jillian Conefrey

# 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Firstly, an entity should consider if there is an ongoing statutory or regulatory investigation and, if so, how that might impact the decision to conduct an internal investigation. For example, it should consider whether there exists a reporting obligation to An Garda Síochána (the police authority). Section 19 of the Criminal Justice Act 2011 ("the 2011 Act") makes it an offence for a person to withhold information from An Garda Síochána which may be of material assistance in (a) preventing the commission of a relevant offence, or (b) securing the apprehension, prosecution or conviction of a person for a relevant offence. A "relevant offence" for the purpose of the 2011 Act includes offences in the areas of banking and other financial activities, company law, money laundering and terrorist financing, theft and fraud, bribery and corruption, consumer protection and criminal damage to property.

Prior to undertaking an internal investigation, it is important to consider whether the information giving rise to the investigation, has originated from a whistleblower. If it has, the entity must ensure that the protections afforded to whistleblowers by the Protected Disclosures Act 2014 ("the 2014 Act") are adhered to.

In any investigation, the principles of constitutional and administrative law are applicable; in particular, fair procedures must be followed.

If an effective internal investigation is conducted and the report is subsequently made available to a statutory or regulatory body contemplating undertaking its own investigation, the relevant statutory or regulatory body may accept the findings of the internal report and decide to take no further steps. For example, they might instead insist on being updated in relation to the implementation of recommendations in the internal report. In that regard, a regulator may attach more credibility to the findings of an internal investigation where it is carried out by an external third party.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

There are a number of factors which must be considered, including

understanding the scale of the issues, the ability of the entity to conduct the investigation, the manner in which the investigation is intended to be carried out and the potential impact of the investigation.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Under the 2014 Act, employers may not dismiss or otherwise penalise, or cause detriment to, a worker for having made a "protected disclosure". The appropriate way to initially assess a protected disclosure is to see whether it meets the criteria under the legislation. It should be noted that there is a presumption that a disclosure is a protected disclosure.

The requirement to have in place a whistleblowing policy under the 2014 Act is mandatory for all public bodies, and highly recommended for all entities. In assessing the credibility of a whistleblower's complaint, an entity should have regard to any internal procedure as set out in the whistleblowing policy. The entity should assess whether or not the concern raised is in fact a protected disclosure or if it is, for example, a grievance issue. Where the matter is being treated as a protected disclosure, depending on the level of information provided by the whistleblower, further discussion with the whistleblower may be required in order to clarify the substance of the allegations.

The 2014 Act provides a number of protections to whistleblowers. For example, an employee may be awarded up to five years' remuneration for unfair dismissal on the grounds of having made a protected disclosure.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

In determining who the client is, outside counsel will usually consider those individuals who are expressly charged with seeking and receiving legal advice on behalf of the entity. The client does not extend to every employee of the entity for the purpose of

claiming privilege over communications. In certain circumstances, it may be appropriate to establish a sub-committee to deal with a particular issue. At the outset, outside counsel should determine who the client is. They should establish clear lines of reporting with those individuals, as legal advice privilege may only attach to communications between the client as defined and the external lawyers.

Those individuals who may be the subject of the investigation or may be considered a relevant witness should be excluded from the running of the investigation.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

As a general rule, when deciding to impose civil or criminal penalties, law enforcement authorities do not have regard to an entity's willingness to voluntarily disclose the results of an internal investigation.

However, in a health and safety context, cooperation by an employer, employees and others with a Health and Safety Authority ("HSA") investigation, including the facilitation of interviews with HSA inspectors, can be a mitigating factor taken into account in the sentencing of any employer/employee convicted of an offence under the Safety, Health and Welfare at Work Act 2005.

In a competition law context, the Competition and Consumer Protection Commission ("CCPC") operates a Cartel Immunity Programme in conjunction with the Director of Public Prosecutions ("DPP"). Under the Programme, a member of an illegal cartel may avoid prosecution if it is the first to come forward and reveal its involvement in the cartel before the CCPC has completed an investigation, and has referred the matter to the DPP. The onus is on the applicant to provide the CCPC with full, frank and truthful disclosure of all details and evidence relating to the alleged cartel. Other regulators may take this into account in the context of mitigation of sanctions.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

Once an entity becomes aware during an internal investigation that a relevant offence, as provided by section 19 of the 2011 Act has occurred, the entity should disclose this to An Garda Síochána.

There is no prescribed time limit under the section 19; however, it states that it must be disclosed "as soon as practicable". The better view is that disclosure should be made as soon as the information comes to hand to avoid prosecution or penalty.

Similar provisions are included in, *inter alia*, the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012. Sections 2 and 3 of that Act make it an offence to withhold information in respect of certain offences against children or vulnerable persons. Similarly, sections 14 and 16 of the Children First Act 2015 require defined categories of persons to report child protection concerts to the relevant authority and to assist with investigations.

Generally, when making a disclosure to An Garda Síochána, the brief details of the relevant offence are set out in a letter to the appropriate Superintendent/Chief Superintendent. The letter should also set out the information on which the knowledge or belief that an offence has or may occur is based, the identity of the suspected offender (if known) and any other relevant information.

Reporting obligations are not limited to the above legislative provisions; there are a number of other legislative provisions which impose mandatory reporting of offences. These include a duty on individuals in a "pre-approved control function" to report breaches of financial services regulation to the Central Bank of Ireland under the Central Bank (Supervision and Enforcement) Act 2013; a duty on designated persons such as auditors and financial institutions to report money laundering offences to An Garda Síochána and Revenue under section 42 of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010; a duty on auditors under section 59 of the Criminal Justice (Theft and Fraud Offences) Act 2001 to report offences that may have been committed by a client under that Act; and a duty on auditors to report to the Director of Corporate Enforcement a belief that an offence has occurred. The reporting procedures are largely similar to that outlined above.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There does not exist an obligation to report the findings of an internal investigation in writing. However, there are a number of advantages to preparing a written report. A written report provides a comprehensive record of the steps taken in the investigation, the procedure used, an examination of the facts and issues considered and the findings following investigation.

Preparing a written report bears the risk of subsequent disclosure to regulatory authorities or in litigation and there are circumstances where a report will not always be protected by privilege.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

In this situation, there is no legislative requirement for an entity to communicate with local authorities before commencing an internal investigation; however, it may be good practice to do so, in order not to impede a government investigation.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

Internal investigations are separate to regulatory or criminal investigations. However, where the enforcement agency is aware that an internal investigation has or is being conducted, it may request details of the findings of the internal investigation. The enforcement agency may also request a delay in steps being taken in the internal investigation pending any regulatory or criminal investigation.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Generally, entities have little power to limit the scope of a government investigation. Statutory Inquires or Commissions of Investigation are obliged to provide interpretation for their terms of reference and that may affect the scope. They may seek submissions on the terms of reference.

In addition, some limitation on scope may be achieved if it can be established by the entity that access to only certain information is relevant. A crucial factor in such instances is communication with the authorities. An investigation cannot involve a widespread trawl of documentation; the information sought must be relevant to the matters under investigation.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Irish authorities regularly liaise with enforcement authorities in other jurisdictions in relation to requests for, and the provision of, mutual legal assistance pursuant to the Criminal Justice (Mutual Assistance) Act 2008 and the Criminal Justice (Mutual Assistance) (Amendment) Act 2015.

There are also many other legislative provisions pursuant to which the Irish authorities may share information with other jurisdictions, including section 33AK(5)(d) of the Central Bank Act 1942.

On 2 November 2017, the Government published its new White Collar Crime package which includes, *inter alia*, the introduction of two new pieces of legislation; namely the Criminal Justice (Corruption Offences) Bill 2017 and the Criminal Procedure Bill. While still in its initial stages, the Criminal Justice (Corruption Offences) Bill 2017 provides that a person may be tried in the State for certain corruption offences committed outside of the State. As such, we are also likely to see much greater reliance on international mutual legal assistance in respect of corruption investigations going forward

When faced with investigations across multiple jurisdictions, it is vital for entities to maintain a coordinated approach to the investigations and to have effective centralised oversight. Variances in legislation between jurisdictions should also be factored into this approach.

### 4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

As Ireland is a common law jurisdiction with a Constitution, general common law and constitutional principles apply, such as natural justice and an entitlement to fair procedures.

### 4.2 What steps should typically be included in an investigation plan?

A typical investigation plan should include a breakdown of the reason(s) for conducting the investigation, the aims of the investigation, information required, where this is likely to be found and how it is to be collated. An investigation plan may also include details of the necessity for witness interviews, consideration as to whether external resources are likely to be required, and whether any statutory or regulatory reporting obligations arise. The investigation plan should clearly define the roles of the respective individuals involved.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Outside counsel should be engaged where the company does not have the necessary internal expertise to conduct an investigation. It is more likely that arguments surrounding privilege may be upheld where forensic consultants are instructed by external lawyers.

In obtaining outside counsel, the entity usually consults their corporate lawyer. The entity should ensure that its lawyer has the relevant expertise to advise on investigations. If it does not, the entity should be referred to an appropriate investigation lawyer.

## 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

There are two types of legal professional privilege ("LPP") recognised in Ireland. Legal advice privilege applies to documents, the dominant purpose of which is the giving or receiving of legal advice. Litigation privilege applies to confidential documents created with the dominant purpose of preparing for litigation that is pending or threatened or for the purpose of prosecuting or defending litigation.

Entities should engage lawyers at the earliest possible juncture in any investigation, in an effort to maintain LLP. The client should be identified early in the investigation for the purpose of engaging with external counsel. All communications over which it is intended to claim LPP should be sent by or to external lawyers. The caption "confidential and legally privileged" should appear on any documents over which LLP is likely to be claimed.

While this is not determinative, it may assist a court in evaluating a claim of privilege. Access to reports and other communications over which LPP may be claimed should also be restricted; the wider the circulation, the greater the risk that LPP may be lost.

Common interest privilege may also apply in the context of internal investigations.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Generally speaking, for legal advice privilege to apply, the communication must be confidential as between the client and lawyer. Disclosure of the communication to a third party may amount to a waiver of the privilege. However, if the communication is created for the dominant purpose of litigation, litigation privilege may extend to correspondence between clients and third parties.

Common interest privilege may also operate to preserve privilege in documents disclosed to third parties where it can be shown that the third party has a common interest in the subject matter of the privileged document or in litigation in connection with which the document was created.

Usually, there is an obligation of confidentiality in relation to interactions between the client and third parties engaged by outside counsel. However, this will depend on the particular circumstances of the investigation and is subject to any statutory reporting or notification obligations.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Under Irish law, LPP extends to communications with both in-house counsel and external lawyers on the same basis. However, in order for communication with in-house counsel to attract privilege, in-house counsel must be acting in their capacity as such.

There are, however, some limitations to this; for example, where the CCPC is investigating suspected breaches of competition law. Section 33 of the Competition and Consumer Act 2014 provides that even where information may be subject to LPP, its disclosure may be compelled by the CCPC. The Act provides, however, that any such information must be kept confidential until the High Court makes a determination on the matter. This process was recently endorsed by the Supreme Court in *CRH PLC v The CCPC* [2017] IESC 34/1.

# 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Each investigation should be carefully considered on its own facts. There are no compulsory powers of disclosure in internal investigations. In the event that an entity fails to disclose privileged material which is relevant to the issues under investigation, this may impact on the overall effectiveness of the investigation.

### 5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Confidentiality is not guaranteed, even where the results of an internal investigation are voluntarily disclosed. This is especially the case if the enforcement agency considers that further investigation is necessary. Disclosure or notification obligations for the enforcement agency may be triggered upon the receipt of the results of the investigation.

### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The key Irish legislation regulating data protection is the Data Protection Acts 1988 and 2003, the latter of which implemented the EU Data Protection Directive 95/46/EC. An entity shall consider the extent of its right to interrogate data relating to individuals or employees pursuant to all applicable data protection and privacy legislation, when conducting an internal investigation.

On 6 April 2016, the Council of the European Union published the final text of the General Data Protection Regulation ("GDPR") (Regulation (EU) No 2016/679) which will enter into force on 25 May 2018 and will implement a harmonised data protection regime throughout the EU. The GDPR will replace Directive 95/46/EC and contains a number of provisions which will serve to increase accountability of data controllers and processors including expansion of the duties of data controllers and processors; increased reporting obligations; and strengthened data subject rights. Under the GPDR, the scope and nature of administrative fines which supervisory authorities can impose on non-compliant organisations has significantly increased and fines of up to €20 million or 4% of total worldwide annual turnover (whichever is greater) of the undertaking may be imposed for breaches.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

For the purposes of an internal investigation, there is no legal requirement to issue a documentation preservation notice. However, best practice is to consider suspending all policies on standard document destruction, once an internal investigation is contemplated. Where possible, IT servers and software systems should be configured so as not to delete any data from the date an investigation is contemplated. All individuals who may have information relevant to the investigation should be notified that they must retain all data. There is no obligation to issue such notice; however it may be done by issuing a document preservation notice.

The disposal of documents relevant to matters under a statutory or regulatory investigation may be an offence. In such circumstances, it is advisable to retain all data pending the outcome of the investigation.

The description of the investigation will depend on the nature of the investigation. In the case of an ongoing statutory or regulatory investigation, greater specificity as to the nature of the investigation may be required.

#### 6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Generally, the Data Protection Acts 1988 and 2003 specify conditions that must be met before personal data may be transferred outside the jurisdiction. If an entity is considering the transfer of data, it should have regard to applicable data protection and privacy legislation of both Ireland and the other country (particularly if the data is being transferred outside of the European Economic Area).

In addition to data protection and privacy rules, the common law implies a duty of confidentiality on banks/financial institutions in respect of their clients. Contractual relationships between parties may also contain confidentiality provisions which restrict the disclosure of data and entities should consider carefully any such contractual provisions.

#### 6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

In Ireland, enforcement agencies do not conduct internal investigations; however, the documents which are generally deemed to be important for internal investigations include communications/ emails, audit reports/accounts, internal policies, diaries, time records, personnel records, telephone records and any other data specific to the nature of the investigation.

# 6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

The scale of the investigation is likely to determine the resources which are required. It is likely that large volumes of data required for any internal investigation will be stored on company servers. In such instances, it may be possible for IT to download this data onto a review platform with little disruption to business. Independent computer forensic experts may assist in collating data from various sources where a large volume of data requires review. Once the data is collated, the scope of the data for review may be narrowed through the use of appropriate keywords or key phrases.

# 6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

The Irish High Court endorsed the use of predictive coding in the case of *Irish Bank Resolution Corporation Limited & Ors v Sean Quinn & Ors* [2015] IEHC 175, which was recently referred to by the High Court in *Gallagher v RTÉ* [2017] IEHC 237. Increasingly, entities are using predictive coding techniques to review large volumes of data and it is likely that greater reliance will be placed on predictive coding in the future. Targeted keyword/key phrase searches are also frequently used to narrow the scope of data for review.

### 7 Witness Interviews

#### 7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There is no obligation to notify any authorities prior to initiating witness interviews for an internal investigation; however, if there is a parallel criminal or regulatory investigation, it may be prudent to consider the timing of such witness interviews.

The general practice is that all interviews should be conducted having regard to the principles of fair procedures. Interviews should be conducted appropriately and the interview notes should reflect this as the notes may subsequently be disclosed to persons against whom allegations are made. The entire investigation may be compromised if interviews are not conducted in an appropriate manner and in accordance with fair procedures.

#### 7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

There is a general common law obligation to provide reasonable cooperation in an internal investigation. This may often be underpinned by an employee's contract of employment. However, an employee cannot be compelled to answer questions, but if they fail to cooperate this may lead to an adverse finding.

# 7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

The general position is that an entity is not required to provide legal representation.

Nevertheless, the entity may have a company policy on this issue and if one exists, it should be considered. In regulatory investigations, regulators often spend time explaining the procedure to witnesses but they do not (and should not) provide legal advice. In respect of internal investigations, a trade union representative may often assist a witness prior to interview.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

All interviews must be conducted fairly and reasonably. Best practice is such that the interview process/procedure should be outlined to the witness in advance of the interview. When conducting witness interviews, interviewers should:

- inform the witness of the nature of the interview and why their attendance is required;
- advise as to the confidential nature of the interview and investigation;
- put any relevant documentation to the witness for comment (consideration should be given as to whether such documentation should be provided to the witness in advance);
- remain impartial during the interview;
- record the interview in writing. As soon as possible after the interview, the interview notes or transcript should be provided to the interviewee who should then be allowed a reasonable period within which to revert with any comments or to otherwise confirm agreement;
- ensure that questions are asked in a reasonable manner; and
- bear in mind that the notes or transcript of interview may be disclosed to a third party at a later date.

Where a regulatory or statutory body is conducting the interview, the interviewer(s) should outline to the interviewee in advance of interview the range of powers available to them.

#### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

The fundamental principle for conducting interviews in Ireland is to ensure that fair procedures are followed irrespective of the circumstances giving rise to the interview.

#### 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

An entity must consider who the appropriate person to conduct the interview is. Special consideration should be given as to whether the individual who received the protected disclosure is the same person charged with conducting the interview.

The interview should be conducted fairly and impartially. Care must be taken against penalisation or otherwise subjecting the whistleblower to unfair treatment, as a result of their having made the disclosure.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

There is no provision in Irish law for granting immunity or amnesty to employees. An entity should exercise caution in this respect, as it may be considered as bias or that the entity is willing to overlook the activities of some of its employees while others face scrutiny.

7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

This depends on the nature of the investigation and by whom it is being carried out. For example, in a criminal investigation, once a statement is made to the authorities, it may only be revised by way of supplemental statement. The original statement remains in existence and will be the subject of disclosure in any criminal proceedings. It is good practice to apply similar principles to statements in internal investigations.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

There is no general requirement that a member of the enforcement authority be present or that a witness have legal representation during interview. Whether a witness is entitled to legal representation at witness interview will largely depend on internal policy and the staff handbook may need to be consulted. Depending on the nature of the investigation, it may also be necessary from a fair procedures perspective.

### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

The seriousness of the matters under investigation will usually dictate whether or not a written report is required. A written report serves as a helpful record of the investigation undertaken, the scope and methodology applied, and the findings of same. However, where a written report is prepared, issues of LPP and other general disclosure or notification issues may arise.

### 8.2 How should the investigation report be structured and what topics should it address?

The nature of the investigation and whether the investigation arises from a statutory investigation or an *ad hoc* investigation or inquiry, will determine the type of report which is required. A typical report may include:

- executive summary;
- introduction/background;
- issues, objectives and scope of the investigation;
- approach/methodology;
- review of documentation and records;
- interview summaries; and/or
- recommendations.

The findings of the investigation should be based on evidence. The report should fairly and accurately reflect the findings. It may also be necessary to consider whether the report is privileged and, if so, it should be marked as such.



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"Joanelle O'Cleirigh is well regarded for her strong knowledge of the healthcare and professional discipline arenas. Sources describe her as 'easy to work with, available and precise; she gives very good legal advice'"

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Jillian is involved in the TRACE Partner firm initiative in Ireland, pursuant to which Arthur Cox provides expertise in relation to anti-bribery laws and regulations for the benefit of TRACE's global network of partner law firms.

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# Netherlands



Niels van der Laan



De Roos & Pen

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# 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

The Netherlands does not have a statutory framework that prescribes when or how to conduct internal investigations. investigating potential wrongdoing is considered an integral part of an adequate risk management and control system. Larger companies must annually report in writing to the supervisory board on risks and internal controls. Corporate governance codes, when applicable, require management boards to report in their annual statement on the effectiveness of the design and the operation of their internal risk management and control systems. Investigating wrongdoing is also essential for financial institutions given their statutory obligation to report any 'integrity incidents'. Lastly, external accountants must report internal fraud and withhold approval of the financial statements, unless irregularities are properly investigated and effective compliance measures prevent reoccurrence. Ignoring indications of wrongdoing may lead to civil or criminal liability of the entity or its directors, especially if it allowed incidents to reoccur. Immediate and effective action may avert liability and/or an investigation or report of fraud by the external accountant.

During internal investigations, Dutch privacy, data protection and labour law rules should be observed (see sections 6 and 7). Violation of these laws may give rise to civil liability and administrative and/or criminal sanctions.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

An internal investigation allows entities to establish whether misconduct has occurred and if so, to take appropriate disciplinary actions and improve its compliance policy without – or before – it becomes a part of public record. Attorney-client privilege safeguards the confidentiality of the findings. Introducing effective compliance measures before disclosure may curtail reputational

damage for the company, positively impact the handling of the case by the authorities (see question 2.1) and avert criminal liability if incidents reoccur despite the entity's best efforts. We note that many administrative laws or permits may oblige entities to report certain incidents to, or expose people to certain risks in front of, the authorities. Companies may prevent enforcement agencies from starting their own – intrusive – investigation by presenting a plan for an internal investigation.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

An employer for whom 50 people or more work is obliged to have an internal reporting procedure for abuses under the Whistleblowers Authority Act. Corporate Governance Codes also require listed companies and companies in specific sectors (e.g. the cultural, healthcare or education sectors) to have reporting procedures. This procedure sets out how whistleblowers can report, what happens with that report and what protection is given to whistleblowers. In any case, an employee who makes a report of an abuse in the correct manner may not be disadvantaged for that reason. Complaints by the whistleblower of being disadvantaged may warrant an investigation by the Whistleblowers Authority, civil liability and administrative fines.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

In internal investigations, the entity itself is usually recognised as the client. Instructions to outside counsel can be given by a representative body of the entity, which may also elect a contact person to oversee the internal investigation. The client, the scope of the work and to whom outside counsel reports should be identified in the engagement letter. All persons connected to the incident under scrutiny, who could potentially be implicated for any wrongdoing, should be excluded from involvement in the internal investigation.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

There is no legal provision that provides that voluntary self-disclosure may lead to immunity from prosecution, reduction of penalties or leniency measures. However, voluntary self-disclosure may be interpreted as cooperation with the authorities, which may positively affect the decision whether or not to prosecute, offer an out-of-court settlement or reduce the penalty. The authorities will take into consideration all facts and circumstances of the case, including the seriousness of the acts committed, the type of organisation, criminal intent and/or knowledge at management or board level, cooperation with the authorities, subsequent introduction of compliance measures, disciplinary sanctions, changes in the organisation and/or management and other relevant circumstances, such as a significant lapse of time.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

Entities themselves may decide if and when to report their findings to the authorities. If possible, it is preferable to report after the facts have been established, disciplinary sanctions have been taken and compliance measures have been introduced, as this may curtail negative media exposure and positively impact the decision of the authorities (see question 2.1). However, the entity may require the investigative powers of enforcement agencies to establish the facts or find the perpetrator. In such cases, management may weigh the interest of the entity in finding the perpetrator *versus* the disadvantage of potential criminal or administrative sanctions and reputational damage from self-disclosure.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There is no legal framework for the format in which the findings have to be reported. A written report – especially when substantiated and provided with attachments – is more manageable than a sole oral statement and therefore more likely to be followed up on. This may be a disadvantage if the entity itself is at risk of sanctions. However, it is an advantage if the entity wishes the authorities to take action against another legal or natural person. For the overall advantages and disadvantages of written or oral reports, please see question 8.1.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

An entity is not required to liaise with state (local or governmental) authorities before starting an internal investigation. It is advisable only to liaise with the authorities if the entity can benefit from a cooperative attitude towards the authorities. Cooperation may facilitate and expedite the investigation and ultimately lead to sanctions for the entity. Also, informing the authorities of an ongoing internal investigation without ultimately disclosing the findings may negatively impact the entity's reputation and goodwill.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

An internal investigation under oversight or with substantial involvement of the authorities may be qualified as a state investigation without adherence to the proper legal procedures and safeguards. Therefore, law enforcement entities prefer not to be directly involved. Law enforcement authorities prefer being provided with the findings of internal investigations and the underlying documents once the internal investigation is final or through spontaneous self-disclosed reports during its course.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

There is no right to help define or limit the scope of a government investigation. By presenting a plan for a thorough internal investigation, companies may prevent enforcement agencies from starting their own investigations. Additionally, entities may try to influence the scope of the authorities' activity informally by liaising with the enforcement agencies and/or restricting their cooperation to certain incidents or activities.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

It is common practice for Dutch enforcement agencies to cooperate and coordinate with other jurisdictions in cross-border investigations. Similarly, the defence should seek local counsel in each jurisdiction to confer effectively on strategy and potential issues.

### 4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

Dutch employees are generally direct, well-informed and unafraid to invoke their rights under Dutch labour and/or privacy law. At

management level, employees are likely to engage legal assistance for witness interviews. Therefore, procedural mishaps are likely to be scrutinised and weaponised in court proceedings (e.g. in labour law or civil disputes). It is therefore advisable to seek experienced and specialised legal counsel when conducting internal investigations.

### 4.2 What steps should typically be included in an investigation plan?

The investigation plan should include a clear research question, the scope of the investigation, approach (including the collection of data and research methods), a timeline and estimated time investment. The plan should carefully weigh the entity's legitimate interest in investigating irregularities against employees' privacy concerns and substantiate the choice of research method.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Outside counsel should be approached for advice on the investigative methods and in order to extend privilege to the internal investigation, so that the entity is not obliged to disclose its findings to enforcement agencies and/or injured parties. Outside resources should be engaged when cost- and/or time-effective or if there is a need for expertise in a specific field. Privilege is extended to outside professionals if engaged by and contacted through the attorney (see question 5.2).

# 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

The Netherlands recognises attorney-client privilege in the context of internal investigations. Attorneys, their staff and the client (and his staff) have the right to refuse to give evidence and confidentiality may be invoked with regard to any correspondence or documents prepared by or for the attorney, both in criminal and civil proceedings. A lower court recently recognised an exemption when the attorney reported its findings as being purely factual and without any legal qualification, conclusion or advice. The decision met heavy criticism. However, as best practice, reports should always combine facts with legal advice and include a statement confirming this.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Attorney-client privilege extends to professionals engaged by the attorney. Work product and correspondence with the law firm within the scope of engagement is confidential and subject to attorney-client privilege. However, direct correspondence between the client and the third party is not privileged. Therefore, any correspondence between the client and third parties should be routed via the attorney.

It is under debate whether it is sufficient to copy the attorney in on correspondence ("cc") or if all correspondence must be addressed to the attorney in his capacity as legal advisor.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Under Dutch law, legal privilege applies equally to all attorneys, whether in-house or outside legal counsel. However, the Court of Justice has not accepted full legal privilege for in-house attorneys in competition law cases, thus restricting their legal privilege in Dutch competition investigations. We note that privilege does not extend to lawyers that are not admitted to the ar.

#### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

It is recommended to mark all privileged correspondence as "privileged and confidential" and all documents/memoranda to or from attorneys as "attorney-client work product". Correspondence with third parties should be routed via the attorney. Also, it is recommended to keep attorney-client correspondence in separate folders marked as privileged, both physically and digitally. This facilitates the identification of the documents or correspondence as being confidential due to attorney-client privilege.

#### 5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

If the results of the internal investigation are disclosed to law enforcement agencies, the findings will very likely become part of the investigation file and – eventually – the case file against the defendants. The Prosecutor's Office, the defendant, injured parties and third parties that demonstrate a legitimate interest in the particular documentation can be granted access to the files. The entity can object to disclosure of this part of the case files to injured parties and/or third parties. However, only in special circumstances will the interests of the company prevail. Although the case file itself is not available to the public, the content can become part of public record via the press when discussed in court.

### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

Employees may have a reasonable expectation of privacy in the workplace. Unjustified violation of privacy may lead to civil liability and high administrative fines. Currently, the Act for the Protection of Personal Information (*Wet Bescherming Persoonsgegevens*) requires violations of privacy to be necessary and serve a legitimate interest that outweighs the privacy interest. Violations through internal investigations are subject to proportionality and subsidiarity. Subjects must be notified of the general possibility of internal investigations and application of investigative methods. Surveillance with hidden cameras without any prior notice is not allowed and punishable as a criminal act. On 25 May 2018, the European General Data Protection Regulation ("GDPR") enters into force and unifies the data protection regime in the EU. The GDPR increases reporting obligations and strengthens data subject rights.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Document preservation notices are only issued if the formal warning is unlikely to hamper the investigation, as they may backfire and implore perpetrators to destroy evidence. The notice is generally sent to all persons involved as well as the ICT and/or administrative departments that process such data, given possible expiration dates on preserving data.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Data for the internal investigation should be collected according to the law of the specific jurisdiction. In transferring personal information outside the EU or the European Economic Area, the entity should observe the data protection provisions of the specific jurisdiction.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

There is no general stance on which documents should be collected. In practice, all data that may reasonably be of interest for the investigators may be collected, including e-mails, and physical and electronic files.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Typically, a full back-up ("image") is made of all data on the entity's server/network, the desktop computers or tablets of the persons involved and their e-mail accounts. In addition, physical files and documents are collected based on markings with relevant key words, such as the person, project and/or time period to which they refer. Physical documents are usually digitalised to make them searchable. Often a data analysis and/or IT company is engaged by the attorney (in order to extend legal privilege) in order to help collect, store and search the files electronically.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

The use of predictive coding techniques is not prohibited. In practice, voluminous data is still largely reviewed manually, based on keyword searches. To save costs, a first review is often conducted by junior lawyers who mark the documents relevant or irrelevant, followed up by a more detailed review of the relevant documents by senior attorneys.

#### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

The Netherlands does not provide for a statutory framework with regard to conducting witness interviews in internal investigations nor an obligation to consult the authorities. In labour law disputes, it has been accepted that the interview should be fair and in accordance with the statutory responsibility to act as a good employer. The burden of evidence that the interview was fair is on the employer.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Employees have a contractual duty towards their employer to act as good employees. Refusing to cooperate in an internal investigation may be grounds for disciplinary sanctions and/or dismissal.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

There is no statutory or regulatory obligation to provide legal representation to witnesses. However, it may be in the interest of the entity to provide legal representation to employees suspected of criminal behaviour, both under the obligation to act as a good employer and given the risk that criminal acts may be attributed to the entity or damage its reputation. The legal advisor of the witness should be independent and have no relevant association with the attorney in charge of the internal investigation.

7.4 What are best practices for conducting witness interviews in your jurisdiction?

As best practice, witnesses are informed in writing of the date and time of the interview, the right to consult an attorney and/or bring legal representation at their own expense and the fact that their answers may be disclosed to the entity. The witness' testimony is recorded on audio-tape and in writing. A copy of the written testimony is provided to the witness and/or his attorney and may be reviewed and revised. The witness is requested to sign the statement for approval.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Dutch people are generally found to be very direct in tone and manner. Answers may be oversimplified and lack subtlety or nuance.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Companies may formulate their own internal reporting procedure that regulates how whistleblowers can report, what happens with the report and what protection is given to whistleblowers. An employee

who does not correctly follow the internal reporting procedure cannot claim protection against disadvantage nor request help from the Whistleblowers Authority. Therefore, companies can uphold the rights of a whistleblower while safeguarding their own interest by setting up a carefully thought out reporting procedure.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

The employer cannot grant "immunity" or "amnesty" with regard to sanctions applicable by law enforcement agencies. There is no statutory or regulatory prohibition to waive a claim for damages or disciplinary action with regard to an employee. However, the interest of the entity in furthering the internal investigation must outweigh the specific disadvantages of immunity/amnesty, in order to prevent future allegations of a conflict of interest or neglect of duty and subsequent civil liability. It is advisable for the management board to take into account the impact of the immunity on the compliance culture and insurance coverage.

#### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

There is no statutory framework that provides for a right to review or revise statements by employees. However, it is common practice to allow employees to review and revise the statement before signing it. Employers often prefer collecting a signed statement as it will have more evidentiary value in court; for example, to corroborate grounds for a dismissal. It is preferable to also record the interview on audio-tape and note the exact wording of the witness if the content of the statement is challenged.

#### 7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

There is no statutory or regulatory obligation to provide or allow legal representation for witnesses. However, it is common practice to allow employees to have legal representation present during witness interviews for internal investigations. Since the attorney conducting the interview is engaged by the entity, the witness is not regarded as a client and his/her answers may be disclosed to the entity.

### 8 Investigation Report

# 8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

It is common practice to prepare a written investigation report. The written report is proof that management and the supervisory board duly investigated the incident or misconduct and is a proper basis for disciplinary sanctions against individuals (e.g. dismissal). Also, a written report is less likely subject to misunderstandings than oral transfer and is accessible for future reference without further explanation. However, access to the report should be monitored closely, since the confidentiality disappears if the report is openly disclosed to third parties (not engaged by the attorney). If preventing disclosure of the report is a priority, it is possible to only allow reading access at the law firm or solely report in oral form (with or without a visual aid for future reference).

### 8.2 How should the investigation report be structured and what topics should it address?

The investigation report should be clearly marked as privileged. It should address the scope of the internal investigation (research question), the investigation process and limitations. The report should present the facts of the case in an objective manner, with reference to the source of the information, and provide a legal analysis concluded by a clear answer to the research question. In consultation with the client, recommendations on improving compliance measures may be provided to offer management a clear guideline on possible compliance measures that can satisfy their duty to prevent reoccurrence. It may be preferable to report recommendations separately or orally, as the authorities may treat a lack of follow-up on a par with taking insufficient action to prevent further incidents/misconduct.



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### **DE ROOS** & PEN

De Roos & Pen Law Firm is a Legal 500 tier 1 firm and was established in 1984. Consequently, it is one of the oldest criminal law firms in the Netherlands.

De Roos & Pen specialises in financial economic and criminal tax law and is recognised both internationally and within the Netherlands as an authority in this field. As a result, the office has a great deal of expertise and experience in handling complex fraud cases.

Additionally, De Roos & Pen conducts internal investigations, mainly on behalf of the financial sector, and offers advice about compliance and corporate governance. As a result, De Roos & Pen frequently serves international (often American) companies with interests in the Netherlands or elsewhere in Europe.

Thanks to our scale, De Roos & Pen is regarded as a (medium) large criminal law office - we are always ready to put together a reliable team of attorneys for every acute criminal law problem.

# Nigeria

Adekunle Obebe





Bloomfield Law Practice

Olabode Adegoke

# 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

The regulations to consider when conducting internal investigations are the Criminal and Penal Codes, the Administration of Criminal Justice Act, the Central Bank of Nigeria Act, the Banks and Other Financial Institutions Act, the Economic and Financial Crimes Commission Act, and the Whistleblowing Programme under the Federal Ministry of Finance.

The consequences of failing to comply with these statutory and regulatory regimes are criminal. Acting outside of stated legislative boundaries is to the disadvantage of the prosecutor of criminal activities.

There are shortcomings of the whistleblowing policy, in that it is not backed by any law. There is no law in place to legally define the framework of the whistleblowing policy in Nigeria and in addition there is no legislative framework to provide protection for whistleblowers or to offer protection to whistleblowers in the event of criminal threats.

The policy which provides for rewarding whistleblowers is also not mandatory and cannot be enforced in any court in Nigeria.

In the Nigerian case of *WILKIE v. FGN & ORS* (2017) LPELR-42137(CA) it was stated that "a policy statement or guideline by the Federal Government does not give rise to a contractual relationship between the Government and a third party; and its non-implementation does not entitle the third party to a legal redress against the Government".

Therefore, there is no existing legal framework surrounding whistleblowing in Nigeria.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

A factor to consider is the economic/political clout that a suspect may have. In Nigeria, the ability of a suspect in a criminal

investigation to take advantage of any position he may occupy in manipulating the course of an investigation should be taken into account. In such circumstances, the investigators need to ensure they adhere to the legal framework of a legal investigation, but prevent undue wielding of powers.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

As with all investigations, the credibility and end result cannot at any point be ascertained. However, under the Whistleblowing Programme, the information is scrutinised to determine the validity or otherwise and to determine its credibility by the administrators of the Whistleblowing Programme. The duration of the investigation should ideally take ten (10) working days. At the end of the investigation, the whistleblower will be informed of the outcome of the investigation.

There is a reward for whistleblowers of between 2–5% of the recovered funds (if applicable).

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

For the purposes of investigation, the client would be the highestlevel security officer in the organisation. To this end, the officer must ensure complete cooperation with the investigating government agency

However, it is important to note that under Nigerian criminal law, the prosecutor is always the particular state where the crime was said to have occurred. Therefore, in Lagos State for instance, the prosecutor is the 'State of Lagos'.

There are steps that ought to be taken in all investigations to ensure impartiality and a non-biased, objective approach to issues. Outside counsel must ensure their independence and maintain objectivity. In-house lawyers must cooperate with investigators to ensure transparency.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

The body's willingness to disclose information will affect the extent of penalties accruing to the body. However, as to whether the involuntariness imposes a civil or criminal penalty, that is determined by the breach committed. Under Nigerian law, where a crime is committed (e.g. theft, corruption), criminal penalties automatically flow, and where there is a civil wrong committed, civil penalties ensue.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

During an internal investigation, disclosures can be made at any point in time. A disclosure may be from an identified source, or done anonymously. The Whistleblowing Programme states that information can be disclosed in writing, via the official telephone lines or via the dedicated online portal.

At any point in time where the party disclosing feels they may be subject to retaliation, a panel of inquest will be provided to address the claims.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

Upon receipt of the information, an acknowledgment response will be sent, and preliminary analysis to confirm whether there is a violation or potential violation will be conducted within ten (10) working days. If an investigation is commenced, the nature and complexity of the matters under investigation will dictate the timeframe. In addition, there is an online feedback mechanism where a whistleblower can independently monitor the status or progress report of tips submitted.

It is also important to note that there is no indication of how the findings of the investigation will be made.

# 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

There is no law that mandates liaising with local authorities before starting an internal investigation; however, in some circumstances, support from local authorities may be vital for proper identification and discovery of any criminal elements.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

An internal investigation under the instruction of a law enforcement agency must be commenced by local authorities. It is seldom within the discretion of the entity whether or not to engage local authorities.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

In the event that a regulatory body or law enforcement agency is investigating an organisation's activity, the entity is not at liberty to decide the scope of investigation of the regulatory body.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Nigerian law enforcement authorities offer cooperation to authorities in other jurisdictions. Particularly, in this region, there is cooperation with other West African and African countries. In the event of coordination between multiple jurisdictions, there is cooperation between authorities.

Strategies for multiple jurisdictions include information sharing, transparency and ensuring clear lines of communication.

### 4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

One of the main challenges entities face during an internal investigation is the lack of adequate training and the requisite competence for these investigations.

Corruption is also a factor that often hinders an investigation, as information may be illegally shared between parties, causing criminal activity to be hidden.

4.2 What steps should typically be included in an investigation plan?

Steps that may be included would be (i) implementation of more transparent interviewing methods, (ii) stricter disciplinary measures within the bounds of existing laws, for failure to comply with investigations, and (iii) improvement of data handling methods.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

The eliciting of assistance from outside counsel is at the discretion of the entity being investigated. The Constitution of Nigeria guarantees persons a right to prepare their defence, and therefore this is encouraged for entities.

In seeking to retain outside counsel, it is important to ensure they are independent and experienced in handling criminal (or civil) matters involving statutory bodies.

## 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Typically, in cases of ongoing internal investigations, adequate protection of the findings must be in place. The company must not disclose information on an ongoing investigation. In the same vein, the lawyer involved is also expected, under the Rules of Professional Conduct, to provide a strict level of confidentiality.

There is also a right to a fair trial, freedom from discrimination and assumption of innocence before being proven guilty. These are all outlined under the Constitution.

Ensuring that the entity instructs legal counsel on their behalf ensures the parties are able to enforce these rights.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

The duty of confidentiality extends to all services engaged in relation to the investigation, as long as there is an engagement set out between the client and the party.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

The same legal privileges are applicable to both types of counsel.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Privileged documents, albeit between defined parties, may be subject to third-party discovery during investigations. It is not guaranteed that such documentation may be excluded from an investigation.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

The disclosure of information recovered from an investigation is at the discretion of the investigating agency. However, with crimes of this nature, there may be disclosure of information if it is deemed to be in the public interest. This is entirely at the discretion of such bodies.

### 6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The 1999 Constitution of the Federal Republic of Nigeria provides for privacy of all information (telephone, correspondence and telegraphic) of Nigerian citizens. However, it is important to note that data protection as a whole has not been codified under the Nigerian legislative framework.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

In Nigeria, document preservation may come under an Anton Piller injunction granted in favour of the party seeking the seizure of the documents (or assets, as the case may be) at a particular location.

This is, however, only applicable to cases which are before the courts, and may not apply to investigative stages.

During an investigation, a letter may be sent to the organisation seeking cooperation and preservation of documents relevant to an investigation. However, if this is flouted, a warrant may be obtained, and documents may be seized from a particular entity (organisation or individual) in order to scrutinise the same.

The entity in question should receive the notice, and the documents that may be included are those within the scope of the investigation.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Typically, the factors to be taken into account include data protection protocols, privity of contract obligations and the procedure for obtaining documentation in the event of non-compliance.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

Generally speaking, any contract between the parties would be deemed essential as it enables the establishment of a relationship between the parties. However, the documents that are deemed important vary from case to case, and the scope of the investigation would generally guide this.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Generally, relevant documents are manually gathered. Electronic gathering is also used in some instances.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Predictive coding is a concept largely not practised in the Nigerian regulatory framework.

As of the time of publishing, the means for reviewing documentation is based on manual searching of documents or searching of electronically stored data.

### Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Pre-trial investigation rests on common law and is largely uncodified. However, the Criminal Procedure Act and Administration of Criminal Justice Act stipulates the rules governing investigation in a general sense.

None of these stipulate the means of initiating witness interviews.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Most, if not all, employees are mandated by virtue of their contracts of employment to cooperate with all internal investigations. Declining to participate may be a breach of such contract with a penalty of termination of employment.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

If a witness is being interviewed, their right to legal representation must be communicated without delay. This is a protection offered under the Nigerian Constitution.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

Best practices are not codified in a body of law. However, the general principles are enshrined in the human rights as found in the Constitution, which include the right to a fair trial, the right to adequate representation, the right to obtain defence and the right to be viewed as innocent until proven guilty.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Cultural factors that are prevalent include undue respect and fear of authority and regulatory institutions. This may unduly intimidate witnesses.

In addition, the prevalence of local dialects may inhibit the ability of witnesses to understand questions posed in English.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Interviewing may take place outside of the offices to prevent partiality and encourage the objectivity of witness responses.

In addition, another safeguard that may be introduced is anonymity throughout the interviewing phase.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

There is no recorded case of immunity or amnesty being granted to an employee during an internal investigation; however, this may be the case in the future.

7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Employees (and generally persons in Nigeria) are able to review statements they have made in an investigation, and are able to clarify ambiguities in such statements after making them.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

The Constitution provides that each witness is allowed to have legal representation present during all stages of investigation and prosecution.

### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

This is common practice in Nigeria.

The pros of such report include the fact that written documents may be circulated across regulatory institutions and prosecutorial bodies with relative ease. Another advantage is that such report may be tendered in evidence before the court during litigation of the matter (if applicable).

However, the disadvantage of this approach is that it reduces the findings of an investigation to the writers' perceptions. Whereas, if an oral report was provided, it may portray a different picture.

3.2 How should the investigation report be structured and what topics should it address?

Investigation reports vary across regulatory bodies in Nigeria. However, it should generally contain a summary of the facts, the claim against the suspect(s), the means of investigation, the findings of the investigation and action that must be taken thereafter.



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Bloomfield is the foremost full-service law firm in Nigeria. The firm provides regulatory compliance advisory services to both local and multinational companies in Nigeria. Our Partners, Associates and Support Staff provide professional service of the highest standard to our clients by combining awareness of clients' needs with a practical and constructive approach to legal issues.

The firm has been involved in providing regulatory compliance training programmes to employees of various companies and ensuring compliance with international and local regulatory provisions.

# Norway



Elisabeth Roscher



Wikborg Rein

Geir Sviggum

# 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Under Norwegian law, there are no statutory or regulatory requirements that oblige companies to conduct an internal investigation. However, there are certain statutory provisions that are relevant to consider when deciding whether to conduct an internal investigation.

First, corporate criminal liability in Norway is subject to prosecutorial discretion, *cf.* sections 27 and 28 of the Penal Code of 2005 (the "Penal Code"). This means that there is no general presumption of corporate liability under Norwegian law, i.e. the imposition of a corporate penalty depends on the circumstances of the case. When deciding whether to penalise a company, the prosecutors and courts will conduct a broad overall assessment based on the elements/factors set out in section 28, including: "whether the enterprise could by guidelines, instruction, training, control or other measures have prevented the offence".

The extent of the company's cooperation with the authorities including conducting an internal investigation will be part of the prosecutor's considerations and may reduce the risk of criminal liability.

Second, section 2 A-3 of the Norwegian Working Environment Act (the "WEA") requires that all companies with at least five employees develop written procedures for internal notifications ("whistle-blowing") concerning censurable conduct in the company. As further explained in question 1.3 below, the procedures shall include procedures on how notifications should be followed up by the employer, which includes a requirement that the issue in question is investigated to the extent necessary.

Third, anyone who has suffered loss as a result of corruption can, according to sections 1-6 of the Norwegian Liability Act, claim compensation from the perpetrator's employer if the corruption has occurred in connection with the execution of the work or duties undertaken for the employer. The employer can only avoid liability if it can be proven that the employer has taken "all reasonable precautions to avoid corruption", and it is not reasonable to impose liability based on an overall assessment of the circumstances of the case.

Finally, section 3-3 c of the Norwegian Accounting Act requires large and/or listed companies to include in their annual reports

those measures that the company has implemented with regard to compliance with the requirements related to, amongst others, corruption, human rights, workers' rights and environmental issues. Such measures will include procedures for the internal investigation of possible violations.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

In addition to increasingly strict and complex legislation, there is a consistent growth in the introduction of ethical guidelines and expectations from various stakeholders. The increase in external pressure is driving the need for greater ethical alignment by companies. In addition to the focus on efforts to ensure compliance with legislation, for example by establishing effective preventive anti-corruption measures, there are also expectations that companies implement measures to detect and respond to potential wrongdoings, and as part of this to conduct internal investigations. Relevant stakeholders include trade organisations, labour unions, investors and financial institutions, as well as customers and suppliers to the entity. The expectations of the Norwegian government exist both generally and specifically when the government is the owner, an investor or the customer of the entity.

Compliance measures, including internal investigations, are also part of good corporate governance. The Norwegian Code of Practice for Corporate Governance includes a recommendation that: "The board of directors must ensure that the company has sound internal control and systems for risk management that are appropriate in relation to the extent and nature of the company's activities."

In the concrete assessment of whether to initiate an internal investigation or to follow up in another appropriate manner, the entity should consider factors such as the nature and severity of the possible misconduct. Since an investigation may become expensive and lengthy, the entity may wish to undertake a step-by-step approach to ensure that the investigation scope is adapted to make it suitable for potential new information/findings.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Section 2 A-1 of the WEA stipulates that any employee has a right to raise concerns, and the employee must follow an appropriate procedure in connection with any such notifications. The same

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applies if the employee notifies supervisory authorities or other public authorities. The employer has the burden of proof if it wishes to claim that a concern has not been raised in accordance with the correct procedure.

Section 2 A-2 of the WEA states that employees are protected from retaliation where complaints have been made in accordance with section 2 A-1. If the employee submits information that gives reason to believe that retaliation has taken place, it is assumed that such retaliation has taken place unless the employer proves otherwise. The employee may in such case claim compensation without regard to the fault of the employer and such compensation is fixed at an amount the court considers reasonable in view of the circumstances of the case. Compensation for financial loss may be claimed in addition under the general law.

According to section 2 A-3 of the WEA, the employer shall put in place written procedures on how to handle (i.e. receive, process and follow up) concerns raised by employees. Whether the concerns are raised appropriately is based on an assessment in relation to each case. The requirements on the employees to document their concerns are not strong. However, the employee will normally need to show that they are acting in good faith with regard to the facts presented in the complaint.

The employer must take the concerns raised seriously. A formal process to consider the complaint needs to take place and whether this requires an internal investigation will depend, amongst other things, on the nature and seriousness of the issues raised. The motive of the whistleblower in raising the complaint is not considered, unless the complaint can be viewed only to have been made with the purpose of doing harm.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

Internal investigations are not regulated by law in Norway. In 2011, the Norwegian Bar Association did, however, issue a set of indicative guidelines (the "Bar Association Guidelines") according to which it is recommended that any private investigation is handled. A key part of any investigation conducted by outside counsel is to ensure that a detailed and clearly formulated mandate is put in place before the work commences. As part of the establishment of this mandate, it needs to be precisely decided who is "the client" and to whom the outside counsel should report. The outside counsel needs to be aware of potential conflicts of interests within "the client" and to safeguard that persons at the appropriate level of the organisation are involved. Internal investigations are by their nature confidential and information related to the investigation should as a general rule only be disclosed on a need-to-know basis.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Under Norwegian law, civil and criminal sanctions are imposed in accordance with different procedural rules and by different authorities; i.e. the enforcement authorities in Norway do not have the power and discretion to choose between civil and criminal penalties. However, the extent of the company's cooperation with the authorities, including the willingness to disclose the result of a properly conducted internal investigation, is relevant in the procedural discretion, *cf.* question 1.1 above, and can provide the basis for reduced penalties. We have also experienced that agreed submission to authorities of the results of an internal investigation has prevented more drastic measures being imposed by the authorities such as ransacking of company premises and seizure of documents and files.

Several of the various government bodies that have the authority to impose civil/administrative sanctions in their respective areas, such as the tax authorities, the competition authority and the financial supervisory authority, have adopted guidelines outlining under which circumstances cases will be reported to the police. In addition to the severity of the case at hand, relevant factors also in this regard may be the extent of the company's cooperation with the authorities and disclosure of facts from an internal investigation. Furthermore, there is a leniency regulation applicable with respect to cartel offences.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

There are no formal procedures that require companies to self-report under Norwegian law, and consequently no required steps for making a disclosure. However, the enforcement authorities (including the Norwegian National Authority of Investigation and Prosecution of Economic and Environmental crime (ØKOKRIM)) encourage companies to disclose any suspicions of corporate crimes and to cooperate with the authorities on any ensuing investigation.

The authorities encourage such disclosure to be made as early as possible. However, they do typically allow a period of time for the company to assess and, depending on the severity of the case, to investigate the potential wrongdoing. Early self-reporting – should a criminal investigation be opened – will enable the coordination of investigative steps between the authorities and the company and should enable the internal investigation to be conducted in a way that does not prejudice the authorities' investigation.

Early disclosure and full cooperation with the authorities will also be part of the consideration when exercising any prosecutorial discretion, including the assessment of any liability or the amount of any penalty imposed. Wikborg Rein Norway

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There are no requirements regarding in what format the findings of an internal investigation should be reported. The findings may be made orally in a meeting or by providing a written report. However, if not provided voluntarily and if not subject to legal privilege, a written report may be requested and also seized by the authorities.

## 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

There are no requirements that a company liaise with national or local government authorities before starting an internal investigation. However, the authorities encourage that the company share the results of any investigation with them and also that investigative steps be coordinated, particularly to prevent the risk that the internal investigation may "disturb the (potential) crime scene" and so prejudice the authorities' investigation. The authorities may wish to discuss a work plan or to provide directions to the company on its internal investigation; for example, requesting the company not to interview certain individuals until after the authorities have conducted such interviews.

Such cooperation will be viewed positively and will also be part of the considerations made when, for example,  $\emptyset$ KOKRIM exercise its prosecutorial discretion in considering if a company should be charged, and for what, and when it comes to an assessment of any liability or the amount of any penalty imposed.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

Law enforcement authorities generally prefer to maintain oversight of internal investigations. The level of involvement in an entity's internal investigation will mainly depend on the severity of the case and whether the authorities have opened (or are likely to open) an investigation. If the authorities have opened an investigation, they may wish to discuss a work plan and/or to provide directions to the company on its internal investigation (*cf.* question 3.1); for example, requesting the company not to interview certain individuals until after the authorities have conducted such interviews.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

In general, an entity does not have the ability to influence the scope of a government investigation.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Yes, Norwegian law enforcement authorities normally exchange information and coordinate with authorities in other jurisdictions in cross-border investigations. This may, for example, be done through treaties on mutual legal assistance. Companies that face investigations in multiple jurisdictions may be well advised to assess which agency is likely to have primary claim to jurisdiction. In addition, they may wish to seek guidance as to which agency will take lead in investigating and prosecuting the matter among the authorities in their home jurisdiction.

### 4 The Investigation Process

# 4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

There are no particular challenges for the investigation process that are unique for Norway beyond what applies within the EU. It should be noted that Norway has strict rules for the collection and handling of personal data. These rules may restrict the investigators' access to information and use of potentially important data. See section 6 below.

### 4.2 What steps should typically be included in an investigation plan?

The investigation plan must be prepared based on the circumstances of each individual case, but it should always satisfy the fundamental non-statutory principle of "justifiability", which includes the principle of hearing both sides of a case. Typically, the following steps should be included in an investigation plan:

- First, an investigation scope should be defined. This is a critical first step, as the investigation will both be inefficient and incur unnecessary time and costs if the scope is not clearly defined. The scope should both define what is to be investigated and also clearly describe the various roles in the investigations between, e.g., outside counsel, forensic consultants and the company's own personnel. The plan should, however, provide flexibility to address new issues and areas that may arise during the investigation.
- Second, guidelines for the investigation process should be established. The guidelines should set out, e.g., how the employees of the company shall contribute, if the employees will be given the opportunity for representation by separate counsel, how collected information shall be handled, etc. The guidelines should be made available to anyone affected by the investigation before they participate, e.g., by giving interviews to the investigators. Proper guidelines are of utmost importance, as important findings during the investigation may otherwise lose their evidentiary value. The Norwegian Bar Association has issued guidelines for private investigations which most legal counsel apply to the investigations which they conduct.
- Third, the entity should set the time schedule for the investigation. This should ensure the timely completion of the investigation, but it should not be so tight that it compromises the quality of the investigation.
- Fourth, the process of collecting information commences.
   This will typically include the collection of physical

documentation, electronic information, interviews and open source information.

- Fifth, the collected information is analysed. This will often reveal the need for further collection of information. Steps 4 and 5 therefore often need to be repeated and they run in parallel throughout the investigation process.
- Sixth, if the analysis of the information suggests that identified entities or individuals have acted in an unlawful or otherwise censurable manner, they should be presented with the information and be given the opportunity to provide their views.
- Seventh, the report is drafted and concluded. The report should normally describe the scope of the investigation, the procedural rules that have been applied for the investigation, the information that has been collected and which factual events the investigators find proven or most likely. The report should also clearly describe which important factual allegations the investigators find inconclusive or otherwise uncertain.
- Eighth, the reported findings are legally assessed. Here, the investigators, or separate counsel, make an assessment of the legal implications of the reported findings. It may sometimes be advisable for any legal assessment to be made by different counsel than the one conducting the investigation, to avoid any possible bias arising from the investigation role.
- 4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Under Norwegian law, companies are not required to elicit the assistance of outside counsel or other resources to assist in an investigation. There are, however, situations where this is generally preferred and recommended. First, the assistance of outside legal counsel will invoke the attorney-client privilege, *ref.* section 5 below. Second, it is often valuable to get an independent review from a third party. Third, the company may want to obtain expert assessment or opinions from an outside counsel or other resources. For example, the company can, with the assistance of outside counsel, consider the need for conducting an internal investigation, and whether other outside resources, such as forensic consultants, are required.

The most important criteria when selecting outside counsel is that the counsel has experience and a proven track record of carrying out professional and effective investigations in accordance with procedural requirements and within the sector or geography relevant to the specific case. Moreover, it should be considered whether the counsel can provide a team with the proper qualifications and size to properly and efficiently handle the investigation from beginning to end. Furthermore, to avoid doubt about the impartiality of the investigation process, companies may consider using outside counsel who is not their regular outside counsel for an investigation process.

# 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

The attorney-client/legal professional privilege exists in internal investigations in the same manner as in civil litigation and criminal

investigations and, e.g., in relation to investigations by ØKOKRIM and the Norwegian Competition Authority. This is based on long-term case law and sections 119, 204 and 205 of the Criminal Procedure Act as well as section 22-5 of the Civil Procedure Act.

The legal professional privilege applies to qualified lawyers, and in general also to those persons, including external experts, who assist the lawyer in his or her work. However, it is a requirement that the engagement of such "assistants" is considered derived from the engagement of the lawyer and not an independent engagement.

In order to be considered privileged, the information must be communicated to/from the lawyer in his or her capacity as a lawyer, i.e. in connection with obtaining legal advice. The privilege does not apply to information a lawyer receives or gives when acting in another capacity, for example, as a member of the Board of Directors.

The legal professional privilege in Norway applies for all types and contents of documents, including parts of a document and emails where the lawyer is copied in, provided they satisfy the above criteria. There are some exceptions to the legal professional privilege, for example in criminal investigations if it leads to an innocent person being convicted or a serious crime being committed.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

If a third party is engaged by an outside legal counsel to assist and provide advice in the investigation and this advice is included or constitutes a part of the legal counsel's advice, the legal professional privilege will apply. This will not be the case if the third party provides separate advice directly to the company and this advice is not part of the legal advice provided by the counsel.

If the investigation is primarily fact-finding, the legal professional privilege may still apply. The Norwegian Supreme Court has held that this, in view of the circumstances of the case, may be the case in situations where the investigation "may have legal consequences", as the collection and systematisation of facts and the legal considerations in such situations are closely interlinked.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Under Norwegian law, the attorney-client privileges as described in question 5.1 above apply equally to in-house counsel. Hence, in respect to legal professional privileges, there is no difference as to whether an in-house counsel or outside lawyer directs the internal investigation.

# 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Documents protected by the legal professional privilege cannot be seized by either external or internal investigators, unless a company representative with the necessary authority has released the document from privilege.

When the relevant data material is collected and mirror copied for an internal investigation, the entity should ensure that IT or technical personnel together with a lawyer review all the material to identify documents that are privileged. Such documents should then be excluded from the data material that is disclosed to the investigators.

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5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

No, they do not.

### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The principal data protection legislation applying to internal investigations is the Personal Data Act (Act of 14 April 2000 No. 31) and the Personal Data Regulation (Regulation of 15 December 2000 No. 1265). The law implements the EU Data Protection Directive (95/46/EC). The purpose of the Act, which is strictly enforced, is to protect natural persons from violation of their right to privacy through the processing of personal data. "Processing of personal data" means any use of personal data, such as collection, recording, alignment, storage and disclosure, or a combination of such uses.

The regulation requires, *inter alia*, that the employer, before accessing and examining an employee's corporate e-mail account or personal workspace and electronical equipment provided by the company for work related use, as far as possible notifies the employee, and that the employee is given the opportunity to make any representations before such examination is carried out. The employee has a right to be present during the examination and to be assisted by a representative. In case the examination is made without prior warning, the employee shall receive subsequent written notification of the examination as soon as it is completed.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

There are no specific legal requirements under Norwegian law to prepare and issue a document preservation notice in connection with internal or external investigations. Practice varies as to how and when this is done in connection with investigations, but it is best practice to issue a legal hold notice to the people involved in case of an investigation. There are no legal restrictions on issuing such a preservation notice, and it is considered part of an employer's powers to do so.

Normally, the particular individuals identified as subjects of, or relevant witnesses in, an internal investigation should receive a notice. The notice should state in general terms the scope/mandate of the investigation in order to give sufficient direction as to what kind of information should be preserved. Compliance with the preservation notice is normally part of the questioning of the persons involved and control is also managed through comparison of data file backup comparisons. Where any such control or comparison requires access to information in an employee's e-mail account or in the employee's personal space in the business' computer network, the strict procedures regarding access to employee e-mails and personal space set out in chapter 9 of the Personal Data Regulations must be observed by the employer, as explained in question 6.1 above.

.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

In cases where documents are located in multiple jurisdictions, the entity must comply with all local laws in each of the jurisdictions in question when accessing and securing documents in connection with internal investigations. Normally, this means that one should engage local legal expertise to safeguard compliance.

Regarding data privacy specifically, for countries that have implemented the EU Data Protection Directive (95/46/EC), the transfer of personal data from Norway to such countries, as well as transfer to countries that have been deemed by the European Commission to have an adequate level of protection, is permitted provided there is a legal basis for the transfer. Specific requirements must be complied with before any transfer of personal data outside the EU/EEA, e.g. consent from the data subject, the use of EU Standard Contractual Clauses, or the transfer is made to a US firm that is part of the Privacy Shield framework.

#### 6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

For an internal investigation in Norway, all kinds of documents can be considered relevant, such as e-mails, other electronic communications, memos, decision documents, accounts, ledgers, presentations, etc. The relevance generally depends on the nature and scope of investigation.

# 6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

For collection of electronically stored data, companies may typically engage a third-party forensic provider with specific software programs and expertise to extract data and properly store and systematise the data for review. The securing of data is typically done by mirror copying the contents on servers, individual laptops and handheld electronic devices. Such electronic mirror copying is also considered the most efficient way of collecting documents, as relevant information is usually electronically stored. With regard to access to documents in an employee's e-mail account or personal space in the business' computer network, see questions 6.1 and 6.2 above.

It is normally also necessary to involve other kinds of internal resources like HR, internal audit, the compliance function, the legal function, the IT department, etc.

#### 6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Predictive document techniques are accepted in Norway. From a data protection point of view, data subjects have the right to demand a review by a physical person of data selected by a fully automated decision.

#### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There are no specific laws or regulations that apply to interviews of employees, former employees or third parties in private, non-judicial or public investigations. However, the Bar Association Guidelines include guidelines for the conduct of such interviews in private investigations. The main principles are, among others, the right to privacy, the right to a fair trial, the presumption of innocence and protection against self-incrimination. For instance, the guidance sets out that affected parties should have the right to be represented by a lawyer (see some further details under question 7.3) and to request access to information the investigator has about him or her, as long as this does not adversely interfere with the investigation or any third party.

It is not necessary to consult any authorities before initiating witness interviews; however, if the public authorities have already been notified about the internal investigation (e.g. by self-reporting), it would be prudent to do so.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

It is generally assumed that employees are required to cooperate with an internal investigation, including giving interviews and providing information that can be used as evidence.

It has been questioned whether an employee may decline to participate in a witness interview in order to protect themselves from self-incrimination. There is no clear answer to this question under Norwegian law and the employee's obligation to participate in an interview has to be determined on a case-by-case basis.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

An entity is not legally required to provide legal representation to witnesses. However, the Bar Association Guidelines set out that if the investigators according to the mandate shall collect information and also assess and conclude on the facts, an "affected party" has the right to have legal or other representation/assistance at every stage of the investigation. In the guidelines, an affected party is defined as a person whose position will be affected by the investigation and its outcome.

When special circumstances make it necessary, the entity shall cover the necessary costs of such legal representation, for example, if the affected party is exposed to the risk of self-incrimination.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

The key words in this regard are due and fair process. Witness interviews should be conducted in a manner that ensures that the relevant parties are adequately respected and protected. It

should also ensure that sufficient information of evidentiary value is obtained for the purposes of the investigation. The entity conducting the investigation must be independent. Appropriate care must be applied both when deciding the scope of the mandate of the investigation and during the actual investigation.

When conducting an interview, the interviewers should inform the witness of the background for the interview and the scope of the investigation. The witness should also be advised on the applicable guidelines for the investigation process (*cf.* question 4.2 above) including how the information given in the interview may be used, the reporting format, and the confidential nature of the interview and not to discuss the matter with colleagues. A record/summary of the key facts of the interview should be made and the minutes/transcript should be provided to the witness who should then be allowed a reasonable period within which to revert with any comments or otherwise confirm agreement.

### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

There are no specific cultural factors that need to be taken into account.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Norway has specific legislation on the protection of whistleblowers, affording employees a statutory right to raise concerns as well as requiring employers to develop internal procedures or other measures that facilitate such raising of concerns, *cf.* question 1.1 above.

According to best practice, the entity performing the interview will have an obligation to maintain secrecy and should only share confidential information with representatives of the company on a need-to-know basis. If the entity reports part of the interview in the final report, it should do so in a cautious manner, without revealing any personal information unless strictly necessary. This means that concerns (complaints) should be investigated impartially and the company should be given the opportunity to consider the complaint and to respond to the allegations.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

An employer may not grant "immunity" or "amnesty" to employees during an internal investigation in respect to potential criminal charges, but the employer has the right to state that the employee will not be subject to dismissal or retaliation by the entity during the investigation. This is, however, not generally advisable in more serious cases.

7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

When conducting interviews, it is considered as good practice to take minutes and to send these minutes to the employee afterwards for review, and potential corrections and comments.

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7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

No, it does not.

### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

It is common practice in Norway to prepare a written report at the end of an internal investigation. Sometimes management and/or boards of directors prefer to have the report in PowerPoint format rather than a full-length report. It is highly uncommon in Norway for companies that have initiated an internal investigation to have the facts, assessments and conclusions presented orally only. The pros of a written report include appropriate documentation of the steps conducted and thoroughness of the investigation.

Companies should, however, be aware that to a large extent written reports that follow internal investigations are subject to disclosure in civil litigation. They are therefore well-advised to conduct assessments of the extent to which written material may expose the company in contract or tort.

### 8.2 How should the investigation report be structured and what topics should it address?

There are no formal requirements as to how the report should be structured. However, there is some guidance to be found in the Bar Association Guidelines.

The investigation report is generally divided into three sections: 1) description of the scope of the investigation, the methodology and procedural rules that have been applied; 2) description of the information that has been collected and reviewed; and 3) relevant assessments including which factual events the investigators find proven or most likely and legal conclusions. The report should also clearly describe which important factual allegations the investigators find inconclusive or otherwise uncertain. Depending on the scope of the investigation, the report could also include recommendations for remediation and mitigating measures. Alternatively, the client may prefer to exclude legal conclusions and recommendations from the report in light of the risk of e.g. litigation and reputational damage.

It is emphasised in the Bar Association Guidelines that, in general, one should be cautious with respect to statements and conclusions in the report regarding individual (personal) guilt. Investigators should adopt a presumption of innocence.



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Mr Sviggum is the only Norwegian lawyer listed in Global Investigation Review's *Who's Who Legal: Investigations 2017* guide. He frequently speaks at universities, conferences and in other fora.

### WIKBORG REIN

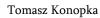
Wikborg Rein is the largest Norwegian law firm. The firm attracts a wide range of Tier 1 clients within compliance, investigations and crisis management. Wikborg Rein is the only law firm engaged internationally by way of a framework agreement with the Norwegian Ministry of Foreign Affairs under which the firm *i.a.* leads investigations into potential misuse of Norwegian aid globally.

The firm employs lawyers in Oslo, Bergen, London, Singapore and Shanghai. Its unique and long-standing presence overseas enables it to offer clients the benefit of an extensive international expertise. The firm has been heavily involved working with clients exposed to large-scale anti-bribery campaigns such as the Lavo Jato scandal concerning Petrobras in Brazil and the campaign initiated by the current government of the Peoples' Republic of China. Several dozen of the firm's partners and lawyers in Norway have spent years working abroad or in-house with their clients.

Wikborg Rein's broad range of legal services beyond compliance and crisis management includes corporate and M&A; dispute resolution; real estate and construction; banking and finance; shipping and offshore; trade, industry and public sector (including technology, media and telecommunications); and energy and natural resources.

# Poland

### Sołtysiński Kawecki & Szlęzak





## 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Some entities, e.g. banks, investment funds, entities managing alternative investment companies, insurance companies, reinsurance companies, as well as entities conducting brokerage activities and fiduciary banks are obligated on the basis of special provisions to carry out inspections of compliance and internal audits, given the lack of general statutory regulations concerning an internal investigation:

- A. Banks are obligated to define and start-up an effective internal inspection system on the basis of banking law. The details of the functioning of such a system are given in resolution No. 258/2011 of the Financial Supervision Authority ("FSA"), the so-called Recommendation H. At present, work is under way on substituting the said FSA resolution with a pertinent regulation by the pertinent minister. The final draft of the relevant ordinance was addressed to the Minister of Finance for signing.
- B. The internal inspection system must also operate in investment funds and in entities managing alternative investment companies on the basis of the Act on investment funds and on management of alternative investment funds ("AIF")
- C. The obligation to introduce and start-up the internal inspection system and internal audit also lies with insurance companies and reinsurance companies on the basis of the Act on insurance and reinsurance.
- D. Moreover, all entities conducting brokerage activity and fiduciary banks are obligated to comply with the conditions being the basis for granting a permit to these entities. The permit is granted only after the entity has filed the pertinent description of the internal inspection on the basis of the Act on trade in financial instruments.

Moreover, managers of capital companies are obligated, in this regard, to observe due diligence on the basis of Art. 293 §2 of the Commercial Companies Code ("the CCC") and Art. 483 §2 of the CCC. A comprehensive inspection of the correctness of the functioning of a given organisation may constitute an indication of due and proper conduct of the company's affairs.

An internal investigation allows the persons managing a given entity to learn about material facts in the context of irregularities disclosed in the company, but, under the applicable law, the fact of carrying out an internal investigation does not constitute an independent circumstance which speaks in favour of a specific entity, e.g. in the case that criminal proceedings are initiated against that entity.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

A circumstance which must be considered before taking a decision on initiating an internal investigation is above all that of the interests of the entity itself and the advisability of quickly obtaining as much knowledge as possible about the facts of the case. Managers of a capital company should also bear in mind that in a situation where due diligence is not shown in taking care of the interests of the company, they may be subject to the civil liability set out in the CCC, as well as criminal liability on the basis of the Criminal Code ("CC"). In situations in which the obligation to carry out inspection tasks follows from legal provisions, a failure to fulfil this obligation may result in a broad range of negative consequences for the entity – from fines to a withdrawal of permits or concessions obtained by the company.

Entities supervised by the FSA should also take account of the resolution of the FSA Rules of corporate governance for supervised institutions, especially with regard to the need to ensure an effective functioning and independence of the internal inspection system and compliance inspection. Having regard to the fact that entities supervised by the FSA, as a public trust institution, should conduct business with the highest diligence, special attention shall be paid to professionalism and the ethical conduct of the persons belonging to the bodies of the supervised entities, and they shall require their shareholders to act in a responsible and loyal manner. In sum, a supervised institution should develop and implement an efficient and independent internal audit function, aimed especially at regular examination of the adequacy and efficiency, in particular of the internal control system, the compliance function and the risk management system. With regard to companies listed on the Warsaw Stock Exchange ("WSE"), also important are the recommendations contained in Good Practices of Companies, listed on the WSE. This concerns, in particular, recommendations II.Z.10 and III.Z.4, which indicate that it is advisable to draw up annual reports on the correctness of company operation, especially an assessment of the company's standing including an assessment of the internal control, risk management and compliance systems and the internal audit function. Internal investigations may undoubtedly facilitate complying with these recommendations.

It must also be remembered that the actions taken by the preparatory proceedings authorities are usually less effective than actions taken independently by the interested entity, which may eventually result in harm to the interests of the injured party. Moreover, court proceedings and those proceedings conducted before the law enforcement authorities in Poland are often time-consuming. If, therefore, a company independently determines the facts of the case and prepares evidence, most likely this will, to some extent, remove these systemic inconveniences which are beyond its control.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

In Polish law, there is no general regulation concerning whistleblowing and how to proceed with information obtained in this manner. The reaction of an entity depends entirely on its internal policy. However, the whistleblower, as an employee, is subject to protection against retaliatory discrimination (consisting, e.g., in dismissing the employee from the company).

Moreover, whistleblowers – also pursuant to general rules following from internal legal frameworks – are subject to the protection following from Art. 10 of the European Human Rights Convention, pursuant to the Strasbourg standards set out in the judgment *Heinisch v. Germany*. These standards provide for the need to weigh up the interests of a given entity (such as, e.g., protection of a company's good name) with the public interest and to provide protection for a whistleblower against sanctions dependent upon his/her motives, as well as the alternative means available to him/her for achieving the assumed goal of disclosing information.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

"The client" is nearly always the interested company, while communication is essentially conducted with its pertinent representative, the management board or the Chief Compliance Officer. What is problematic are situations in which a member of the management board (or the entire management board) is suspected of bringing about the disclosure of irregularities in the company. Then, communication with the client is most often conducted by other company bodies (e.g. the supervisory board).

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Polish law essentially does not contain developed leniency-type institutions (except for antimonopoly/antitrust law), though in

the case of criminal liability, each time the perpetrator's attitude is taken into account. For example, Art. 15 of the CC provides that a perpetrator is not subject to a penalty if he/she voluntarily prevented the effect of an illegal act or that the penalty is reduced for a perpetrator who voluntarily made efforts to that end. Art. 16 of the Tax Criminal Code regulates so-called voluntary self-disclosure, i.e. non-imposition of a penalty for a tax crime or misdemeanour by a perpetrator who, having committed an illegal act, informed the law enforcement authority about it, disclosing material facts about the act, in particular about the persons who took part in its commission. Art. 60 §3 of the CC provides for a reduction of the penalty for a perpetrator who disclosed to the authorities information concerning a crime, in particular the identity of other perpetrators of the illegal act. In the case of bribery of a public official, disclosure by the perpetrator of all the material facts of the crime, prior to their discovery by the authorities, means that under Art. 229 §6 of the CC he/she is not subject to a penalty. An internal investigation may increase the chances of availing of the above described institutions which reduce the criminal liability of the perpetrator.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

Disclosure to enforcement authorities of information gathered by the company during an internal investigation is recommended to a company only after all the proceedings have been carried out and after it has been determined that the established facts of the case contain all the material information. Otherwise, it is not recommended to disclose to the enforcement authorities information gathered by the company.

An exception here are banks which, under banking law, are obligated to immediately inform the preparatory proceedings authorities about each case in which a justified suspicion arises that the activity of the bank is used to conceal a tax crime, to finance terrorism, or to launder money, or for purposes linked to these acts.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

In all circumstances it is recommended that a report be drawn up in writing, in a properly secured file. The results of the investigation should only be conveyed orally in situations where it is not possible to prepare a report in writing. The risk of a disclosure of data contained in the written report is minimal if the appropriate methods for securing these data are applied, i.e. above all securing the file with a password, encoding the disk, and observing the rules for handling classified documents.

It must be pointed out, however, that the recent changes in criminal procedure in Poland establish that a piece of evidence shall not be deemed inadmissible exclusively on the grounds that it has been obtained as a result of an infringement of the procedure or the forbidden act referred to in Article 1 §1 of the Criminal Code, unless the piece of evidence has been obtained in connection with the fulfilment of the official duties by a public officer, as a result of: homicide; causing deliberate damage to health; or deprivation of liberty [Art. 168a of the Code of Criminal Procedure ("CCP")]. Thus, it is impossible to entirely rule out the risk of use of information – obtained as a result of the actions of investigation authorities – in a manner which is contrary to the interests of a given entity (e.g. hacking an IT system).

## 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

In Poland, there is no legal obligation for an internal investigation to be preceded by engaging in cooperation with the prosecuting authorities. If, in the course of an investigation carried out by the authorities, the object of examination is the functioning alone of a given entity and no specific charges have been made yet against it, then it is recommended that the entity disclose information obtained as a result of an investigation only when it has full knowledge about the facts of the case and after it has carefully examined all the circumstances of the case. In a situation where proceedings before the prosecuting authorities are already at the stage of verification of specific charges against the examined entity, the rules and procedure of cooperation are specified in individual summonses or notifications served on that entity, and are also determined by the actions of the persons carrying out tasks on behalf of the pertinent authorities.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

No. The law enforcement authorities are only interested in the results of possible internal investigations. In addition, investigative steps in order to bring the case to the court phase must be performed by the authorities themselves.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

The law enforcement authorities act independently within their powers. Through cooperation with them, the entity against which the actions of the law enforcement authorities are aimed may have an indirect influence on the scope of those powers (e.g. by filing pertinent evidence applications or by way of participation in the interviewing of witnesses).

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Yes. Law enforcement authorities gladly avail of numerous regulations in this regard; both those following from Polish law (inter alia, relating to the European Arrest Warrant or the actions indicated in Art. 585 of the Code of Criminal Procedure, as well as those regulated in the Act on exchange of information between the law enforcement authorities of EU Member States) and following from EU law (e.g. from Art. 82 Treaty on the Functioning of the

European Union; and from Art. 5 of Council Framework Decision No. 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, implemented into Polish law in Art. 592a CCP), as well as from agreements on mutual legal assistance (e.g. agreement between the Republic of Poland and the United States of America on mutual legal assistance in criminal cases).

If an issue being the subject of an internal investigation may have an international aspect, it is decidedly recommended to avail of the assistance of a team of specialists who are familiar with various legal systems since regulations concerning the course of an investigation, as well as of the potential obligations to disclose its results, are in many countries significantly more developed than in Poland.

### 4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

A basic problem is the lack of legal regulations concerning the conduct of internal investigations. However, *inter alia*, problems linked to the need to obtain consent for the processing of personal data, especially in case of former employees of the company, are particularly difficult for the entity conducting such an investigation. The processing of data shall be permitted only where whom the data concerns has given his or her consent, save in respect to the removal of data concerning this person (Art. 23 Sec. 1 of the Personal Data Protection Act).

### 4.2 What steps should typically be included in an investigation plan?

The answer depends on the character of the case, but most often an investigation is conducted according to the following layout. An initial outline is established of the irregularities which may occur in the company. Then, an inspection is carried out, *inter alia*, of the e-mails of company employees and an inspection of procedures and IT systems in which key – from the point of view of the subject of the proceedings – data may be found. In certain cases, it is also necessary to carry out research of documentation kept in paper form. If possible, it is recommended to question individual employees and persons acting within the organisation once the preliminary conclusions have been drawn by the persons conducting the internal investigation in the company.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Availing of outside specialists is recommended in every situation which requires professional knowledge in a given field, in particular in the area of forensics. An important attribute is strong investigative skills. One should also take into account specialist knowledge and skills in a given sector, experience in similar cases, as well as analytical abilities.

# 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Yes. The interviewing of a person regarding circumstances which constitute a professional secret carries with it the restrictions set out in Art. 180 CCP. The interviewing of persons who practice the legal profession, e.g. an attorney or legal counsel, with regard to facts which are subject to secrecy, is only possible when it is indispensable for the sake of justice, and the fact cannot be established on the basis of other evidence. However, recent changes to the criminal procedure permit the use of evidence obtained in breach of the law. Thus, all information obtained or created in the course of an internal investigation carries the risk of being used in a manner which is contrary to the interests of the entity. Thus, it is recommended that all files be encrypted, no open correspondence should be conducted, and personnel should be instructed, as appropriate, on the subject of confidentiality.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Cooperation with third parties is carried out each time in the form of sub-contracting, on the basis of an earlier concluded, individual agreement containing a duly developed confidentiality clause, adapted to the specific nature of the commissioned activities.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

In practice, cooperation with an outside entity is much more beneficial than with an in-house one. In that case it is possible to specify the scope of obligations of the outside entity (including those obligations which concern confidentiality) in a manner adapted to the specific nature of the tasks. An outside entity is also not involved in the internal relations of the organisational structure of the client, which may have a negative impact on the integrity of the internal investigation.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

The scope of possible security measures is very broad and covers both purely IT-related measures and internal procedures in the company. In practice, much benefit is gained from applying the so-called Demilitarised Zone ("DMZ"), i.e. a closely monitored, separated area of the network. In this area, one can store information of a confidential nature for instance on a mobile server, but it is not used for ordinary communication with other units. All information of a confidential nature, including that concerning internal investigations, should be stored in a DMZ.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Information obtained in the course of preparatory proceedings, regardless of its origin, is subject to so-called "secrecy of preparatory proceedings". Until such time as it is disclosed in court proceedings, it cannot be made public, under sanction of the penalty set out in Art. 241 §1 of the CC. Anyone who publicly spreads information from a closed court trial will be liable to the same punishment. In the current legal state in Poland, there is a possibility of closing court proceedings to the public, subject to the public prosecutor's consent, in cases when important private interest could be infringed due to a public hearing (Art. 360 §1 and §2 CCP).

### 6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The legal norms contained in the regulations on personal data protection and protection of privacy are found, *inter alia*, in the Personal Data Protection Act, and in the Criminal Code. Poland is currently preparing for the entry into force of the Regulation of the European Parliament and of the Council (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, i.e. the so-called GDPR regulation (which will apply from 25 May 2018).

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

No. Such an institution is not used at all in view of the lack of legal regulations which could make it effective. Moreover, one must remember that issuing a summons to secure documents increases the risk of a disclosure of confidential information, and may negatively impact on the prospect of securing evidence in possible future preparatory proceedings.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

There are a large number of issues which must be taken into account in the case of placing information in various jurisdictions. These include the subject matter scope of banking secrecy, or the scope of the denunciation obligation, especially with regard to foreign branches of credit institutions. Many recommendations also follow from EU law; *inter alia*, Directive No. 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, of which the key provisions were implemented in Poland in the Telecommunications Act. European Union law is implemented into the Polish legal system or it is directly applied.

In the international context, one should also take into account the possible differences in the manner of implementation of EU acts, as well as in the manner and practice of their application in various Member States.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

In principle, what is deemed important are all documents (both in electronic versions and in writing) which are relevant to a given case, which the entity has in its possession. There are no significant differences between the practice of internal investigations and the practice of preparatory proceedings conducted by law enforcement authorities.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Most often, cooperation is engaged in with authorised employees of the client who are instructed about what tasks they should perform and what information and documents they should obtain. Documentation is then collected in electronic form, after which it is reviewed and analysed. However, seizure of electronic evidence should be performed by forensic specialists using dedicated hardware and software.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Various technologies and software are used. In particular, in the case of a large number of documents, it is worth using review platforms such as Relativity or Nuix.

### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There are no legal regulations in this regard; however, one should always bear in mind the personal rights of the interviewed person. The provisions of CCP on interviewing witnesses or parties to proceedings do not apply. With regard to current employees, depending on the situation, the provisions of the Labour Code may apply, in particular Art. 94 point 2 LC which regulates the obligation to organise work in a manner best suited to make effective use of working time and achievement of high efficiency and appropriate quality of work by employees through the exercise of their abilities and qualifications. In addition, one has to bear in mind that an employee, if a member of a Trade Union, may be represented by a Trade Union. There is no obligation for earlier consultation with any authorities regardless of the intention to interview.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

The obligation to cooperate with the employer follows essentially from Art. 100 §2 point 4 LC, i.e. to care for the interests of the employing establishment, protect its property and to maintain the confidentiality of information, the disclosure of which could cause damage to the employer. In the absence of application of the provisions of CCP to internal investigations, an employee does not have the right to refuse to make a statement. At the same time, however, the interviewed person does not face any consequences, apart from professional ones, in the case of making a false statement or refusing to make a statement.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

This obligation does not exist because of the informal character of the internal investigation.

7.4 What are best practices for conducting witness interviews in your jurisdiction?

There are not strict rules/best practices for conducting witness interviews, but it is important to take care of rights and freedoms of a witness. Interviews are essentially conducted by members of the investigation team – lawyers and forensic specialists. Sometimes, HR and/or compliance officers of the client also participate.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Poland is a country which is quite ethnically and culturally uniform. In this respect, there are no particular factors which should be taken into account when planning and conducting internal investigations.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

In light of the absence of detailed whistleblowing regulations in Poland, it is difficult to answer this question. However, it is inadmissible to apply any means or methods towards the whistleblower which could infringe his/her dignity or which could restrict his/her freedom; *inter alia*, freedom of speech.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

A release from professional liability of a specific employee is essentially an internal matter of a given entity. However, it should be borne in mind that application of "amnesty" or "immunity" towards specific persons cannot have a discriminatory character with respect to the remaining employees. Art. 18<sup>3a</sup> LC prohibits unequal treatment of employees in all aspects related to employment, including in the application or non-application towards them of all types of sanctions.

#### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Internal investigations have an informal character, thus these issues take different forms depending on the internal policy of a given entity – in certain companies there may, for example, exist an internal inspection regulation which guarantees the interviewed person specific rights.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

There is no such requirement in Polish law.

### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Reports on internal investigations are almost always drawn up in writing as this facilitates both their later use by a given entity and the management of the information collected in the course of the investigation. Of course recording the results of the investigation on a permanent carrier gives rise to certain risks, as mentioned above in the answer to question 2.3. Situations also occur (though rarely) in which the preparation of a written report is required directly by legal provisions. An example of such a regulation is point 4.29 of

attachment No. 2 to the regulation of the Minister for Health on the conditions of Good Manufacturing Practice.

### 8.2 How should the investigation report be structured and what topics should it address?

There are no strict, formal requirements of a legal nature which specify how the investigation report should be structured. It is recommended, however, that such report indicates the reasons for initiating the internal investigation, as well as that it contains a list of the tasks carried out, list of witnesses, list of custodians and the key findings, together with a list of the evidences on which they were based. The minutes from the interviews and other documents indicated in the report should constitute attachments to it.



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Opened in 1991, Sołtysiński Kawecki & Szlęzak is one of the leading law firms on the Polish market. The firm provides a comprehensive service to large business entities (both public and private) in Poland and abroad. Sołtysiński Kawecki & Szlęzak employs over 120 lawyers with various specialist areas, thanks to which it offers a very broad range of legal services.

One of the leading departments of Sołtysiński Kawecki & Szlęzak is the White-Collar Crime Department, which deals with business crime law practice, as part of which it conducts a comprehensive service of clients, *inter alia*, involved in criminal proceedings. Lawyers employed in the White-Collar Crime Department carry out assignments related not only to conducting criminal proceedings themselves, but also carry out tasks of an investigative and audit nature, and assist business entities in conducting internal investigations.

Soltysiński Kawecki & Szlęzak employs top-class specialists who have expert knowledge not only of the law, but also of the practical functioning of business entities.

# Scotland







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### The Decision to Conduct an Internal Investigation

What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Scotland is a separate legal jurisdiction within the UK. Scots law and UK-wide laws therefore apply.

Under Scots law it is a criminal offence to fail to report to the police suspicions of certain business, financial and other serious crimes unless there is a reasonable excuse for not reporting. A reasonable excuse for not reporting may be that the suspected misconduct was investigated and a conclusion reached that criminality had not

From a UK-wide perspective, various duties under the Companies Act 2006 give rise to a need for suspected financial misconduct to be investigated. In addition, the protection of whistleblowers, under the Public Interest Disclosure Act 1998, may be breached if a whistleblower's complaint is not investigated.

Listed companies need to consider the requirements of the Corporate Governance Code and the Market Abuse Regulations 2014 in relation to the requirement to disclose inside information and the grounds on which a disclosure can be delayed. A common reason for a delayed disclosure is that the facts are being investigated.

Businesses regulated by the Financial Conduct Authority or other industry-specific regulators need to consider the specific regulations applicable to the regulated business and the expectations of the regulator.

What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Specific to Scotland is the Guidance of the Crown Office and Procurator Fiscal Service ("the Scottish Prosecutor") on selfreporting breaches of bribery laws by commercial organisations.

In addition, other law enforcement bodies, such as HM Revenues and Customs and the Competition and Markets Authority, encourage companies to conduct internal investigations and to make voluntary disclosures in return for more lenient treatment.

Adherence with corporate whistleblowing, employment and compliance policies is also an important consideration.

How should an entity assess the credibility of a 1.3 whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

The Public Interest Disclosure Act 1998 protects workers who make "protected disclosures" from detrimental treatment. For a disclosure to be protected, the worker needs to reasonably believe that the disclosure is made "in the public interest". Protected disclosures cover a wide range of potential wrongdoing including criminal offences, failing to comply with legal obligations, endangerment of health or safety, and damage to the environment. A whistleblower who suffers detriment may bring a claim against his/her employer in an employment tribunal.

Internal whistleblowing reports should be taken seriously because of an increasing trend for regulators to encourage whistleblowing directly to them. Accordingly, unless there is a reasonable basis to consider that a whistleblower's report is vexatious or malicious, whistleblowing reports should be investigated.

Employers should follow the guidance published by BIS: "Whistleblowing Guidance for Employers and Code of Practice". The Financial Conduct Authority has also published guidance.

How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

Identifying the client is important for compliance with duties under the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, the law of legal privilege, and to avoid professional difficulties because of conflict of interest rules and the Scottish criminal code.

A lawyer's client needs to be a legal entity but the internal representatives of the "client" to whom the lawyer reports may be defined narrowly. With listed companies or companies that wish to follow the Corporate Governance Code, instructions will commonly come from the Audit Committee or a specifically established Investigation Committee.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

There are a number of UK-wide law enforcement bodies that have jurisdiction over businesses operating in Scotland. Many UK regulators encourage voluntary disclosures in return for more lenient treatment, which often amounts to the imposition of a civil penalty instead of a criminal prosecution.

In addition, the Scottish Prosecutor offers businesses that self-report bribery offences the opportunity to negotiate a civil settlement *in lieu* of a criminal prosecution. The factors relevant to a decision to not prosecute include: the timing of the self-report; the completeness of the report; the thoroughness of the company's investigation (the company will be expected to have engaged a law firm and forensic accountants to conduct an independent investigation); and the level of co-operation with the prosecutor's own inquiries.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

With regard to corporate bribery self-reporting, the Scottish Prosecutor will often be notified of a potential issue in parallel to the making of a money laundering disclosure to the National Crime Agency and/or a statutory report to Police Scotland.

A money laundering disclosure, under the Proceeds of Crime Act 2002, is required to be made as soon as is reasonably practicable after unlawful conduct is suspected. A statutory disclosure to Police Scotland, under the Criminal Justice and Licensing (Scotland) Act 2010, arises when in the course of business information comes to an employee which causes that employee to suspect that two or more people have agreed to act together for the principal purpose of carrying out a serious crime (for example, fraud or bribery). The report needs to be made as soon as is reasonably practicable. It is appropriate for there to be a short period of investigation (usually measured in weeks rather than months) to enable the facts to be clarified and for a lawyer to advise whether there is a sufficient legal basis for making one or both statutory disclosures.

If a self-report is also made to the Scottish Prosecutor, the prosecutor will generally allow the company to conduct an internal investigation (utilising external lawyers and forensic accountants) and to report back in an agreed timeframe. That timeframe may be subject to agreed extensions.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

For corporate bribery self-reporting to the Scottish Prosecutor, a written report by a solicitor (a lawyer) must be provided. The risk that arises from providing a written report is that a civil resolution is not accepted. The report may be used to direct a police investigation and the report may be admissible evidence in subsequent criminal

proceedings. For that reason, it is important to meet with the prosecutor prior to submitting the report to discuss the findings with the aim of obtaining an indication of whether the report will be accepted for civil settlement purposes. The report should also be prepared by a lawyer who understands the Scots law of evidence and, in particular, the Scots law of corroboration and hearsay.

# 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

There is no requirement to liaise with law enforcement before starting an internal investigation. However, it is advisable to do so when it is known that the police or a regulator are investigating because, without liaison, there is a risk of the law enforcement investigation being hindered or prejudiced which itself is a criminal offence under various statutes and statutory instruments; for example, section 90 of the Police and Fire Reform (Scotland) Act 2012.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

The Scottish Prosecutor generally does not maintain oversight of an internal investigation. An exception is in the field of corporate self-reporting of bribery offences in which cases the Scottish Prosecutor will need to be informed of the investigative steps taken. The Scottish Prosecutor may ask for additional investigative steps to be taken but the Scottish Prosecutor will generally not seek to define the scope of the investigation in the same manner as the UK's Serious Fraud Office.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

An entity that co-operates with Police Scotland and the Scottish Prosecutor will be able to discuss the scope of the investigation with the police and prosecutor. Such discussions will usually be followed by written representations concerning the lawfulness and proportionality of the proposed investigative steps.

Where a person or business is concerned about the scope of a search of premises or of documents and electronically stored material which is conducted under a warrant issued by a court, it may seek to challenge the warrant or the scope of the search by way of a Bill of Suspension to the High Court of Justiciary.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Yes. The Scottish Prosecutor has a dedicated mutual legal assistance team. In addition, there is close co-ordination with the UK's Serious Fraud Office and UK-wide regulators which report cases for prosecution to the Scottish Prosecutor.

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In many financial or corporate criminal matters, the Scottish Prosecutor and the UK's Serious Fraud Office have concurrent and overlapping jurisdiction. Where that arises, close attention should be given to a Memorandum of Understanding between the Scottish Prosecutor and the Serious Fraud Office for handling such cases.

For corporate bribery, which may be investigated by the Scottish Prosecutor or the Serious Fraud Office, the Scottish Prosecutor's settlement terms tend to be more attractive to a Deferred Prosecution Agreement with the Serious Fraud Office.

Different considerations may apply in non-bribery cases and in bribery cases in respect of which the US authorities may have an interest in addition to the Scottish and UK authorities. In such cases, a Deferred Prosecution Agreement with the Serious Fraud Office (and potentially also the US authorities) may be the best means of avoiding prosecution and/or reaching a more "global" resolution.

### 4 The Investigation Process

### 4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

A unique challenge is the scope of Scotland's reporting duties under the Criminal Justice and Licensing (Scotland) Act 2010. Businesses need to be careful that they do not inadvertently trigger a reporting duty by obtaining information in non-privileged circumstances that gives rise to a suspicion that criminal conduct has occurred because that could lead to relevant individuals and the business needing to report matters to Police Scotland.

### 4.2 What steps should typically be included in an investigation plan?

An investigation plan needs to set out the way in which a lawful and proportionate investigation will be conducted, taking into consideration data protection, employment, corporate, and criminal laws. The plan should set out the basis for considering an investigation to be justified and the proposed steps to be taken to collate and review documents/electronically held data and to conduct interviews. The plan should cross-refer to employment contracts, employee handbooks and corporate policies to evidence data protection consents and employee awareness that investigations may be conducted.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

If self-reporting is a potential outcome of the investigation, the investigation should usually be by lawyers with assistance from forensic consultants. Under the Scottish Prosecutor's self-reporting guidance, the investigation must be conducted by external lawyers and forensic consultants. It is important that the investigation is conducted by professionals who are skilled in the conduct of internal investigations and who have a working knowledge of Scottish and UK reporting duties, the law of privilege, data protection laws and Scottish and UK criminal law.

# 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Scots law recognises confidentiality *post litem motam* (equivalent to litigation privilege) and legal advice privilege.

Litigation privilege protects confidential communications and documents produced for the dominant purpose of actual or contemplated litigation. At the outset of an internal investigation, the dominant purpose of the investigation may not be litigation and therefore reliance on litigation privilege alone can be a risky approach.

Legal advice privilege protects confidential communications between client and lawyer for the purpose of giving legal advice. The privilege extends to the lawyer's own notes and work papers which relate to the giving of legal advice, but there is doubt over whether the privilege would extend to notes of witness interviews. The safest option in terms of maximising the privilege protection over investigations and reports is for the investigation to be conducted by external lawyers and for the investigation findings to be communicated by way of legal advice.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

The work of non-lawyers engaged by outside counsel will be confidential but not privileged unless litigation privilege has been engaged. This is an important consideration in deciding whether and when to engage third party consultants.

### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Yes, except in relation to competition investigations by the European Commission in respect of which in-house counsel privilege is not recognised. There are also practical considerations that mean the privileged status of an in-house lawyer's work may be weaker than external counsel. For example, if reliance is to be placed on litigation privilege, having engaged a specialised external litigator may help bolster the case for the dominant purpose of the work being the preparation of litigation rather than purely fact-finding.

### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Where a claim of privilege is challenged, the courts require satisfaction that the document was either a communication between a lawyer and a client, or that it was created for the purpose of litigation or potential litigation. It is therefore important that the parameters and limitations of privilege are understood and that the framework

for maintaining privilege is set up properly. To maximise privilege protection, the following steps should be considered:

- Involve lawyers (in-house or external) from the outset

   the investigation should either be conducted by a lawyer
  (usually a solicitor admitted to practice in Scotland) or, if that
  is impractical, the investigation should be at the request of a
  lawyer.
- Seek to set up litigation privilege litigation privilege is set up by obtaining legal advice that the incident or matter is likely to result in litigation (civil or criminal) and that an investigation should be conducted for the purpose of preparing for the contemplated litigation. An email or communication to this effect should be issued at the outset of the investigation.
- Identify the client the persons who embody the "client" (the company or business organisation) for the purpose of the legal advice in question should ideally be identified in an email between a director or authorised person and the company's lawyers before the investigation commences. The email should set out who is authorised to receive the legal advice from the lawyer.
- Marking of communications and documents all communications and documents regarding the investigation should be marked "Privileged & Confidential".
- 5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Not as a matter of course, but confidentiality undertakings may be agreed to. The Scottish Prosecutor will not generally agree to keep a report confidential from other law enforcement bodies. The report may also need to be disclosed to an individual who is charged with an offence if the investigation arose from the internal investigation. Steps can be taken to reduce this risk by conducting a privileged investigation and providing the report to the Scottish Prosecutor on the basis of a limited waiver of privilege.

### 6 Data Collection and Data Privacy Issues

## 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

UK-wide laws including the Data Protection Act 1998, Computer Misuse Act 1990, and the Regulation of Investigatory Powers Act 2000 apply in Scotland. In addition, the Regulation of Investigatory Powers (Scotland) Act 2000 applies in relation to surveillance.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

There is no legal requirement to issue a document preservation notice but they are becoming increasingly common as a means of evidencing that steps were taken to preserve documents and electronic data. Such notices may be issued to the IT department, directors and employees in relevant business units. Care is needed to ensure that a document preservation notice does not effectively alert

a suspect to the existence of the investigation prior to steps being taken to secure electronic and hard-copy documents. In addition, document preservation notices may not be used where doing so would serve to heighten employee anxiety about the proportionality of an investigation if alternative methods can be taken to secure documents and data.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Data protection and local employment laws are major considerations. Many EU countries have data protection and employment laws that go beyond what is strictly required by EU regulations. Care is also needed to comply with laws relating to the use of computers as it may be a criminal offence to access another entity's computer or server without the entity's permission. Consideration needs to be given to whether or not it is advisable to bring documents into the UK because doing so may increase the ease with which they can be recovered by law enforcement.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

Scots law of evidence requires original documents to be collated where possible (this is a significant difference to the position in England). For use in a criminal trial, a person needs to certify a document as an original or a true copy of an original, and as a business document. For electronic evidence, it is important to obtain the originating email where possible and to have a person give a statement concerning the location of the email and the method by which it was collated.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

In most cases, forensic technology consultants will be engaged to secure and forensically copy electronically held data. Where original documents or equipment are secured, the documents/ equipment should also be secured in a forensically sound manner which necessitates securing documents and equipment in evidence bags or envelopes and recording where, when and by whom the document/equipment was secured and removed.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

The use of predictive coding techniques and other search parameters such as keywords and data ranges are increasingly common. Best practice entails utilising the services of forensic technology consultants and electronic review platforms. A data protection impact assessment should always be completed to set out the proposed search parameters and the steps that will be taken to ensure the review is proportionate to the issue at hand and conducted securely. External lawyers and forensic consultants need to ensure they get the consent of the data controller (usually their client) to the proposed searches.

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### 7 Witness Interviews

# 7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There are no specific statutory laws or regulations governing the conduct of witness interviews.

There are common law principles of fairness that may lead to evidence being excluded if the evidence was obtained unfairly. Issues of fairness in relation to interviews of employees in internal investigations who were subsequently charged with criminal offences were recently considered in *Fitzpatrick v Harvie* [2014] *HCJAC 69*. In essence, where an objective is for the evidence obtained in the course of an internal investigation to be admissible in later proceedings, all interviewees should be given a clear indication of the investigation's nature, and any suspects should be told that their answers may be used in subsequent proceedings and afforded the opportunity to take legal assistance.

The ACAS Code of Practice on Disciplinary and Grievance Procedures also needs to be taken into consideration from an employment law perspective.

# 7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Yes, employees are subject to a duty of fidelity which requires employees to co-operate with an employer's reasonable and justified inquiries. An employee has a duty to provide reasonable co-operation to his employer whilst still employed. Ultimately, it may be a disciplinary offence for an employee to decline outright to be interviewed, though the reasons for the refusal will have to be taken into account. Where an employee declines to attend an interview or refuses to answer questions at an interview, perhaps because of a genuine concern that he or she may give incriminating answers that may be used in subsequent criminal proceedings, the employee should be informed in writing that, unless he or she cooperates, disciplinary action will be a consequence.

### 7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

There is no legal requirement to provide legal representation to witnesses prior to an internal interview. Where an employee or former employee is suspected of criminal wrong-doing, as a matter of fairness, the employer/former employer may warn the employee/former employee of their suspicions and recommend that the employee/former employee obtain legal representation. The legal representation may be covered by Directors & Officers insurance or the entity may decide to meet reasonable legal fees if doing so is likely to aid co-operation.

## 7.4 What are best practices for conducting witness interviews in your jurisdiction?

Those with background knowledge should be interviewed before interviewing any persons who may be implicated. It is usual to interview more junior employees first and to work up the management hierarchy. To guard against collusion, parallel interviews may be conducted. No interviewee should get to see the interview notes of another person who has been interviewed.

It is important to determine whether the interviewee is a witness or a suspect. An interviewee who is a suspect should be told the nature of the suspicions and be afforded the opportunity to take legal advice. All interviewees should be informed of the nature of the investigation, that the exercise is confidential and that they should not discuss their evidence or the questions with anyone else.

Prior to conducting any interview, consideration should be given to the means of recording the interview and whether or not signed witness statements will be requested. Interviews should generally not be audio or video recorded unless the Scottish Prosecutor or other law enforcement body has requested audio/video recording. Obtaining signed witness statements is useful for future disciplinary purposes but they can slow down the investigation and signed statements are less likely to be considered to be privileged than a lawyer's note of interview.

The interview should generally be conducted by a lawyer with another lawyer or trainee lawyer or paralegal present to take a note of the interview.

## 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

The main cultural factor is that, under Scots criminal law, there is a general right of silence and, unlike in England & Wales, adverse inference cannot be drawn from silence at an interview in the course of criminal proceedings. Accordingly, many employees and for that matter lawyers may wrongly consider that they have a right of silence in the course of an internal investigation.

### 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Employees are protected from being subjected to detriment because they have made a protected disclosure. Detriment covers actions or deliberate inactions, such as failure to investigate complaints, bullying and harassment, and exposing the whistleblower. A whistleblower does not have a right to confidentiality but there are circumstances in which revealing their identity would result in a detriment. It is therefore important to ensure that confidentiality is preserved as much as possible. If senior individuals have to be informed of the identity of the individual, the obligation not to cause or allow any detriment should be made clear. The individual should be given reassurance that they did the right thing by coming forward and should be offered support if they have any concerns.

### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Giving employees "immunity" or "amnesty" during an internal investigation is not a common practice. Given that a company cannot guarantee immunity from a criminal prosecution, there would be a need to ensure that any promises of immunity were not themselves misleading.

### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Employees can request to review and revise statements but there is no obligation to agree to the request. From an employment law perspective, it is common practice to accede to such a request, but in investigations into criminal or regulatory matters issues relating to privilege and speed of investigation may weigh against giving employees the opportunity to consider and revise statements.

### 7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

There is no right to legal representation during a witness interview during an internal investigation. Allowing a witness to have a lawyer present may be agreed to as a means of expediting co-operation or, with respect to suspected wrong-doers, as a matter of fairness.

The police or prosecutors should not normally attend internal interviews. Having the police or prosecutor in attendance would undermine any claim to privilege over the interview and contravene the ACAS Guide to Discipline and Grievances at Work.

### 8 Investigation Report

# 8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Under the Scottish Prosecutor's self-reporting guidance, a written investigation report must be prepared. PowerPoint-type presentations that are a common US approach and are increasingly seen in England and Wales are insufficient for this purpose. Outside of self-reporting, a written report is not necessary.

The main pro of a written report is that it evidences the existence of the investigation, the steps taken and the findings. That may be important for the purpose of explaining why an entity did not self-

report and subsequently to discharge an "adequate procedures" or similar due diligence-type defence.

The main con of producing a written report is that a third party may seek to recover the report and it may be admissible evidence against the entity, particularly if its privileged status is challenged. There is also a need to ensure that personal data is expunged after a reasonable period. Where the report concludes that there was no wrong-doing, European Commission guidance recommends deleting or expunging personal data within two months of the investigation being concluded.

### 8.2 How should the investigation report be structured and what topics should it address?

Before documenting the investigation's factual findings, consideration should be given to potential future disclosure to a third party and the application of legal privilege.

In internal investigations, it is appropriate to rely on one source of evidence and third-hand evidence, but the findings should be based on evidence rather than speculation. The source of evidence should be accurately recorded. If there are any concerns about the credibility or motives of an interviewee, they should be noted.

Unless prepared by a lawyer, the factual report should not refer to any criminal laws, statutes and expressions of views on causation, criminality or negligence.

The report should be marked **Privileged & Confidential** if prepared by a lawyer or prepared for the purposes of contemplated legal proceedings. Alternatively, it should be marked **Private & Confidential**.

The report should usually follow the following structure:

- Introduction a summary of what triggered the investigation.
- Immediate Steps Taken such as stopping payments, securing emails, suspending individuals, etc.
- Purpose and Scope of Investigation why an investigation was conducted and a summary of the investigative steps (with the detail given in an Appendix).
- Factual Findings the facts should usually be set out in chronological order. Any documents and email communications should be listed chronologically. The explanations of those interviewed should be provided.



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Pinsent Masons LLP is an international law firm with offices in England, Scotland, Northern Ireland, France, Germany, Turkey, China, Singapore, the United Arab Emirates, Qatar, South Africa, the Republic of Ireland and Spain. Pinsent Masons was recognised by *Legal Week* as the UK Law Firm of the Year in 2016.

Pinsent Masons' Corporate Crime and Investigations team is ranked in the top tier for Scotland by *The Legal 500* and the top band by *Chambers & Partners*. The team specialises in corporate financial crime, regulatory crime and internal investigations. In Scotland, the team is recognised for its work in advising companies on self-reporting to the Scottish Prosecutor and for negotiating out-of-court settlements with the public prosecutor.

# Singapore

### Allen & Gledhill LLP



Jason Chan

# 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

There are no specific statutory or regulatory obligations that apply to the conduct of internal investigations. An entity would often need to consider issues of privilege: see question 5.1 below.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

This would be determined on the facts in each case. For example, the entity should assess whether its own internal protocols require an internal investigation to be initiated, and if so, whether any specific procedures have to be complied with when conducting an internal investigation. One significant factor would be whether the process and product of the internal investigation would be protected by privilege. This issue is not entirely settled under Singapore law: see question 5.1 below.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

This would be determined on the facts in each case. Singapore law does not impose any statutory or regulatory requirements on the assessment of a whistleblower's complaint. Singapore does not generally have any statutory protection for whistleblowers. However, in the specific context of a complaint dealing with corruption, the Prevention of Corruption Act (Chapter 241) provides that no complaints as to a corruption offence shall be admitted in evidence in any civil or criminal proceedings, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery. It is possible that this statutory protection extends to complaints that are made during an internal investigation.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

If outside counsel is engaged to conduct an internal investigation, it is prudent to set out in outside counsel's Terms of Reference the persons that are authorised to give instructions to and receive advice from. This would usually be determined by the entity's management and/or Board of Directors. It is important to exclude any persons who have actual or potential conflicts of interest when deciding which persons are authorised to give instructions and receive advice from outside counsel.

# 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

The law enforcement authorities may consider an entity's willingness to voluntarily disclose the results of its internal investigation when deciding whether to commence proceedings or to impose penalties. However, this is entirely at the law enforcement authorities' discretion. In this context, other facts that law enforcement authorities may consider would include whether the entity had extended genuine cooperation during the authorities' investigations, and the extent to which the entity may have benefited from the alleged misconduct.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

Singapore law does not impose any statutory or regulatory requirements on the disclosure of an internal investigation to

enforcement authorities. This is distinct from any general or specific disclosure obligations that may be imposed on the entity, such as obligations to file suspicious transaction reports and/or disclosure obligations for listed entities.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

It is common for the results of an internal investigation to be consolidated in the form of an investigation report. If the internal investigation was conducted by outside counsel with a view to providing legal advice to the entity on litigation (upcoming or ongoing), potential risks and/or other issues, the legal advice is often set out in the investigation report.

# 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

An entity that is aware that it is the subject or target of a government investigation is not required to liaise with local authorities before starting with an internal investigation. If the entity chooses to do so, it must be mindful that the investigation authorities are likely to seek disclosure or production of the results and findings of the internal investigation.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

Law enforcement entities in Singapore generally do not maintain oversight of an entity's internal investigations. On occasion, the law enforcement entities may suggest or require that the entity address specific issues during the course of the internal investigation.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

No, the entity does not have any ability to define or limit the scope of a government investigation.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Yes, law enforcement authorities in Singapore commonly coordinate with authorities in other jurisdictions. Entities that face investigations in multiple jurisdictions must be mindful that Singapore's enforcement authorities commonly share information and coordinate their investigations with their foreign counterparts.

As such, entities that choose to voluntarily provide information to the Singapore enforcement authorities (such as an investigation report or statements taken during the internal investigation) must be prepared that such information may be shared by the Singapore authorities with their foreign counterparts.

### 4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

See question 5.1 below.

4.2 What steps should typically be included in an investigation plan?

This would be determined on the facts in each case. Some common steps would include data collection, evidence preservation, document review, compliance with internal protocols relating to investigations, coordination with external service providers, communication with law enforcement agencies, witness interviews and statement-taking.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

This would be determined on the facts in each case.

# 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Singapore law recognises legal professional privilege, including both legal advice privilege and litigation privilege. In addition, representations that are made in plea bargaining are also privileged and inadmissible in evidence. However, the State has taken the position that it is uncertain whether the law enforcement authorities' statutory powers of search and seizure or to order production provide for the protection of such privilege during investigations. This issue remains presently unresolved under Singapore law. All documents that may be subject to privilege should be clearly marked, for ease of identification and extraction if necessary.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Such interactions may be confidential. However, such interactions would be privileged only if they fall within the scope of legal professional privilege. See question 5.1 above.

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5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

Yes, legal privileges apply equally.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

See question 5.1 above.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

The enforcement agencies will usually keep the results of an internal investigation confidential, if voluntarily provided by the entity. However, they are not obliged to do so. Representations that are made in plea bargaining are privileged and inadmissible in evidence.

### 6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

Information obtained during the course of internal investigations would be subject to the provisions of the Personal Data Protection Act 2012.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

It is common practice to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation. This would include hard copy documents, and soft copy data such as electronic correspondence and documents. The issuance of a document preservation notice in relation to an internal investigation is not a legal requirement under Singapore law.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

It is important to consider data privacy and bank secrecy laws in other jurisdictions where documents may be located. These may impact whether the documents or their contents can be transferred between countries. It is also important to consider whether dealing with documents in other jurisdictions will have any impact on ongoing or potential investigations by local law enforcement agencies in those jurisdictions.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

Email correspondence is one of the most important types of documentary evidence in internal investigations. In recent years, correspondence on instant messaging platforms has become an increasingly important type of documentary evidence. Where the internal investigation involves allegations of false or manipulated documentation, it is important to obtain soft copies of the relevant documents in order to review the files' metadata information and properties.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

It is increasingly common to rely on automated document review software to catalogue and perform an initial retrieval of documents, after identifying the relevant custodians and key words. Given that an internal investigation will often need to review an extensive amount of email and other correspondence in a limited amount of time, such software is often seen as a cost-effective way to streamline and deploy resources during the investigation. It is also common for computer forensic experts to be engaged to extract information that may have been deleted from data storage devices, and to identify whether information has been transferred and/or modified.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

See question 6.5 above. The Singapore Court provides parties with an opt-in framework for requests and applications for the giving of discovery and inspection of electronically stored documents. A request for discovery of an electronically stored document or class of documents may specify a search term of phrase to be used in a reasonable search for such documents. The scope of such a search would include specifying or describing physical or logical storage locations, media or devices, and specifying the period during which the requested electronically stored documents were created, received or modified.

### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

There are no specific statutory or regulatory obligations that apply to the interviews of employees, former employees or third parties. If outside counsel is aware that a particular person has been called or issued a subpoena to appear in Court as a witness for the Prosecution, counsel will be required to inform the Prosecutor of his intention to interview the witness

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Singapore law does not impose any specific obligation on an employee to cooperate with their employer's internal investigation. Depending on the entity's employment terms, it may amount to a disciplinary breach or misconduct for an employee to decline to participate in a witness interview.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

No, an entity is not required to provide legal representation prior to interviews.

7.4 What are best practices for conducting witness interviews in your jurisdiction?

See question 7.1 above.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

This would be determined on the facts in each case.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

This would be determined on the facts in each case.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

This would be determined on the facts in each case. It should be emphasised that an entity can grant "immunity" or "amnesty"

only to the extent of refraining to take disciplinary action against its employees, or to not make any complaint to the relevant law enforcement authorities. However, it is not possible for an entity to grant "immunity" or "amnesty" from investigation or prosecution by law enforcement authorities. It should also be emphasised that the law enforcement authorities can proceed to investigate and prosecute an employee, even if the entity does not make any formal complaint against the said employee.

7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

There is no legal obligation to allow employees to review or revise statements that they have made. However, Singapore law does not prohibit such review or revision.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

No, this is not required in Singapore.

### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Yes, it is common practice for a written investigation report to be prepared at the end of an internal investigation.

8.2 How should the investigation report be structured and what topics should it address?

This would be determined on the facts in each case. In addition, see question 4.2 above.



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# Allen&Gledhill

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# South Africa

Marelise van der Westhuizen





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# 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Entities should consider a number of statutes when deciding to conduct an internal investigation, including the:

- Prevention of Organised Crime Act, 1998 (POCA);
- Protected Disclosures Act, 2000 (PDA);
- Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA); and
- Financial Intelligence Centre Act, 2001 (FICA).

# Consequences of non-compliance with statutory or regulatory regulations

There are a variety of consequences that may follow, depending on the specific statutory or regulatory obligation that has been contravened. Significantly, institutions face reputational risks.

The regulatory consequences of a failure to conduct an internal investigation and to report on any irregularities range from prison sentences to fines, and are stipulated per offence in the different statutes

For example, under the Competition Act, fraudulent conduct, most notably price fixing and collusive trading, is prohibited. Administrative (civil) penalties under the Competition Act cannot exceed 10% of the corporation's annual turnover during the preceding financial year.

Furthermore, chapter 5 of the Prevention and Combating of Corrupt Activities Act (PRECCA) sets out the penalties for committing any of the statutory corruption offences under PRECCA. For a majority of the offences, including the general offence of corruption, on conviction, the sentences are as follows:

- a prison sentence (the maximum sentence being life imprisonment);
- a fine of unlimited value; and
- the endorsement of a convicted person or entity on the South Africa Register for Tender Defaulters.

In addition to any fine, a court may also impose a further fine equal to five times the value of the gratification involved in the offence.

An additional potential consequence of committing an offence under PRECCA is that the relevant Director of Public Prosecutions may direct an investigation into any property (including cash or funds) in the possession, custody or control of any person, if that property is suspected of:

- having been used in the commission of an offence;
- having facilitated the commission of an offence; or
- being the proceeds of that offence.

POCA regulates the temporary restraint and permanent confiscation of assets. Generally, forfeited assets are used to compensate victims of the crime involved, or are otherwise forfeited to the state.

A significant benefit of conducting an internal investigation into money laundering offences and terrorist financing offences is the ability it affords a company to file a suspicious transaction report with the Financial Intelligence Centre and the concomitant defence it affords a company (and its employees) under section 7A of POCA to some of the predicate money laundering offences.

### 1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Internal investigations often start with an allegation of wrongdoing, which may come from a whistleblower, shareholder, director, the media, auditors, regulators or someone else. At the outset, an entity must decide whether the allegation warrants investigation and, if so, who should conduct the investigation.

In South Africa, there is no statutory requirement for a company to conduct an internal investigation even when there is a suspicion of wrongdoing. This means that the decision to commence an internal investigation is entirely at the discretion of the entity. In reality, however, many entities choose to conduct internal investigations when they discover potential breaches so that they can assess their exposure ahead of formal investigations by the regulatory bodies, and ensure that directors and senior management discharge their fiduciary and professional duties to the companies.

Investigations can be disruptive and expensive, and resources may be limited. While the need to investigate in certain instances is obvious, in other instances, determining whether to conduct an investigation, and how that investigation should be conducted, are judgment calls. Some factors to consider in making these determinations include:

- the seriousness of the allegations, including whether the alleged misconduct violates criminal law or company policy;
- whether the alleged misconduct involves senior management or board members:

- the company's potential reputational and other exposure if the allegations are true;
- the possibility for additional, future violations, or the possibility that the violations are continuing;
- whether the alleged misconduct implicates a potential human rights risk to employees, the entity or the general public;
- whether the alleged misconduct implicates a potential health and safety risk to employees or others;
- whether the alleged misconduct calls into question any prior internal control or financial certifications provided by executive officers and whether the alleged misconduct prevents such officers from truthfully executing future certifications;
- the likely response of the company's auditors to the alleged misconduct;
- whether there is a parallel government investigation or an investigation by regulators or whether such an investigation is likely to occur;
- whether an entity's audit committee charter, code of conduct, or other policies mandate or encourage an investigation whether the issue must be reported to regulatory officials;
- whether the entity is a multinational entity and what jurisdictions it operates in;
- the extent to which the company may receive credit from enforcement officials for conducting its own investigation; and
- the possible impact on any pending or potential civil litigation.

Consideration should also be given to whether the company has a history of similar incidents, since such history raises the likelihood of regulatory intervention. If a complaint cannot be objectively dismissed as frivolous, the following scenarios often warrant some type of formal internal investigation:

- a subpoena from a government agency or regulatory authority;
- a shareholder demand letter;
- issues raised by an external auditor; or
- an internal report, such as through an ethics hotline, raising serious allegations involving senior management.
- 1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Corporates are best advised to have a whistleblower protocol and policy in place to assess every whistleblower complaint. This assessment is ideally done by a sub-committee of the board with appropriate representation of internal audit, legal, compliance, management and human resources.

The credibility of a whistleblower's complaint should be assessed having regard, in particular, to the following:

- the background and employment history of the whistleblower;
- the whistleblower's knowledge of the operations of the corporate;
- whether the complaint was made timeously;
- the seriousness of the allegations;
- the accuracy of the allegations; and
- any motive the whistleblower might have to misrepresent or exaggerate the allegations.

The PDA covers whistleblowing in South Africa. A whistleblower may not be subject to an occupational detriment for having made "protected disclosures" as defined in the PDA. The term "occupational detriment" has been interpreted broadly by South

African courts, and it includes any internal investigation against the whistleblower. In such a case, the whistleblower is protected and the internal investigation will be categorised as an unfair labour practice and if the whistleblower is dismissed, the consequences are compensation or reinstatement.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

Outside counsel, or an attorney, is typically briefed by a particular client to conduct an internal investigation. In the circumstances where an attorney is instructed by an entity to conduct an investigation into a complaint, the attorney's responsibility is to conduct a robust and independent investigation without bias or influence so as to accurately uncover and provide the facts of an investigation, a conclusion and possible recommendation to the entity so that the entity can deal with the complaint appropriately.

In investigating a complaint, the investigator (be it an attorney or other outside counsel) should remain impartial in coming to a conclusion. All witnesses should be interviewed and the evidence assessed objectively. This would apply to witness statements received from an in-house attorney, senior executive or shareholder.

Where a member of the board of a company is implicated and conflicted it is advisable for a corporate to mandate a sub-committee of the board to instruct external counsel on the investigation, to receive feedback from external counsel and to respond to such advice.

# 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

South African law does not generally encourage self-reporting and our law does not cater for deferred prosecution agreements. It is, however, compulsory to report bribery offences and offences relating to theft, extortion, forgery or uttering a forged document involving an amount of R100,000 or more and offences relating to money laundering or terrorist financing. In terms of section 7A of POCA, a corporation and employees of a corporation may raise as a defence to certain predicate money-laundering offences the fact that a report was filed with the Financial Intelligence Centre pursuant to section 29 of FICA.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

A report in terms of FICA must be made utilising an online portal made available by the Financial Intelligence Centre. Such report

must be made as soon as possible but not later than 15 days (excluding Saturdays, Sundays and public holidays) after a person acquires reportable knowledge or forms a reportable suspicion.

PRECCA does not stipulate a time period within which a report of an act of bribery or an offence of theft, extortion, forgery or uttering a forged document must be made. It is widely accepted that such report must be filed as soon as reasonably possible.

Reports must be made in terms of section 34 of PRECCA by a person in a position of authority to the Directorate: Priority Crime Investigations, also known as the Hawks (DPCI). The report is made by completion of the required form, found at <a href="https://www.saps.gov.za/dpci/reportingguide.php">www.saps.gov.za/dpci/reportingguide.php</a>, and submitting it to the DPCI.

The section 34 report follows a standard form in which the following issues must be addressed:

- a brief description of the suspicion of or alleged offence committed;
- how the suspicion or knowledge of the alleged offence came to your attention;
- full names, identity number or date of birth and contact details of person(s) allegedly involved in the offence;
- the real or potential impact, losses or consequences of the alleged offence;
- whether the matter has been reported to any other person or authority and if so to whom and when; and
- name and contact details of possible witnesses to the alleged offence
- 2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

There are no prescriptions in South African law relating to the format of reporting on the outcome of internal investigations. It is important, however, to consider legal professional privilege over the work product of an internal investigation as the circulation of the work product to a regulator or other third parties can have the effect of waiving legal professional privilege.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

If a regulator or government is investigating the same conduct which is the subject of an internal investigation, the entity may want to liaise with the authorities to facilitate some level of coordination. Clear communication with government or a regulator may demonstrate the entity's willingness to cooperate and transparency. There is, however, no specific requirement for an entity to liaise with local authorities before starting an internal investigation.

FICA prescribes in its section 32 that the Financial Intelligence Centre or an investigating authority may request further information concerning a report filed in terms of section 29 of FICA or the grounds for such report. It is an offence in terms of FICA not to provide such additional information.

Persons and entities should take care not to hinder any law enforcement agency in the conduct of an investigation. Doing so constitutes a common law offence.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations?

What level of involvement in an entity's internal investigation do they prefer?

Law enforcement agencies do not generally maintain oversight over internal investigations provided the internal investigation does not interfere with the conduct of any external investigation by a law enforcement agency or regulator.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Refer to question 3.1 above.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Any investigation in a foreign jurisdiction would need to be conducted through, and in cooperation with, the relevant authority in the foreign jurisdiction. International cooperation is increasingly becoming necessary and more prevalent across all forms of corporate investigations. South African law specifically permits international cooperation.

The practical steps entities can take to manage a multi-jurisdictional investigation are the following:

- Set up an investigation team, consisting of internal and external advisers, and a steering committee.
- Obtain local law advice on issues of data protection, privilege, witness interviewing and employment law.
- Establish multiple but linked workstreams that feed into the main investigation. Decide whether to split the workstreams by jurisdiction, regulator or issue.
- Preserve all relevant data. Data may have to be collected, processed and presented in different ways for different regulators in different jurisdictions.
- Strategically manage data protection risk. Ensure that a robust data protection strategy is in place before any investigation occurs. This will assist entities to navigate the relevant jurisdictions' data protection laws.
- Consider the variation of legal privilege between jurisdictions.
   Agree with external lawyers and/or with regulators (where appropriate) a single set of privilege principles that will be applied.
- Plan engagement with regulators initially and throughout the investigation.
- Be clear on internal processes for gathering and approving the release of data.
- Keep the accountable executive and steering committee fully informed throughout the investigation. This equips them to manage internal and external concerns.
- Ask to see early drafts of information requests or subpoenas for comment before issue.
- Consider potential remediation outcomes. This will assist in setting out the scope and process of the investigation.

### 4 The Investigation Process

### 4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

Entities are faced with the following challenges when conducting an investigation in South Africa:

- Cultural differences: South Africa is known for its ethnic and cultural diversity. Methods and practices which are acceptable in one culture may not be so in another and approaches to body language and eye contact can differ.
- Language differences: with 11 official languages, simple translations may not always be adequate and there are nuances to the way in which languages are spoken which will often only be apparent to a local, first language speaker.
- Employee rights: collective agreements may regulate the way in which investigations are conducted and such agreements may be legally binding as between the trade union and employer.
- Legal privilege: legal privilege is a vital consideration in conducting any investigation. Businesses should assess the level of privilege which is afforded to them in the jurisdictions in which an investigation will be conducted and ensure that the documentation generated in the course of an investigation is protected from disclosure as far as possible.
- Current political climate: the current political climate in South Africa is one of political and policy uncertainty together with perceptions of widespread corruption. As a result, entities can face considerable public and political scrutiny when subject to allegations of corruption or mismanagement. Careful marketing and public relations are therefore required when conducting investigations.

Entities operating in South Africa ought to be aware of the unique ways in which some of these challenges may present themselves and ensure that their internal policies and procedures are adequate.

## 4.2 What steps should typically be included in an investigation plan?

The investigation plan is an internal document that outlines the goals and proposed investigative steps. An investigation plan should set out the following:

- the initial scope of the investigation;
- a synopsis of the known facts;
- the issue(s) under investigation;
- the jurisdictions and laws implicated;
- the investigative team, including, if known, the core team and their respective jurisdictions;
- any investigative steps taken (document collection, initial interviews, etc.);
- proposed investigative steps going forward; and
- the reporting lines to the entity, including identification of the decision-makers within the entity and to whom the investigative team will report.

The scope of the proposed investigative steps will vary on a case-bycase basis, but generally includes, at a minimum, review of documents and formal interviews of key individuals. In addition, it should be considered whether it is necessary to engage forensic accountants and/or local counsel as required. It is important that the investigation plan be drafted using flexible language to allow the team to adapt or otherwise react to new facts and developments as the investigation progresses. If requested, the investigation plan can be shared with those within the entity responsible for engaging and overseeing the investigation (i.e. General Counsel, Compliance Director, and/or Board of Directors). Circulation of the document should be kept to a minimum to ensure preservation of privilege.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

The use of outside counsel or specialist third parties such as forensic consultants will depend on the nature and complexity of the investigation to be conducted. For example, it may be useful to elicit the use of a forensic consultant in an investigation into allegations of fraud or corrupt activities. It is important in the South African context to recognise the limitations of legal-professional privilege to ensure, to the greatest extent possible, that the product of the investigation is protected from disclosure.

# 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Attorney-client privilege is recognised in South Africa. There is a common law right to legal privilege and any discussions with an attorney for purposes of obtaining legal advice or in the contemplation of litigation are considered legally privileged and cannot be admitted in legal proceedings, unless such privilege is waived by the client. The case of *Thint (Pty) Ltd v National Director of Public Prosecutions and others; Zuma v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC)* set out the four requirements for legal privilege to apply as follows:

- The legal practitioner must have acted in his/her professional capacity.
- The client must have consulted the legal practitioner in confidence. This applies to all communications, whether written or oral.
- The communication must have been made for the purpose of obtaining or giving legal advice.
- The advice should not have been sought for an unlawful purpose.

There are two forms of legal privilege:

- The first is legal advice privilege, which applies to communications that are confidential, which pass between a client and his or her legal adviser or lawyer and which have come into existence for the purpose of giving or receiving legal advice.
- 2. The second is litigation privilege, which applies to communications that are confidential, the purpose of which is for use in litigation, either pending or contemplated. (There must exist more than a mere possibility of litigation when considering whether litigation was contemplated or not.)

Privilege does not apply if the client obtains legal advice to further a criminal end. Legal-professional privilege is the right of a client and can only be waived by the client.

Some best practices for preserving legal-professional privilege is to ensure that internal communications relating to advice obtained from external counsel is kept to a minimum and that investigation findings or advice is not provided to any third parties, which could result in the waiving of legal-professional privilege.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Legal privilege will only apply to certain interactions between the client and legal counsel (as more fully set out above) and privilege will not attach to interactions between the client and third parties. Documents recording interactions between a client and third parties may be considered confidential (in the protection of trade secrets and business practices, for example) but such documents are not necessarily protected from disclosure.

### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

South African courts have held that legal privilege generally applies or extends to salaried legal advisors in the employ of government and in the employ of private bodies who advise the entity employing them in their capacity as internal legal advisers.

The court in *Mohamed v President of South Africa and Others 2001 2 SA 1145 (C)* held that legal professional privilege can be claimed in respect of communications with internal legal advisers where the communications amount to the equivalent of an independent external legal adviser's confidential advice.

The courts will not, however, extend legal professional to persons who do not have the qualifications for admission as an attorney or advocate. The communications of a chartered accountant, for example, would not enjoy privilege where he/she is providing tax advice which could also be regarded as legal advice.

### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

In assessing whether a document attracts privilege or not, our courts refer to the "privilege test". Generally, the rule is that if a document is prepared with the overall purpose of giving or receiving legal advice, the document will attract privilege. The privilege belongs to the entity, and only the entity can waive the privilege and disclose privileged information to third parties.

It is prudent to clearly mark all privileged documents as "confidential and legally privileged" for ease of identification and retention by a client when documents are disclosed to a law enforcement agency or regulator, although marking a document as such does not render a document privileged where privilege is absent.

Entities should guard against the disclosure by the entity of a legally privileged document to a third party, as doing so might be construed as a waiver of privilege.

It is advisable as a starting point when carrying out an internal investigation to establish a communications protocol. Given that there are strict rules as to when privilege will apply, careful consideration will need to be given as to how the investigation is

conducted, and who communicates what to whom, in what form and when, in order to maintain privilege as best as possible.

When establishing a communications protocol, it is important to bear in mind which privilege rules are likely to apply to the investigation, and which jurisdictions' regulators and/or prosecutors may request copies of the investigations material in due course. This will inform the structure of the communications protocol, as communications which may be privileged in one jurisdiction may not be in another.

### 5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Should the enforcement agency decide to take action against the entity, they are under no obligation to keep the results of an internal investigation confidential and are entitled to use such results as evidence in their case.

### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The common law right to privacy, the right to privacy contained in the Bill of Rights in the Constitution and the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 apply to internal investigations in South Africa

The Protection of Personal Information (POPI) Act, 2013 was signed into law in November 2013 but a commencement date for all obligations under the Act has not yet been announced. The Information Regulator was established on 1 December 2016 and regulations were published for comment on 8 September 2017 and open for public comment until 7 November 2017.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

It is common practice in South Africa to prepare and issue document preservation notices. A document preservation notice should be sent to any and all entity employees who may have information relevant to the investigation. The notice should instruct those employees and other potential custodians to retain all internal records, including written and electronic records that are relevant to the investigation. The notice can be sent on a rolling basis as additional employees with potentially relevant information are identified. In some instances, it may be advisable to collect some data before issuing the preservation notice where there is a risk that a particular custodian may delete data before it is collected.

Data preservation notices should be issued to the individuals responsible for the IT infrastructure within an entity, for purposes of ensuring all electronic records are retained.

It is important to keep a full record of the dissemination and response to a document and data preservation notice.

### 6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

The following factors must be considered:

- Data privacy laws and employees' duty of disclosure to their employer.
- Logistical challenges of securing and collecting important documentation.
- Linguistic challenges and the possibility of documents being in multiple languages.

### 6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

If an entity has become the target or subject of an investigation, a diligent search should be conducted to locate and secure documents that relate to the transaction or incident. Such documents include:

- policies, procedures, and manuals;
- hard copy data;
- emails and other electronic data, including archived emails;
- personnel files;
- minutes from Board of Directors' meetings and related Board materials; and
- privileged documents that are not subject to production.

If the government has commenced its own investigation, it may request that the company produce documents on certain topics. Other relevant information can include items such as telephone records, text messages, instant messages, shared network files, backup data, internet search histories, databases, voicemails, and other data that may only be accessible through a forensic examination of a device.

# 6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Identifying and collecting the appropriate documents for review is key to maintaining the integrity of the review and ensuring the robustness of the process. The following resources and steps are considered when preparing for document collection in an investigation.

### Who will collect the documents?

It should be considered whether document collection will be performed by the entity's in-house IT department or third-party forensic data collection experts. The use of third-party experts will expedite the collection, preserve the integrity of the documents, and safeguard the independent, unbiased nature of the investigation. The use of third-party experts does, however, come with additional cost implications.

### What types of documents should be collected?

- Hard copy documents may include handwritten notes, compliance and operating documents, bills of lading, invoices, working papers, and executed contracts.
- Electronic documents may be obtained from a broad range of sources, including the entity's server(s), employees' laptops, flash drives, instant messaging, etc.
- Electronic devices (Blackberries, mobile phones and laptops)
   mobile devices often contain locally saved data that cannot be captured from the entity's server. Accordingly, entity-owned physical devices used by relevant custodians should be imaged to ensure the preservation of such data.

#### Where to store the documents?

As an initial matter, collected documents should be stored in the jurisdiction where it is found. Although it is often most efficient to review documents outside of its originating jurisdiction, all relevant data privacy issues should be considered and resolved before the data is moved.

It is commonplace in South Africa to make use of document management systems to store and review data.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

There are no prohibitions against predictive coding techniques. Document management systems and data analytics assist significantly in the analysis of a large volume of data. It is imperative to keep an accurate record of all predictive coding and search terms applied to data along with the results of such application.

### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Employees are obliged to obey all lawful and reasonable instructions from the employer and therefore would be obliged to assist in acting as a witness for the employer. A refusal, without a valid justification, may amount to insubordination and a failure to obey a reasonable order.

Previous employees and third parties do not owe a similar duty to the employer in respect of an internal investigation and would have to voluntarily act as a witness. In such an instance, arrangements would have to be made with the witness' current employer to take time off to attend an interview or hearing.

Witness interviews in investigations are an informal process and there is no legal obligation for an entity to consult investigative authorities before initiating witness interviews.

It is prudent to caution employees at the start of a witness interview that external counsel act for their employer and not on the employee's behalf, that the witness is entitled to have their own legal counsel present and that the fact of the interview and the content of the interview is protected by legal professional privilege which may only be waived by the employer.

### 7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Yes, all employees are obliged to assist the employer in the effective running of the business. To the extent that an investigation is a tool toward such efficiencies, an employee has a duty to comply with such a lawful instruction to act as witness. Failure to do so may result in the employee being charged with insubordination and refusing to obey a lawful instruction.

### 7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

There is no obligation to provide legal representation to a witness prior to an interview.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

- The first step is to identify a list of witnesses that you intend on interviewing and to determine whether they may be a "hostile witness", such as someone who is forced, threatened or coerced into giving evidence, as such a witness will prove far more detrimental to the investigation than helpful.
- 2. Give the witness the requisite Upjohn warning.
- 3. Advise the witness that they may be called to an internal investigation hearing.
- 4. Identify yourself and others who are part of the interview.
- 5. State the reason for the interview.
- 6. Explain your authority to conduct the interview.
- 7. Explain why they are selected, in particular, to be interviewed.
- Remind the interviewee of their duty to provide complete and accurate facts.
- Request their cooperation and inform them that they will be protected against any retaliation.
- 10. Request them to keep the interview content confidential.
- 11. Offer no opinions relating to the investigation.
- 12. Take detailed notes throughout the interview.
- Restate important questions to ensure that you receive accurate answers.
- Ask for documentary evidence to support their statements or claims
- 15. Request that they contact you if they recall anything at a later stage

## 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

South Africa is known for its ethnic and cultural diversity. Methods and practices which are acceptable in one culture may not be so in another and approaches to body language and eye contact can differ. Additionally, as South Africa has 11 official languages, simple translations may not always be adequate and interviewers should be cognisant of the fact that a competent translator may need to be employed to ensure procedural fairness and the accuracy of the interview.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Refer to question 1.3 above.

### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Item 3(6) of Schedule 8 of the LRA requires that employers apply the penalty of dismissal consistently with the way in which it has been applied to employees in the past for the same or similar transgressions. The courts have held that an exception will arise where the employer is able to differentiate between employees who committed similar transgressions on the basis of, *inter alia*, differences in personal circumstances, the severity of the misconduct and other material factors.

While there is no concept of granting "amnesty" or "immunity" to an employee in respect of South African Labour Law, one could argue for a lesser disciplinary sanction short of dismissal in circumstances where an employee, involved in similar or the same form of misconduct, has admitted the misconduct and shown genuine remorse. Genuine remorse may be viewed as a mitigating factor and will be taken into account when determining an appropriate disciplinary sanction.

### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

There is nothing in labour law which requires a witness statement to be closed once it is signed. Practically, one may also not want to rely solely on the strength of a witness statement in a disciplinary investigation and/or hearing as any discrepancies in the witness' oral statement and a written statement may give rise to questions regarding the credibility and trustworthiness of the witness.

### 7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

No, there is no requirement that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations. The witness, however, does have the right to have a legal representative present should he or she wish.

### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Investigatory findings are conveyed in the form of an oral and/or written report. While an oral report best preserves privilege for the entity and reduces the chance that any report could be subpoenaed by the government, many companies will prefer a written product. In such cases, consider ways to best preserve privilege. For example, ensure that the advice is circulated only on a confidential "need to know" basis within the entity.

## 8.2 How should the investigation report be structured and what topics should it address?

An investigation report may be structured as follows:

- 1. Investigation agreement.
- Facts summarise the basic facts that prompted the investigation.
- Scope clearly identify the subject matter of the investigation, terms of reference and any limits (legal or otherwise) on the investigation.
- Investigation plan describe the recommended steps to take in order to conduct a comprehensive, independent investigation plan.
- 5. Investigative team list the team and their respective jurisdictions.
- Third party vendors list third party vendors that were engaged during the investigation.
- Investigation steps list the investigative steps that were undertaken or will be undertaken.
- 8. Analysis, findings and conclusions.
- 9. Recommendations and remediation steps.



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# NORTON ROSE FULBRIGHT

Our investigations lawyers represent corporates, financial institutions and individuals in internal and regulatory compliance hearings and investigations, as well as enforcement proceedings brought by domestic and international regulatory bodies. We assist clients with all aspects of regulatory advice, risk management, the application of administrative law principles and related litigation.

Regulatory issues and investigations often span several jurisdictions. Equally, a single review in one jurisdiction can give rise to consequences, including litigation, in others. With over 50 offices across Europe, the US, Canada, Latin America, Asia, Australia, the Middle East and Central Asia, we offer global coverage to companies and senior executives, enabling them to respond to regulatory and compliance issues and investigations wherever they arise. Our investigations lawyers combine significant knowledge of international regulation, industry sector knowledge, cross-disciplinary skills and on-the-ground resources to provide our clients with a "one-stop" practical solution.

As a key component of our practice, our practice support team applies cutting edge technology to identify key documents and facts early in investigations. This assists in developing strategies and priorities, with the further benefit of managing and reducing costs. We create costs savings through flexibility and certainty in pricing.

# Spain





Mar de Pedraza



De Pedraza Abogados, S.L.P.

Paula Martínez-Barros

# 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

The "phenomenon" of conducting internal investigations is quite recent in Spain, as corporations could not be held criminally liable until the reform of the **Spanish Criminal Code** undertaken by the **Organic Law 5/2010 of June 22** (in force since December 24, 2010).

Nowadays, companies are not obliged to report to the authorities illegal acts committed within the legal entity. Likewise, they do not have an obligation to investigate wrongdoings or potential crimes, but they have the option to do so if they consider it favourable for their own interests.

Thus, conducting an internal investigation goes hand in hand with the correct implementation and effective monitoring and supervision of a compliance programme. This means that if a company wants to benefit from the exonerating or mitigating circumstances of criminal liability set forth in Articles 31 bis 2 and Article 31 quater of the Penal Code, carrying out an internal investigation to identify wrongdoings and wrongdoers will be considered by authorities as a proactive measure that could lessen the company's eventual criminal liability in the future.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

In addition to the strong incentives that enable the application of mitigating and exonerating circumstances of criminal liability, there are other factors a company should consider before deciding to initiate an internal investigation.

One relevant factor is the company's reputation. The name of the company can be highly damaged if it tolerates unfair or wrongful business practices and does nothing to avoid, control or investigate them and these facts are brought to public attention.

For the aforementioned reason, the possible extent of the reputational risk, which would have economic impact, is a key issue to consider before balancing whether or not to start an internal investigation.

Another factor to consider when adopting this decision is the greater or lesser willingness of the company to implement a strong corporate culture of compliance among employees. For instance, deciding to carry out an internal investigation when unlawful practices are discovered, will establish behavioural guidelines among the employees that would make them respect the company's culture and comply more rigorously with their obligations.

Finally, the legal entities should also take into account the individual liabilities of the wrongdoers and the impact that this would have for the company.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

The rules in Spain are peculiar in this regard and it is still not fully clear if whistle-blowers can preserve anonymity. For now, in accordance with the developing state of our jurisdiction in these matters, the reports should be considered confidential, but the whistle-blower is not anonymous.

In order to assess the credibility of a whistle-blower, the following actions should be taken:

- Identify the whistle-blower's background and whether he is reporting for the first time or if he has done it previously. In such case, determine what happened in the former cases.
- Detect the vagueness or consistency in the description of the facts.
- Check if other employees have reported connected events.
- Request supporting documentation or evidences that corroborate the whistle-blower's account of events.
- Obtain other witness accounts.
- Interview the reported persons and ascertain if their statements accord with the denounced facts.

Once all of the aforementioned features have been thoroughly analysed, the company would be in a position to determine if further investigation is needed or if it does not merit follow-up.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

In most cases, "the client" will be the Chief Compliance Officer, the Corporate Legal Counsel or the Legal Department as they are usually to whom the employees report wrongdoings, as well as who initially verifies the credibility and risk or extent of the denounced facts.

Sometimes, it can be difficult for an external counsel to ascertain that the contact person from the company is non-biased by internal conflicts and has no potential exposure to the facts under investigation.

Even though intuition plays an important role when determining the independence of the contact, the two basic steps to follow are: (i) to check the reporting structure of the company; and (ii) to identify in which department or level of the company the unlawful facts were allegedly committed.

If no suspicious connection is made, the external counsel may assume that the reporting relationship is free of internal conflicts. Notwithstanding, any red flag that arises from the communications should be taken into account and be examined in greater detail.

A good way to avoid the conflict problem is to have three different and separate lines of reporting: one to the Compliance Officer; another one to the Legal Department; and lastly, to the Board of Directors

Finally, any person who might interfere in the course of the investigation should be walled off from it, no matter which department he/she works at or what work position he/she holds.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Please note that in this chapter, when referring to self-disclosure to authorities, we are talking about criminal risks that could also imply civil liability derived from the crime.

That being the case (a criminal exposure linked or not to civil liability), when a company decides to voluntarily and timely disclose the wrongdoing to the authorities after conducting an internal investigation, it will always be considered positive and, therefore, the potential penalties may be less severe and/or the monetary penalty may be reduced.

Thus, to self-disclose and cooperate in further inquiries will always be advantageous to legal entities, since they have a starting point to negotiate with Prosecutors and judicial authorities.

Authorities may consider the following factors when an entity discloses the results of an investigation:

- the willingness to cooperate after reporting and the extent of the cooperation;
- the timing of the disclosure;
- 3. the nature of the conduct disclosed;
- 4. the pervasiveness of the conduct within the company;
- the pre-existence of a compliance programme which was holistic, appropriate, effective and efficient; and
- 6. any remedial or disciplinary actions taken by the entity.
- 2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

The most appropriate time to make the disclosure to authorities is once the internal investigation is closed and the investigators have finished the final report which contains all findings and conclusions about the irregular facts.

To proceed to a disclosure at an earlier stage will only make sense in cases of great gravity or if the authorities have prior knowledge of the facts from other sources such as third parties, media publications, anonymous reports, etc.

Before making a disclosure, the company must address the following features: (i) the potential penalties the entity could face also considering mitigating and exonerating circumstances of criminal liability; (ii) the subsequent consequences for the company; (iii) how, when and to whom to disclose the facts; and (iv) the likelihood of further legal proceedings of other kinds arising as a result of having disclosed the information, e.g. data privacy, labour proceedings, civil proceedings, administrative actions, etc.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

A good way to proceed is to make an appointment with the Public Prosecutor Office and then present the facts, findings and conclusions reached.

If the alleged crimes are of an economic nature or include corruption, it is better to report them to the Anticorruption Prosecutor Office, based in Madrid.

Moreover, and if the aforesaid crimes are not included, the company should report to the local Prosecutor of the place where the offence was committed.

At first, it is wiser to report the wrongdoing verbally and negotiate with the Prosecutor and to only provide the written information or documentation, if requested later or if it is beneficial for the company.

In fact, there are some risks of providing reports in writing:

- more evidence can be used against the company;
- the report can be leaked to undesired sources; and
- some facts that the company does not want disclosed may be shared unintentionally.

# 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

Legal entities are not required to liaise with the authorities despite the fact that they are aware of an ongoing investigation.

On the one hand, if a judicial proceeding is already initiated and the Court requires information or documentation from the company which is not a defendant, it would have to comply with its legal duties and provide the Court with what was required.

On the other hand, if the company is a defendant in a criminal proceeding, despite the ruling of the Spanish Supreme Court STS 514/2015 of September 2 (replicated in other rulings) stating the conviction of legal persons should be based on the inalienable principles of criminal law, there is a great debate about whether the right to a fair defence provided in Article 24 of the Spanish Constitution applies to legal entities. If this were the case, companies would not have an obligation to provide the information or documentation required.

Nonetheless, the company will always be in a better position if it liaises with the authorities as higher penalties will be avoided and mitigating and/or exonerating circumstances of criminal liability will apply, lessening potential fines and judicial actions to be taken against legal entities.

# 3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

It is still too early to tell which position the enforcement authorities would prefer in relation to internal investigations in Spain, since the criminal liability of legal entities is very new in our jurisdiction.

Although it has been around for eight years, since the **Organic Law** 5/2010 of **June 22** came into force (December 24, 2010), very few entities have been sentenced by the Courts, meaning that companies are still processing the extent of their responsibility and the penalties that can be imposed on them.

In addition, the reform of the **Spanish Criminal Code** implemented by the **Organic Law 1/2015 of March 30** (in force since July 1, 2015) brought more certainty on how a compliance programme should be undertaken and how that affects the criminal liability of legal persons, which is why the implementation of such programmes is now taking shape and internal investigations are starting to emerge.

### 3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Nothing has yet been defined in our jurisdiction in this regard, but the entity can always offer help to the authorities with the investigation, provided that such investigation is not secret.

Note that the company knows its business functioning better than an outsider and therefore may identify the information needed or the alleged wrongdoers much quicker than the authorities. However, limiting the scope of the investigation will be very difficult.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Yes, if needed.

Nowadays, many internal investigations cross borders, as entities are becoming more global every day.

Facing an international investigation is not an easy task, so coordination is the key issue to attain satisfactory results. A good strategy to achieve that is to centralise the investigation team where the wrongdoing was committed.

Henceforth, one should identify the experts in every country where the investigation could have any type of impact so that they can provide assistance about legal issues, jurisdiction specialities and attorney-client privilege doubts that may arise in the course of the investigation.

Finally, one should establish a clear reporting line among all the teams in different countries so that no relevant information, documentation or recommendation is missed.

### 4 The Investigation Process

### 4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

One of the greatest challenges in our jurisdiction is that there are not many experts in conducting investigations, nor entities which have fully implemented holistic compliance programmes, which makes it more difficult to identify wrongful conducts.

Another challenge is access to employee devices and the processing of their data for the purposes of the investigation. First, most companies do not have IT policies that specify which access may be granted to their devices or under what circumstances; second, there are specific and strict provisions on data privacy and labour law that the company has to comply with; and third, there are contradictory resolutions from Spanish Courts with regard to the access a company can have to these data/devices.

Moreover, employees are not accustomed to being part of an internal investigation and may be reluctant to share all the information they have about the investigated facts because they are afraid of the possibility of disciplinary action which the company can impose upon them.

## 4.2 What steps should typically be included in an investigation plan?

The investigation plan should address:

- the person within the company to whom the findings of the investigation should be reported (Compliance Officer, Legal Counsel, Board of Directors, all three of them, etc.) and the agenda for communications;
- the document collection and review of the documentation, including the employees' consent to access their devices and to review their e-mails, clearing up criminal, data protection and employment law concerns;
- interviews to be conducted: identify the persons; the order; if they will take place in person, telephonically or via videoconference; and where are they going to be conducted;

- retention of external experts to provide support and detailed knowledge in the analysis or collection of documentation (forensic), consultants, appraisers; and
- delivery of the work and format of the report.
- 4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

The assistance of an outside counsel will be determined according to the nature of the facts reported, the positions the wrongdoers hold, the expertise required for conducting the investigation and any other matters, such as the reputational impact.

When there is suspicion of the commission of a crime, it is always advisable to retain an outside counsel to assure independence in the course of the investigation, as well as to guarantee the authorities the objectivity of the results achieved.

It is a key determinant to hire an outside counsel experienced in conducting investigations, and it is preferable that such attorney is specialised in corporate crimes and compliance programmes' implementation

Finally, any time an electronic device and or/electronic data needs to be analysed, copied or processed, the company should retain forensic consultants. In the same way, the company should hire any outside resource needed to assist with the investigation.

# 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Yes. Spanish legislation recognises the professional secrecy of attorneys.

Such secrecy is enshrined in the right to personal privacy (Article 18.1 CE) and the right to a fair defence (Article 24 CE), and releases them from the obligation to report events of which they are aware as a result of the explanations of their clients (Article 263 of the Criminal Procedure Act LECrim) and to testify regarding those events that the accused has disclosed in confidence to their attorney as the person entrusted with their defence (Article 416.2 and 707 LECrim). Such exemption applies to the production of documents in criminal proceedings at the request of the court and to any other measure of investigation authorised by the court for the purposes of seizure of the requested documents.

Spanish case law has established two requirements that must be met by communications between companies and their attorneys in order for them to enjoy the protection of professional secrecy: on the one hand, the communications must be made within the scope of and in the interests of the rights of defence of the client (which includes not only information subsequent to the commencement of the proceedings, but also prior communications in relation to the matter investigated in such proceedings); and, on the other hand, the communications in question must be with an independent attorney (external counsel).

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Any interactions and/or communications that take place during an internal investigation where an outside counsel is engaged will be confidential and, in principle, protected by professional secrecy.

Nevertheless, professional secrecy in Spain is not absolute and is not applied consistently as, in certain cases, the judicial authorities may gather documents or information subject to such secrecy.

### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

The case of *US v. Akzo Nobel Chemicals International B.V.* sheds light on the limitations of legal professional privilege for in-house lawyers. European Union laws also consider in-house lawyers as less independent than outside counsel and therefore their professional secrecy has a much more limited application.

In the same line, only outside counsel communications will be protected by professional secrecy in Spain.

In-house counsel are bound to the company (the client) by means of an employment relationship and therefore not considered independent. Thus, their communications with the entity might not be protected under Spanish legal privilege.

For that reason, it is always recommended to retain an outside counsel to conduct internal investigations.

### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

With regard to the protection of personal documents of employees, attention should also be drawn to the Spanish Labour Act (*Estatuto de los Trabajadores*), which provides that, in the performance of their work, employees have a general right to personal privacy and due consideration of their dignity (**Article 4.2.e of the Spanish Labour Act**). This means that any searches carried out on them or on their personal lockers or property must be carried out respecting the safeguards set forth in **Article 18 of the Spanish Labour Act**. However, irrespective of the provisions of employment laws, such protection does not apply when, within the context of criminal proceedings, the Judge instructs that the company be searched.

Thus, the Examining Magistrate has the authority to conduct any enquiries which they believe may shed light on the events under examination as Judges are required to investigate any indication of a crime, there being no restrictions as to what may be found.

However, any measures of investigation which violate fundamental rights (the intervention of personal communications, the search and raid of private premises, etc.) may only be agreed to in exceptional circumstances and are subject to reasoned authorisation by the Court in the form of a court order.

Nevertheless, if an information request is made to a company under investigation, it can claim its constitutional rights under **Article 24.2 of the Spanish Constitution** (CE) – primarily, the right to a fair defence and not to incriminate oneself, and the right not to give a statement against oneself – and could, therefore, not respond to the request made.

Please note, as stated before, it is as yet unclear whether the said rights are applicable up-front to legal entities, notwithstanding the ruling of the Spanish Supreme Court STS 514/2015 of September 2.

Despite the above, an order issued by the Judge could force the company to eventually produce the document, when such document is vital for ascertaining the material facts of the case.

### 5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Not necessarily. If the authorities deem it necessary to initiate a criminal proceeding after receiving notice of the commission of unlawful activities, the findings of the internal investigation reported by the company might not remain confidential and could subsequently be shared during the course of the corresponding criminal proceeding.

Notwithstanding, if the authorities do not initiate criminal actions, the usual practice would be to keep the results of the internal investigation confidential.

### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The following laws and regulations apply in terms of data privacy during investigations:

- LOPD: Spanish Data Protection Act (Organic Law 15/1999, of December 13, for the Protection of Personal Data).
- RLOPD: Spanish Data Protection Regulation (Royal Decree 1720/20007, of December 21), that approves the Regulation that develops Organic Law 15/1999, of December 13, for the Protection of Personal Data.
- Data Protection Directive: Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
- Directive 2016/680 of the European Parliament and of the Council of April 27, 2016 with regard to the protection of natural persons in the processing of their personal data by the competent authorities for prevention, investigation, detection and prosecution of criminal offences or the execution of criminal sanctions and on the free movement of such data.
- 6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

It is not a legal requirement or a common practice to issue a document preservation notice when carrying out an investigation, although this procedure should be contemplated in the policies listed in the compliance programme of the company.

Notwithstanding the above, after conducting the interviews, employees should always be warned about the preservation of the relevant documents for the investigation.

Furthermore, companies are required by law (Commercial Code, General Taxation Law, Labour Law, etc.) to preserve the documents for a period of time, depending on the nature of such documents. A company should inform its employees about those data storage periods.

Each document or data has its own preservation period established by law, but it should be noted that the Criminal Code has increased the statutes of limitation for crimes against Public Treasury and Social Security so that the general retention period for financial, accounting and labour data should be increased to at least 10 years.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Any factors should be taken into account.

Each jurisdiction has different procedures and applicable laws regarding document seizure and data processing and transfer, so before the company gathers any documentation it should consult the experts on such jurisdiction to proceed accordingly.

### 6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

Some of the most important groups of documents to be collected for an internal investigation are the e-mails exchanged between employees and/or former employees and those received/sent to third parties that are related to the facts of the case.

Additionally, all kinds of contracts, agreements, financial statements, bank accounts, account movements and accounting documents are very relevant when it comes to economic crimes.

# 6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

In order to guarantee the document collection process, the company should retain external experts, usually forensic, and document review services providers.

The most common and efficient practice used by these experts in this case is to create copies of the backup server of the company as well as the laptops and devices used by the employees, but owned by the company. It is very important that the company has a clear and specific IT policy in this regard, and with regard to data protection issues and employment law guarantees and policies.

Finally, it is better to create the above-mentioned backup in the presence of a Public Notary and then deposit with him the copy obtained.

In such way, the search and processing of the relevant data will be done in the copy and not in the original, which will guarantee accuracy and protect the data from any electronic manipulation.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Usually, when reviewing voluminous documentation, the experts use processing tools that enable a keyword search.

Retaining experts to do this job is the best way to ascertain that the investigators and/or the entity do not access the private and personal data of the wrongdoers or the data of any other employees who are collaborating with the investigation and have granted access.

### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Any employment law requisites and guarantees should be taken into account when conducting interviews with employees.

Furthermore, any interviewed individual will be guaranteed the set of constitutional rights; among others, the right to honour, privacy and personal reputation, the right to dignity, no discrimination, etc.

In Spain, there is no need to consult any authorities before conducting interviews.

# 7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Employees are required to cooperate with their employer during an internal investigation; not doing so can be considered a cause of dismissal on disciplinary grounds or of any other disciplinary actions.

In order to make employees better understand their duty to cooperate, they should be instructed and trained on the company's compliance programme, and the obligation the latter has to comply with the penal regulations to mitigate or exonerate its criminal liability.

Notwithstanding the above, prior to conducting an employee's interview it is crucial that the attorney informs such employee that he represents the legal entity and not the employee individually.

### 7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

Entities are not required to provide legal representation to witnesses prior to interviews.

However, there may be serious cases in which the interviewer can warn the witness of the need for an attorney. That said, if he refuses to contact an attorney, the interview can continue as scheduled, because providing legal representation is not required by law.

Finally, note that if the company itself decides to provide legal representation to employees, this could lead the investigation to come to a standstill as the employees, wrongdoers or not, could be reluctant to cooperate.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

Some tips to consider when conducting interviews to obtain better results are:

- Plan in advance the persons who are going to be interviewed and the order of the interviews.
- Analyse the witnesses' background and relation to the facts.
- Give the witness notice of the existence of the investigation and the nature of the facts investigated, unless it is strictly necessary to proceed unannounced.
- Be flexible and provide the witness with a range of dates to choose to be interviewed.

- Conduct the interview in person and in the company's facilities. Interviews should be individual and conducted in a separate, comfortable room.
- Prepare the interview outline, as well as the general warning messages, and the supporting documentation for each interview.
- The interviewer should be a person with 'soft skills' so as to provide a more relaxing atmosphere for the witness to share the information more openly.
- Inform the witness that the interviewer represents the company and not him individually, that information can be disclosed at the sole decision of the company, instructing him to preserve the relevant documents and data for the investigation, etc.
- Remind the witness to maintain the confidentiality of the interview and inform him of possible future contact in order for him to provide further information or documentation.
- Take notes of the explanations given by the witness and also his reactions to questions. Then draft a complete report of the interview.

#### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

In Spain, people pay close attention to interpersonal relationships. People are usually open and friendly so, when conducting interviews, it is important to create a personal bond with the interviewee and to show closeness to him/her.

The more comfortable the witnesses feel, the more information they will share, so the soft skills of the interviewer are a key factor that must be considered.

### 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

The interviewed whistle-blower will have the same rights and/or privileges than any other witness interviewed during the course of an internal investigation.

The entity, of course, will advise him that the information provided is confidential, although not anonymous. Furthermore, the entity will assure the whistle-blower that there will be no retaliation against him for reporting the wrongdoings and/or wrongdoers.

At the end of August 2017, the European Parliament made a proposal to fight against corruption and other illegal conducts committed within companies by strengthening the protection to whistle-blowers. The proposal includes granting them legal protection, guaranteeing confidentiality, providing them with economic and psychological support if needed and even conferring them compensation for damages.

# 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

It is usually not appropriate.

When an internal investigation starts, the company is not yet sure who will be directly involved in the investigated irregular facts, so granting "immunity" or "amnesty" to employees can be a doubleedged sword.

If the entity grants "immunity" to the wrongdoer without knowing it and he is dismissed later on, then the company will have to face difficult labour proceedings in which it will have to readmit him or pay him vast amounts of money.

In addition to this, we have a peculiarity in Spain with regard to criminal proceedings: a Public Prosecutor can allege the commission of any public offence, meaning that no matter the "immunity" or "amnesty" granted by the company, a criminal proceeding can be opened against the wrongdoer by the Public Prosecutor.

### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

There are not specific provisions in the Spanish jurisdiction regarding the revision of statements by interviewees during an internal investigation.

Notwithstanding, if the witness is not hostile, the revision can be offered, keeping a track record.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

No, in the Spanish jurisdiction it is not required for any third party to be present during the witness interviews for internal investigations.

### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Usually, it is more common practice to prepare a written investigation report.

Mainly, the pros of producing the report in writing are: (i) it allows the entity to have a better understanding of all the steps taken by the investigators, the documents that have been analysed and the conclusions reached; (ii) the investigators can ensure that they do not miss any information that needs to be shared with the entity; and (iii) it offers an easier way to provide the information to the authorities in the future or, at least, provides an outline for doing so. On the other hand, the cons are: (i) the report can be leaked to unwanted third parties; and (ii) it may include facts and findings that the company does not want to disclose.

## 8.2 How should the investigation report be structured and what topics should it address?

In order for the entity to better understand the conclusions reached by the investigators and the steps taken during the internal investigation, we consider that the final report should be structured as follows:

- Summary of the events that lead to the internal investigation and the retention of external counsel and any other experts.
- 2. Summary of the relevant background information of the case.
- Analysis of the investigation process, evidence collected and findings:
  - a) Review of the compliance programme.
  - Analysis of documentation and relevant remarks about the documentation analysed.
  - c) Interviews conducted with employees, former employees and third parties, identifying names and positions of the interviewees and unusual statements made by them.
  - d) Other expert reports needed (forensic, appraisals, etc.).
- 4. Conclusions.
- Recommendations (if necessary).

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### De Pedraza

abogados

De Pedraza Abogados is a boutique law firm specialising in criminal law, committed to providing its clients with highly sophisticated criminal law advice. Its specialist legal advisory services cover the traditional pre-litigation and litigation side of criminal law cases, in which it represents clients as the defence or prosecution, and the more novel "preventive" side of corporate defence and compliance, which has become a central part of criminal law advice since December 2010.

### **Criminal Law Practice**

De Pedraza Abogados is able to act before the various criminal law courts in defence of the interests of individual or corporate clients – either as defence or prosecution lawyers – at all stages of the proceedings, including *vis-à-vis* any relevant public registries.

### **Corporate Compliance**

As a result of our impeccable and in-depth knowledge of the applicable national and international law, at De Pedraza Abogados we advise companies which may be in any way subject to the jurisdiction of the Spanish criminal courts, ensuring that they have a suitable corporate compliance system in place in order to prevent or mitigate criminal liability.

# Switzerland



Andreas D. Länzlinger



Bär & Karrer Ltd.

Sarah Mahmud

# 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

There are no provisions in Swiss law that would explicitly direct a company to conduct an internal investigation. However, a number of statutory provisions can make it a practical necessity to do so.

First, duties to cooperate with regulatory authorities and provide them with accurate information can indirectly compel entities to investigate potential misconduct because this may be the only way for the entity to find out what happened and rectify issues. One of the most important Swiss regulators, the Financial Market Supervisory Authority ("FINMA"), for example, frequently orders entities to explain incidents and produce information and documents relating to matters under its supervision. Regulated entities are also under an ongoing obligation to immediately notify FINMA of any material event that is significant to its supervision. The Swiss stock exchange, SIX Swiss Exchange, imposes a similar ad hoc notification requirement on listed companies, and financial intermediaries also have duties to investigate and report suspicious activity to the Swiss Money Laundering Reporting Offices. Providing FINMA incorrect information, even if only negligently, is a criminal offence, which can attract a fine of up to CHF 250,000, while intentionally doing so bears a maximum sentence of three years' imprisonment. Sanctions against the entity can go as far as a regulatory authority revoking an entity's licence to engage in business, particularly if it fails to remediate the unlawful conduct in issue.

Secondly, companies and those in charge of them can be held liable for failing to take adequate measures to detect or prevent the commission of offences within their organisation. Under the Swiss Criminal Code ("CC"), a legal entity may be convicted for failing to implement reasonable measures to prevent the commission of an exhaustive list of catalogue offences (known as primary corporate liability); or for an offence committed during the ordinary course of its business, if the organisation does not have the necessary corporate structures in place to allow it to attribute responsibility for the offence to a single natural person (known as secondary corporate liability). An entity's board of directors and its executive organs also have general duties of care under company law, which are recognised as requiring them to set up compliance and control systems to detect, investigate and remediate misconduct.

Employees with enhanced compliance obligations, such as senior management or compliance officers, may also be held criminally liable for failing to take action to prevent the criminal conduct of others in the organisation.

The benefits of conducting an internal investigation in competition law are well-known. Under a statutory leniency programme, companies may be granted complete or partial immunity from sanction if they report unlawful restraint of competition before the other participants to the infringement do so.

In the case mentioned below in question 2.1, the criminal prosecution authorities have shown that they are also willing to reward a company's proactive approach to uncovering misconduct, and consider the initiation of an internal investigation, cooperation with the authorities and implementation of compliance measures to be mitigating factors at sentencing.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

An entity should bear in mind that regulators such as FINMA usually have the power, under their overarching authority to remediate unlawful conduct and restore compliance, to order internal investigations. If necessary, FINMA can appoint an independent investigator (usually a law firm or an audit firm) to investigate and implement remedial measures within a regulated entity. By taking the proactive and early decision to investigate, entities have the advantage of preserving a degree of control over the structure and pace of their investigations, and give themselves time to prepare responses to any government or media enquiries before they arise.

Before deciding on an investigation, entities should consider the following: whether the wrongdoing is still ongoing; worst-case scenarios in terms of impact on share price and data security; potential employment law consequences; the likelihood that the matter will come to the attention of domestic and/or foreign authorities; whether it should notify insurers; the costs of engaging external lawyers and consultants; and any reputational risks that might arise.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

A whistleblower's complaint should be investigated with the same care and diligence as any other report of impropriety. An entity's exact response – and whether it is necessary to appoint external

consultants to assist – will depend on the specific allegation and the whistleblower in question. An entity should normally take immediate measures to preserve relevant evidence, investigate the facts and document the steps in its investigation. If substantiated, steps should be taken to sanction and remediate the wrongdoing.

Although legislative reforms in employment and criminal law are under parliamentary discussion, currently Swiss law does not offer any statutory protection to whistleblowers. Whistleblowers who breach confidentiality and secrecy obligations (for example, by leaking protected information to the public) are subject to criminal sanction. Nonetheless, terminating an employee's engagement solely on the grounds that he has made a whistleblowing complaint can constitute unfair dismissal in civil law. From a compliance perspective, it is considered to be best practice for entities to establish reliable avenues for their employees to report suspected misconduct free from reprisal.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

The identity of the "client" will vary depending on the specific investigation and the terms of counsel's engagement. As the person who often leads the investigation internally, the client can influence whether an investigation is viewed as being independent and, hence, whether its findings are reliable.

To ensure the reporting relationship is free of internal conflicts, no employees or third parties who were involved in the matters under investigation or who are otherwise personally interested in its outcome, should lead or otherwise be part of the investigation team. This should apply regardless of whether the person is an in-house attorney, senior executive or major shareholder. To facilitate a conflict-free investigation, outside counsel should be granted full and free access to the entity's internal records and to its employees, so it can make recommendations as to the composition of the investigative team.

As a matter of good practice, entities should designate specific individuals or a steering committee with responsibility for the supervision, strategic direction and overall coordination of the investigation, and to whom outside counsel should report its findings. Limiting and defining the number of persons involved in the investigation can help to focus the direction it takes, maximise confidentiality and legal privilege and ultimately make it more cost-efficient.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Yes, they do. As mentioned above, competition law authorities can grant immunity to companies that (first) report unlawful infringements

voluntarily. At sentencing in criminal proceedings, law enforcement authorities generally take into account mitigating factors, such as an offender's remorse and whether reasonable efforts have been made to remediate wrongdoing. The voluntary disclosure of the results of an internal investigation can qualify as a mitigating factor. Earlier this year, we saw the first reported instance in Switzerland of a company being rewarded for self-disclosing criminal conduct to the authorities. The company reported its liability for failing to take adequate measures to prevent the bribery of foreign public officials, and shared the investigative reports of its external lawyers. The company's admission of guilt, its full cooperation with the authorities and its investment in improving its compliance systems were reportedly rewarded by the authorities reducing the penalty imposed from CHF 3.5 million to the symbolic sum of CHF 1. As is always the case, the company was nonetheless separately ordered to disgorge its profits from the illegal activity.

#### 2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

In competition law, companies may need to disclose any impropriety early on in order to benefit from the statutory leniency programme. Otherwise - and save for any ad hoc obligations to notify the authorities of material events - a company is generally free to disclose whenever it feels appropriate. From a strategic point of view, it should only do so once satisfied that it has a clear understanding of the main aspects of the misconduct in issue, its implications and the actors involved, even if it has not yet uncovered all the details. As mentioned in response to question 1.2, once the authorities are involved, the company will no longer have autonomy over the investigation and will be forced to react to external pressures. The following considerations can influence the timing of a self-disclosure: any disruption that disclosure could cause to fact-finding; the desirability of potential state action to secure evidence, freeze assets or interrogate and apprehend suspects; and the likelihood of resulting court proceedings, requests for assistance from domestic or foreign authorities, media coverage or whistleblowers.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

In cases where an investigation has been ordered by the authorities, the findings are usually required to be in writing. If a company's intention is to cooperate fully with the authorities, it should also report the findings of a voluntary internal investigation in writing. While there is no formal requirement to do so, as a matter of common sense, a written compilation of the most salient facts would manifest the greatest degree of transparency, cooperation and contrition.

Although reports prepared by external lawyers may be privileged, the risks associated with written reporting are that the findings may nonetheless be used against the company in domestic or foreign court or regulatory proceedings or that the report is leaked to the press. As is set out in response to question 5.5, the authorities may be subject to duties to cooperate with one another such that the report, or its findings, may be distributed further than its intended audience. While this risk still exists with oral reporting, it is less pronounced. A report may also contain information belonging to or affecting the rights of employees and third parties. Any

unauthorised use of the report and resulting breach of rights could have legal consequences for the company. Companies are advised to engage with the authorities on the format, scope and use of their reports prior to disclosure.

# 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

Save for in relation to certain regulated financial markets, entities subject to ongoing or pending government investigations are not required to liaise with the authorities. It is, nonetheless, advisable that they do so. Being in contact and maintaining good relations with the authorities is not only beneficial because of the goodwill it could generate and the potential credit the company may receive in return; the authorities can also be a valuable source of information as to developments that may affect the entity (e.g. planned coercive measures, involvement and collaboration with foreign authorities, etc.). In a best-case scenario, an entity may be able to, for example, minimise the disruption caused by a dawn raid by agreeing mutually beneficial terms for producing evidence. If entities investigate in parallel to the authorities, they risk frustrating the government's fact-finding strategies and, at worst, expose themselves to allegations of tampering with or destroying evidence.

# 3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

Law enforcement entities will usually not involve themselves much or at all in an entity's internal investigation. If the subject matter is of interest, they would usually decide to investigate themselves or appoint an independent investigator to report back to them. For internal investigations conducted voluntarily, our observations in question 2.2, on disclosure, apply. The level of involvement that a law enforcement entity is likely to expect post-disclosure will depend on the importance and potential consequences of the investigation. Despite their usual restraint, we have noticed a trend in the authorities following the US model for investigations, such that they may expect to be more involved in investigations in the future.

### 3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

In criminal proceedings, the prosecuting authorities will define the scope of their investigations independently and without input from the concerned parties. There may be more flexibility and opportunity to informally influence an investigation if it is ordered or conducted by regulators such as FINMA. Regulators will usually define the scope of an investigation; however, it may be possible to discuss with them and agree on a reasonable scope, the most efficient methodology to be used and on realistic reporting deadlines.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

A multitude of treaties and legal provisions deal with the Swiss enforcement authorities' cooperation with their international counterparts. Particularly in recent times (e.g. numerous tax evasion matters involving Swiss banks, the most recent FIFA scandal in which officials were arrested in Zurich, or the multi-jurisdiction investigations in the Petrobas/Odebrecht affair, etc.), we have observed an increase in cases involving international cooperation and coordination.

Where an entity is simultaneously investigated by authorities in multiple jurisdictions, it is usually in its best interests for the various proceedings to be coordinated and, if possible, resolved comprehensively. Parallel investigations bring with them: the risk of delays; repeated and increased business disruption; overlapping sanctions; and sustained reputational damage. Although an entity cannot control the authorities' willingness to coordinate, it can attempt to influence them by making appropriate disclosures. The best course of action will always depend on the circumstances of the case and will almost inevitably require an entity to seek legal advice in all the jurisdictions concerned.

### 4 The Investigation Process

### 4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

A unique challenge for internal investigations in Switzerland is that co-operating with foreign authorities outside the realm of administrative assistance proceedings can have criminal law consequences. The same criminal law provisions can restrict the fact-finding activities that can lawfully be conducted in Switzerland, if the intention is to use the findings in court or regulatory proceedings abroad. These challenges arise from the operation of so-called "blocking provisions" intended to protect Swiss sovereignty. Of these, article 271 CC is the most relevant. This provision prohibits foreign states from, either directly or indirectly, performing in Switzerland any act which falls within the exclusive competence of the Swiss public authorities. As is the case in a number of civil law jurisdictions, Switzerland views the taking of evidence as a judicial function within the exclusive competence of its public authorities. As such, collecting documentary evidence and interviewing witnesses located in Switzerland can require government authorisation.

In cross-border investigations, it is also worth noting that Swiss inhouse counsel do not enjoy legal privilege. This can impact the procedural protection given to their communications and work product in foreign jurisdictions.

## 4.2 What steps should typically be included in an investigation plan?

An investigation plan should clearly set out the scope of the investigation (e.g. jurisdiction, subject matter, business area, time-frame, etc.), its purpose and the legal issues that should be addressed by outside counsel during the investigation.

It should typically include and address the following steps: (i) formation of an investigative team; (ii) reporting milestones (including the structure and format for reporting); (iii) taking interim or immediate measures at the start of the investigation (e.g. to secure evidence); (iv) identification, preservation and collection of relevant evidence; (v) scoping interviews; (vi) (physical and electronic) document reviews and analysis; (vii) engagement of experts; (viii) substantive interviews; (ix) preparation of investigation reports; and (x) communications with the authorities and the media.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

If companies decide to elicit the assistance of outside counsel, they should do so early on in an investigation. The nature, scope and budget of an investigation will determine whether additional external consultants should be engaged. The main reasons for using outside counsel are to maximise the chances of the investigation results being privileged; to ensure the investigation is independent and free from conflicts of interests; to obtain an independent perspective on the issues; to lend the factual findings and legal conclusions neutrality and credibility; and to engage with the authorities. The criteria for selection should reflect those reasons. Outside counsel should be selected based on their know-how and experience in conducting investigations; their reputation for being independent; their history of engaging with the authorities; the resources they have to deal with investigations; and, in international investigations, their track record for collaborating with foreign counsel and dealing with cross-border issues.

# 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Yes, Swiss law recognises the confidentiality of documents and material relating to the attorney-client relationship. The scope of the privilege can vary depending on the type of proceedings but, typically, it only applies when lawyers registered to practise law in Switzerland are engaged and, under certain circumstances, in EU and EFTA countries. Provided the documents and material relate to an engagement for the provision of typical legal services, privilege can extend to: confidential information that a client shares with his lawyer; information from other sources; the lawyer's own work product; and even work product of the client or third parties; but it does not cover pre-existing evidence created outside the scope of a lawyer's engagement.

Although conducting internal investigations can qualify as the provision of typical legal services, one must tread carefully in investigations involving statutory anti-money laundering ("AML") obligations. The highest Swiss court, the Federal Supreme Court, recently decided that lawyers' work product (reports and notes of employee interviews) was not privileged because it resulted from investigations which the client was under statutory obligation to undertake in any event. The performance of delegated AML compliance obligations is thus unlikely to constitute a typical legal service that attracts privilege.

In criminal proceedings, both legal entities and natural persons are also entitled to claim privilege against self-incrimination. The principle is usually interpreted restrictively for legal entities and cannot be used to circumvent their statutory obligations to keep records, such as under AML legislation.

Best practices to preserve legal privilege include defining the scope of a lawyer's engagement and the legal issues to be addressed at the outset of an investigation, and keeping particularly sensitive documents in an external lawyer's custody.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Third parties who are engaged to support outside counsel can fall under their instructing legal counsel's privilege if they qualify in law as a person assisting them. Anyone from administrative staff, forensic experts, accounting firms or private detectives can qualify as a "person assisting" a lawyer, provided the lawyer exercises the requisite degree of direction and supervision over them. If so, the third party would be bound by the same professional rules of confidentiality as the lawyer. Best practices for engaging third parties include: defining the scope of the collaboration in writing; regular reporting to the outside counsel; copying counsel in all communications with the third party; and ensuring the third party agrees to adequate confidentiality undertakings.

### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

No, they do not. The current position under Swiss law is that legal professional privilege and professional duties of confidentiality do not extend to in-house counsel. Although legislative reforms have been proposed to change the law, two such proposals have recently failed. A third proposal to extend privilege to dealings with inhouse counsel in civil proceedings is currently being deliberated. Note, however, that communications with patent attorneys may be privileged regardless of whether they are in-house or not.

### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Legal privilege is best ensured by engaging independent counsel early on in an investigation and clearly defining the legal services they must provide. As a general rule, all communications and work product should be shared on a confidential basis and with a pre-defined circle of persons, on a "need-to-know" basis only. Privileged material should be marked accordingly and stored separately because this will make it easier to claim privilege over it during any government attempts to seize evidence.

### 5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

Enforcement agency employees are usually bound by official secrecy and must keep information they become aware of during the exercise of their duties confidential. At the same time, agencies may also be bound to notify other authorities, including criminal prosecutors, of any unlawful conduct that comes to their attention, be it in the context of information provided voluntarily or otherwise.

While this can discourage companies from volunteering the results of their investigations, the Swiss authorities have shown that they can be sympathetic to companies torn between regulatory compliance and criminal self-incrimination. FINMA, for example, has often refused requests by criminal prosecutors to share internal investigation reports that have been provided to it voluntarily, on the basis that this would discourage cooperation and thus compromise it ability to supervise in the long term. We recommend carefully reviewing the applicable regulatory rules prior to any disclosure and, if necessary, addressing concerns directly with the relevant enforcement agency.

### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The collection and use of personal data is generally governed by the Federal Data Protection Act of 19 June 1992 ("**DPA**") and the Data Protection Ordinance. Employment law provisions in the Code of Obligations also impose duties of care on employers, which may restrict the handling of employee data. As described in answer to question 4.1, Swiss blocking provisions can also affect the collection and transfer of data from Switzerland.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Specific legal provisions impose general document retention obligations, such as in corporate and federal tax law (10 years); however, unless an authority has specifically ordered evidence to be preserved, there is no legal requirement to preserve documents in connection with litigation and/or regulatory proceedings. Nonetheless, it is common practice for companies to issue data preservation notices when litigation and/or regulatory proceedings become reasonably foreseeable, particularly because this ensures compliance with obligations in other jurisdictions. It follows that there are no formal requirements on how such notices are issued, although the provisions of the DPA continue to apply. Data preservation notices should accordingly only be issued to employees who are likely to have business-related information that is relevant to the investigation. Unless there are reasonable grounds to believe that doing so would risk data destruction and/ or compromise the confidentiality of an investigation, the notice should inform the recipient of the background to the investigation, the purpose of preservation and the anticipated use of the preserved data. A common-sense approach should be taken to recording compliance with the notices to ensure that the data is admissible in legal, regulatory or other proceedings in Switzerland and abroad.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Different jurisdictions bring with them: differing blocking statutes, data privacy and employment law rules; varying provisions on

legal professional privilege and confidentiality; and diverging data processing standards. The most important factor to consider in cross-border investigations is that the collection, transfer and use of documents complies with the requirements in each applicable legal system. This requires time and careful planning. Cross-border data transfers can require: consents or waivers to be obtained from data subjects; notification of or authorisation from the authorities; the agreement of a data transfer framework; and/or document redaction.

The most relevant restrictions to consider in Switzerland are: blocking provisions in articles 271 CC and 273 CC; restrictions in the DPA on transferring personal data to countries deemed to have insufficient safeguards for data privacy (such as the US); provisions of employment law, which may require employee notification prior to data processing; article 162 CC, which penalises the breach of a statutory or contractual duty of confidentiality to a third party; article 47 of the Banking Act on banking secrecy; and other professional secrecy obligations.

### 6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

There are no specific guidelines governing document collection in internal investigations. The types of documents that could be important depend on the nature of the investigation. In their own investigations, the criminal authorities must consider all relevant evidence that has been obtained lawfully and in accordance with current scientific technology and practices. Admissible evidence can include anything from GPS data, to internet scripts, to any type of electronically stored information. Companies are therefore advised to collect any and all the evidence that is necessary to investigate the issues, including: hard copy data (e.g. archives, files, minutes of meetings, policies, HR files, etc.); electronically stored information (e.g., email records, databases, online servers, locally stored data repositories, journals/logbooks, back-up and legacy systems); lawfully obtained telephone and audio-visual recordings; oral evidence (e.g., from current and former employees and thirdparty witnesses); and any expert or specialised data (e.g., analyses on price movements, payments transactions, etc.).

# 6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

The resources used to collect documents during an investigation vary greatly depending on its scope and funding. In larger investigations, it is commonplace for the latest scientific technology to be used to collect and process data (e.g. electronic imaging, e-discovery solutions and specialist IT or forensic accounting methods). It is usually considered most efficient to use comprehensive e-discovery programmes, which enable multiple data processing functionalities, such as searching, threading, tagging and redaction.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

There are no specific restrictions on using technology-assisted review or predictive coding techniques to assist and simplify investigations. The usual e-discovery solutions and software used on the international market are also widely used by larger organisations and law firms here. The golden rule when reviewing a voluminous document

collection is to plan carefully and to document each step and important decision made during the review process. The population of data for review should first be collected on a data processing platform. Clear objectives should be set for the investigation before the review commences, and the search criteria should be defined based on those objectives and agreed with all the relevant stakeholders. The review process should be guided and supervised by qualified lawyers to ensure compliance with the applicable law.

### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Employment law, as contained in the Code of Obligations, does not impose specific rules on how to conduct employee interviews. An employer's main duty, under its general obligations and duties of care, is to respect its employees' personal rights. The ground rules for conducting an interview should always be fairness, objectivity and respect for the interviewee. In particular, employers must not exert any coercive control during the interview. Third parties (e.g., former employees) can be interviewed if their participation is voluntary. Using the findings from such an interview in foreign proceedings may, however, breach article 271 CC unless prior government authorisation for the interview is obtained (the appropriate department to grant authorisation can depend on the subject matter in issue). The authorities may also need to be consulted prior to interview if they are investigating the same matter so as not to frustrate their fact-finding efforts.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Employees have general duties of loyalty to their employer, which require them to comply with their employer's instructions. They are also under a duty to account for all their activities during employment and must share with their employer all the products of their work (correspondence, analyses, contracts, etc.). These two obligations are widely recognised as entailing a duty to cooperate with employer's internal investigations and, more specifically, to participate in witness interviews. In return, the employer must safeguard the employee's personal rights during the course of the investigation, just as it would have to do during the ordinary course of employment. If an employee is targeted by an investigation and at risk of criminal prosecution, he should arguably be granted the privilege against self-incrimination and, consequently, have the right to refuse participation or to answer specific questions. The authorities on this point are divided.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

The question of whether an employee has a right to legal representation at an interview during an internal investigation is disputed in academic literature. The usual practice is to not provide representation unless the employee's own conduct is in issue and he is at risk of criminal prosecution. In such cases, as a matter of

good practice, the employee may be allowed the opportunity to seek advice but there is no obligation on the entity to provide or finance it.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

Best practices include giving the interviewee sufficient information about: the background to the investigation; the purpose of the interview; any allegations made against him; the intended use of information he provides; and giving an "Upjohn Warning" to disclose that the company's lawyers do not act for him. Witnesses should also be directed to keep the contents of the interview, and the fact that is being conducted, strictly confidential. The contents of the interview should be recorded in a memorandum, protocol or even *verbatim* minutes. In order to ensure a proper record of what is said, interviews should always be attended by two interviewers. If it is likely that an interviewee may expose himself to criminal prosecution, entities should carefully consider whether to grant the interviewee access to legal advice and representation.

## 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Interviewers should note that professional interactions in Switzerland tend to be formal and conservative. Employment relationships can to be hierarchical but they are also stable, with employees often having worked at the same company for many years. This, together with the fact that internal investigations are still a relatively new phenomenon, may necessitate increased sensitivity and respect when handling witnesses during interviews.

Although most Swiss employees tend to speak English to a relatively high standard, out of fairness, interviewees should always be offered the option of responding to questions in their native language. Four official languages are spoken in Switzerland, so care should be taken to engage translators for the correct language.

### 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Whistleblowers should generally not be treated differently from any other interviewee, particularly if they are company employees. If there are reasonable grounds to fear an adverse reaction against the whistleblower, an employer's duty of care may oblige it to take measures to protect the whistleblower's identity.

### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Under exceptional circumstances, granting immunity or amnesty can be a means of finding out important information, which an entity would have no other way of uncovering. This should, however, be granted sparingly and as a last resort only so that employees are discouraged from holding the entity hostage to their cooperation.

# 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Under data protection law, an interviewee should be granted the right to review and amend the minutes of an interview. In the interests of accurate fact-finding, the records of an interview should be shown to the interviewee immediately or shortly after the interview so as

to avoid any misunderstandings or later disputes as to their veracity. However, to reduce the risk of dissemination, the minutes should not necessarily be provided to the employee, in order to protect the integrity and confidentiality of the investigation.

### 7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

No, there is no requirement that enforcement authorities be present at witness interviews. Such attendance would be unusual, if not detrimental to the purpose of an investigation because it is likely to inhibit the free communication of information. Equally, there is no requirement that a witness be legally represented. However, if there is a chance that a witness risks criminal sanction and/or incriminating himself during the interview, it is recommended, as a matter of good practice, and in keeping with an employing entity's duty of care if the witness is an employee, that the interviewee either be advised that he can refuse to answer questions that would tend to incriminate himself or be given the chance to seek legal advice or representation.

### 8 Investigation Report

# 8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Yes, it is. The advantage of written reporting is that the findings can be used as evidence in any related or ensuing proceedings (e.g. to impose disciplinary sanctions), particularly if the investigation

is conducted by an external and independent expert. The cons of producing a written report are that it may be used against the entity, as set out in answer to question 2.3. Depending on the sensitivity of the subject matter, an oral presentation of the conclusions and findings in the investigation may be appropriate. The disadvantages of this are that: oral reporting may not be suitable to communicate complex factual findings and legal analysis; the findings and conclusion are more likely to be misinterpreted than a printed message; it may not convey the necessary urgency; the message given may be short-lived; and a follow-up is less likely.

## 8.2 How should the investigation report be structured and what topics should it address?

There are no rules on how to structure an investigation report. As a matter of best practice, a report should include the following: (i) an executive summary of the main findings and conclusions; (ii) a summary of the background to the investigation, its triggers, scope, purpose and the legal issues it addresses; (iii) information as to the members of the investigative team and all consultants who were engaged, including their responsibilities; (iv) a description of the document preservation, collection and review processes; (v) a chronology of relevant facts; (vi) a summary of the underlying subject matter and the persons involved; (vii) the investigative findings from the various reviews and interviews; (viii) an overview of the applicable legal and regulatory framework; (ix) an analysis of the relevant events pursuant to the applicable laws; (x) conclusions as to responsibilities and liability; and (xi) recommendations for next steps and remediation. As far as practically possible, the report should attach any evidence referred to in the body of the report in an appendix.



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# Turkey



Gönenç Gürkaynak



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### 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Under Turkish law, there are no obligations or regulations that require companies to conduct internal investigations or to submit the findings of these investigations to the public authorities. Thus, internal investigations are not technically used as mitigating tools during a criminal investigation. However, companies may, in practice, adopt internal procedures to minimise risks relating to corruption and corporate crime. As a general rule, internal investigations must comply with the provisions of Turkish labour law and privacy laws. Pursuant to Article 5 of the Turkish Labour Code No. 4857 ("TLC"), the employer has an equal treatment obligation towards its employees. This means that employers should not discriminate against their employees due to their language, race, colour, gender, disability, political view, philosophical belief and religion. For instance, investigating only female employees will be deemed a violation of the equal treatment obligation. Therefore, the employer should execute an internal investigation providing that it adheres accordingly to the said components which are stipulated in the TLC.

As such, if execution of an internal investigation, leading to termination, actually violates the provisions of the labour law, then the employee may initiate a re-employment lawsuit within one month of the termination date, with the claim that the termination that relies on an investigation violating labour law is therefore invalid, subject to the proof of the conditions that (1) he or she has been employed for more than six months, (2) there are more than 30 employees in the relevant workplace, and (3) the employee is working under an indefinite employment agreement.

If the employer violates the principle of equal treatment in the execution or termination of the employment relationship, the employee may request compensation of up to four months' salary plus other benefits of which he/she has been deprived. Additionally, as per Article 99 of the TLC, acting contrary to the obligation to equal treatment, employers or their representatives shall be imposed with an administrative fine amounting to TL 155.00 (approximately 40 US dollars) for each employee who is exposed to the unequal treatment.

Furthermore, in the case of violation of privacy laws during the internal investigation, the company may be faced with penal and administrative sanctions. As for corporate disputes that may arise during internal investigations, Turkish corporate governance rules should be followed.

In general, internal investigation procedures must be in harmony with the legal climate of the country. Such an investigation would prove beneficial to the company, as during an official investigation the company would already know the facts and may choose to disclose information to public authorities as it deems strategic.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Given the possible international nature of corruption investigations due to the spillover effect, the most important consideration before an internal investigation, aside from the legal concerns, is the strategic one. Namely, the findings of the internal investigation or any disclosures to press about this process may find its way into another jurisdiction's official investigation file. Therefore, companies should carefully consider the possible spillover effects of an internal investigation both before and during the investigation. Further, from a practical point of view, the company should also consider what effects, if any, the internal investigation will have on its business processes and if it may lead to a decrease in the profitability of the company. In the face of such business risks, both the management and the legal team can come together to find constructive ways to both continue with the internal investigation and not undermine the business targets.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Turkish legislation does not provide statutory protection to whistleblowers or require companies to have whistleblower procedures in place. When an employee reports suspicious conduct within the company, the company's response to these employees will be evaluated under the general principles of employment law. As such, if an employee were to speak up in order to report an irregularity, this can in no way be a cause for dismissal of the whistleblower or imposition of any other sanction on the whistleblower for that matter. That being the case, employees are often reluctant when it comes to reporting an irregularity with the

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concern that it could have adverse ripple effects on themselves. Therefore, entities are advised to adopt internal compliance policies and provide regulations for whistleblowing issues, such as anonymity and retaliation, just so employees can feel free to report irregularities without worry. As for non-credible complaints, such complaints usually arise from an angry ex-employee or an exbusiness partner. Therefore compliance professionals are advised to assess the merits of such claims before jumping into large internal investigations.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

In general, the client is usually determined as the person who retains the law firm. As for the department within the legal person, the client would be deemed the highest management of the company. During internal investigations, conflicts of interest may arise between the client as the department that the outside counsel reports to and the department that is the subject of the investigation. Such risks whereby the outside counsel ends up investigating the actions of the individual(s) who has contacted the outside counsel may arise at any stage of the internal investigation, and the outside counsel should raise this issue to a hierarchically higher (and possibly impartial) department of the company, as soon as such risk arises. If the individual who is considered to be the client is potentially implicated in the investigated irregularity, the outside counsel should advise the higher department to allow for the exclusion of the implicated department.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Under Turkish law, companies can be held liable civilly or administratively. The Turkish criminal law system does not impose criminal liability on legal persons. Further, there is no legislation or guideline that sets self-disclosure as a mitigating factor. Thus, whether a judge should consider voluntary disclosure of facts as a mitigating factor is a matter left to the discretion of the judge adjudicating the file.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

There is no legislation and guideline under Turkish law that mandates/advises self-disclosure for legal persons. Therefore, the issue remains unregulated under Turkish law.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

As explained under question 2.2, self-reporting for legal persons is not regulated under Turkish law. Regardless, if a company wishes to report the findings of its investigations to an official authority, such communication between private persons and official authorities is usually done in writing. Self-disclosure itself brings the risk of spillover to other jurisdictions. Therefore, companies should take the utmost care when communicating such sensitive information to public authorities.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

There is no requirement to liaise with the authorities before starting an internal investigation if the entity is aware that it is the subject or target of a government investigation under Turkish law. In the absence of such requirement and any regulation providing self-disclosure as a mitigating factor for legal persons, whether a company chooses to liaise with public authorities depends on strategic considerations of the company.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

Since the issue of internal investigations is not regulated under Turkish law, investigations by the company and by public authorities are conducted as two separate processes.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Aside from cases where law enforcement authorities are not complying with legal constraints, entities can only attempt to affect the scope of the investigation through their lawful statements. In cases where the law enforcement authorities are not respecting legal constraints imposed upon them, companies should use legal objection mechanisms in order to limit the scope of the actions of the authorities, thereby limiting the scope of the investigation.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Turkey is a party to many bilateral and multilateral mutual legal assistance treaties and coordination with other authorities is conducted through these treaties. Facing investigations for the same

issue in multiple jurisdictions is a critical issue for companies, as information provided to one authority may quickly find its way into the investigation file in the other jurisdiction by way of mutual legal assistance. Accordingly, companies should use a multi-dimensional strategy, knowing that investigations in different jurisdictions are closely connected to each other.

### 4 The Investigation Process

#### 4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

Once employees become aware of the existence of the investigation and the questions posed during the employee interviews, keeping the relevant information confidential may become one of the challenges faced by companies during internal investigations. In order to mitigate this, the employees should be made aware of the seriousness of the issue of keeping the existence of and the information pertaining to the investigation confidential. Nevertheless, the risk of disclosure to peers remains and the interview questions may not have the targeted shock effect on employees following the first interview

### 4.2 What steps should typically be included in an investigation plan?

In conducting the investigation, the company and its advisors should first determine the scope of the investigation, i.e. the facts the company would like to explore. The investigation plan would then typically involve a review of preliminary documentation such as relevant agreements and the corporate structure of the company, employee interviews, if they are deemed necessary, document review and prescription of next steps for the company.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Companies typically revert to outsourcing the investigation when the investigation at hand requires the expertise of outside counsels who are knowledgeable about the local law and culture and who would be able to coordinate the investigation vis-à-vis government officials, as well as with different jurisdictions. Also, outside counsels are hired when a company's resources are insufficient when compared with the size of the investigation. This usually depends on the number of the employees to be interviewed and the size of the document to be reviewed. Outside counsel should also be retained in cases where the company does not have a local legal department. In such a case conducting the investigation through outside counsel would be efficient and more result-oriented, as the local outside counsel would have the expertise regarding the local regulations, as well as an understanding of the local culture. As for outsourcing the forensic part of the investigation, most companies outsource this step as they do not have the expertise to handle such a technical process.

### 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

Turkish law recognises attorney-client privilege. According to Law No. 5271 on Criminal Procedure, offices of lawyers can only be searched upon a court decision and in the presence of a public prosecutor. The president of the Bar, or any lawyer who is a member of the Bar, must also be present. When they decide to seize an item in the office of a lawyer and the lawyer, president of the Bar or the lawyer's representative objects to the situation on the grounds that the item relates to the lawyer's professional relationship, then these will be collected separately in a sealed envelope and the courts will be authorised to decide on the situation of the relevant item. If the court decides that these belong to the professional relationship between a client and a lawyer, then these will be returned immediately. In addition, according to Attorney's Act No. 1136, it is prohibited for lawyers to disclose the information they found out in the scope of their work. The Supreme Court and Turkish Competition Authority also have the same approach. Documents can be marked as "privileged and confidential" in order preserve attorney-client privilege.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

There is no precedent or legislation which can be applied to interactions between the client and third parties engaged by outside counsel during the investigation. The "confidentiality principle" is applied between attorney and client.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

There are no specific provisions setting out whether the attorney-client privilege applies equally to internal or outside counsel under Turkish law. However, Turkish Competition Board's Dow Turkey decision (2 December 2015, 15-42/690-259) stipulates that correspondences with an independent attorney fall into the scope of attorney-client privilege and shall be protected. Thus, the attorney client privilege would be applicable for independent attorneys who do not have an employment agreement with their client. Accordingly, correspondence with and documentation prepared by the in-house counsel may not be subject to attorney-client privilege even if they relate to defence rights.

## 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

According to the general principles applicable to attorney-client privilege, a document is deemed to be privileged if it has been prepared by an independent attorney and to the extent it concerns the client's defence rights. Accordingly, to render such material

out of the scope of the discovery it is recommended to mark the documents as "confidential, privileged" and as relating to defence rights. It is further recommended to have a lawyer present in the company offices during a raid. According to the Dow Turkey decision of the Competition Board (2 December 2015), (Dow Turkey), if the case handlers intend to obtain a document protected under legal privilege, all objections should be raised in the course of the dawn raid and these objections should be put in writing in the on-site inspection minutes, if possible.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

There is no legislation regulating whether public authorities should keep the outcome of an internal investigation confidential when it is voluntarily provided to them. However, as per Article 170 of Law No. 5271 on Criminal Procedure, public prosecutors are to initiate investigations when there is reasonable doubt showing that the entity committed a crime.

### 6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

Turkey's first Law on Protection of Personal Data ("Privacy Law") entered into force rather late, on 7 April, 2016. However before that, protection of personal data was a principle stipulated in Article 20 of the Turkish Constitution ("everyone has the right to ask for protection of their personal data"), and several crimes were determined relating to obtention and recording of personal data without consent and non-deletion. Accordingly, during internal investigations, companies should abide by the Privacy Law and if they do not, are subject to administrative fines stipulated in the legislation. Further non-compliance with general principles of data privacy law could result in the imprisonment of the relevant real persons as per the Turkish Criminal Code.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

During internal investigations it is common practice to issue a document preservation notice, although this is not a legal requirement. That said, a deed of consent in which the employee allows the employer to review his/her hardcopy and electronic documents is also advised, as the lack of such consent may result in the company's incompliance with the laws under certain situations. Once the scope of the investigation is determined, the company should identify the related employees so that their documents can be retained. This documentation could include any form of information from physical notes to electronic documentation. Within the document retention notice the investigation should be defined briefly, without any details due to confidentiality concerns. Compliance with the preservation notice should be recorded by the compliance officer or the in-house counsel of the company.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

An entity must consider data privacy and data transfer laws, as well as blocking statutes in other jurisdictions when documents are located in multiple jurisdictions. Where one authority requests a document on which another jurisdiction imposes a blocking statute, the entity is advised to inform the requesting authority about the blocking statute.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

Enforcement agencies generally have the authority to request any documentation deemed relevant for their investigations, provided that they use their authority in compliance with the laws.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

For internal investigations which require data going back a few years, the company's backup system, if any, comes in handy. Aside from this, any documents/electronic documents are collected through forensic services, provided by third party firms.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Generally, voluminous data is reviewed through computer software that is specifically designed for this purpose, so that a quicker, more targeted document review can be realised.

### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

The issue of interviews during internal investigations is unregulated under Turkish law. Therefore, interviews with employees, former employees and third parties are made on a consensual basis. Therefore, entities are advised to get the consent of the interviewees before interviews (for employees: if such consent is not already provided in the employment agreements). During and following the interviews, the entity should act in compliance with labour laws (for employees) as well as data privacy laws.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

As interviews are conducted on a consensual basis, employees are not obligated to participate in these interviews. However, in practice, employees generally do not refuse such call; both in terms

of not to have refused a request by the employer and not to look suspicious over the allegations. That being the case, there can surely be cases where an employee's input can be integral for the investigation to move along and in such cases; the employee can be deemed obliged to assist the employer in its investigation to the fullest extent possible since it is an employee's primary duty to be committed to the employer. Whether an employee can be deemed obliged to cooperate with an internal investigation depends on the unique circumstances of each case and how integral that particular employee's cooperation is to the investigation.

#### 7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

Witness interviews are conducted on a consensual basis; therefore there is no requirement to provide legal presentation. In any case, the witness may participate in the interview accompanied by legal representation.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

There are no guidelines, legislation or precedent regarding the best practice for conducting witness interviews. Entities must comply with data privacy laws and labour laws during employee interviews.

### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

It is more efficient if the interview is conducted by someone who is accustomed to the local culture of the jurisdiction. This is because certain gestures and attitudes might be deemed disrespectful in the local culture and those would lead to unnecessary tensions during the interview. The interviewer might end up unnecessarily intimidating the interviewee leading to a less fruitful interview.

## 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

First and foremost, an anonymous whistleblower hotline would serve to protect the interests of the whistleblower. However, the protection of the interest of the company while upholding the rights of the whistleblower is a delicate balance and must be evaluated separately in each case.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Immunity or amnesty is usually granted by companies when the company wants to disclose widespread corrupt conduct and would like to expedite the internal investigation process. The case for immunity and amnesty is stronger when the corruption attitude is top-down in the company and many of the acts have been committed through the encouragement of the top-level management.

## 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

There is no legislation or precedent for employees to review or revise their statements given in consensual interviews. However, when the interviewees request so, such request as well as the amended statements should be recorded in the investigation file as these would render the statements more dimensional and not including them would mean the company is ignoring certain facts.

#### 7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

No, it is not required to have enforcement authorities or legal representatives present during interviews in internal investigations.

#### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

Yes, it is common practice to prepare a written investigation report. However, in cases with the highest confidentiality sensitivities, the company may not wish such a report to be prepared, so that such a report never enters the records of the company. Preparing the report on the other hand, would allow the management to review the findings and re-evaluate the investigation where necessary.

### 8.2 How should the investigation report be structured and what topics should it address?

The report should address the allegations and the findings regarding each allegation. Having an executive summary section is advised, as the top management of the company may not have the time to review the whole of the report, which sometimes consist of hundreds of pages. The report can also include the advice of outside counsel regarding the next steps the entity should take.



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# Ukraine

### Zavadetskyi Advocates Bureau



Oleksandr Zavadetskyi

### 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Several laws in Ukraine, in particular the Laws On Corruption Prevention, On Public Service, On Security of Labour, and On Trade Unions, establish the obligation of an entity to conduct an internal investigation in some situations. Specifically, the Law On Corruption Prevention states that anti-corruption procedures of entities should contain rules on conducting internal investigations and also entitles the National Anticorruption Agency to initiate internal investigations within the entities falling under the competence of the Agency. According to this Law, some types of entities, in particular public service offices and state-owned enterprises, are obliged to have anti-corruption programmes in place and appoint officers to be responsible for the implementation of anti-corruption programmes, including conducting internal investigations. If such an officer is appointed, he or she is supposed to be responsible for commencing the internal investigation and due documentation of the facts related to the alleged corrupt activities. Other situations, conferring liability for not conducting an internal investigation, include disciplinary liability of corporate officers if they violate by-laws and the responsibility of public servicemen in accordance with the institutional statutes. If the situation develops into one where a public authority has the competence to interfere, then there may arise an issue of adequacy and properness of the corporate officers' actions. For example, if criminal charges may be considered, the actions taken by the entity and its officers with effect to prevent wrongdoing or mitigate its consequences should be taken into account as a reason for the application of leniencies provided by the law.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

There is a variety of factors that an entity might want to consider when deciding whether to conduct an internal investigation and, if so, what the scope and methods of such investigation would be. One of the most pressing issues to deal with would be personal data and confidential information protection. The Law On Protection of Personal Data establishes strict rules on the collection and handling of personal data. Other laws that regulate information obtaining and handling are the laws On Information, On Access to Public Information, and On State Secrecy, which, amongst others, state that any procedure that involves information having any specific legal status must be accomplished in accordance with this specific status. Also, any discovery made in the process of an internal investigation may serve as a reason for initiating a criminal case. Moreover, the Criminal Code provides for sanctions on persons who conceal facts of serious crimes known to them.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

If a whistleblower exposes compromising information about a company, it may not always be easy to assess the credibility of the information. In the easier case, a whistleblower may be well-known to the company, as well as his level of awareness of the company's affairs. But more often whistleblowers do not act directly in order to preserve their own safety. Information coming from a whistleblower may be dispersed via media or by a proxy, and it may even be difficult to identify the whistleblower himself and to understand whether this person is still working for or with the company. Therefore, a specialist dealing with the situation would have to take into account and analyse various facts. The most important would be to identify the source of the disclosure, his/her involvement in the company's affairs in the past as well as in the future, grounds of the information disclosed, its impact on the company's activity, mitigating actions to be taken and possible consequences. The law provides an entity with the possibility to claim compensation for losses caused by dissemination of labelling information or by illegal disclosure of the confidential information. Also, it is possible to renounce the labelling information in court. In some cases, it may be even be possible to bring a whistleblower to criminal responsibility. However, it must be taken into account that whistleblowers are protected by the law in situations where they disclose information about illegal activities of other persons and information that demonstrates facts of potential threats to public interests. Besides, in cases when a whistleblower appears to be a company's employee, provisions of the labour law should be considered and there is no ground specified by the labour law for penalising, in any way, a whistleblower based on the mere fact that he/she has disclosed information about a company's activity.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

Apart from taking instructions from an authorised contact at a client's company, an outside counsel should examine by-laws of the company and regulations applicable to its activity in order to clearly understand who is an appropriate point of reference. Making a mistake in the identification of the proper terms of reference can substantially undermine the efficiency of the investigation. According to the law, a privately held entity is managed by an executive director or a board that is chaired by a CEO. At that, shareholders are the primary origin of the corporate authority and there may be intermediate bearers of the authority between shareholders and the executive body, such as the supervisory board or specific boards established by the shareholders. It is common for large corporations that an outside counsel is instructed to cooperate with and report to an internal audit committee, a chief compliance officer or a supervisory board. Medium-size Ukrainian companies often have an in-house security unit which is usually involved in matters like an internal investigation. Of course, a company's legal department is generally perceived as a participant of an internal investigation procedure. To reduce the risk of being affected by an internal conflict of interest, a counsel should be discreet in the identification of the proper terms of reference and should double-check the information received from within the entity. In any case, shareholders should be understood as ultimate stakeholders in the process of investigation.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

In the Criminal Law there exists the concept of attenuating circumstances, meaning that in a situation where suspected persons, individuals or entities act in a manner that reduces negative consequences of a wrongdoing, this should be taken into account during the qualification of the breach of law and thus influence the type of applicable penalty. It is possible to reduce the adjudicated penalty in the appellation procedure if, in the court of first instance, attenuating circumstances have not been taken into account properly. With regards to a Civil Law liability, which in Ukraine means responsibility for losses caused to third parties, it is more likely that disclosure of the results of the internal investigation would not influence the scale of responsibility, as their factual damage would play the decisive role in measuring the responsibility. But in the area of regulatory liability, which in Ukraine is named administrative liability, being by nature a public liability, the concept of attenuating circumstances applies as well.

When imposing penalties, courts and other law enforcement authorities, in general, are obliged to consider all the factors influencing the qualification of the event. If an entity had conducted an internal investigation of its wrongdoings and this has reduced the damages caused or served as an instrument for the prevention of further breaches of law, then it may constitute a good reason for reducing the severity of the sanctions to be imposed on the entity.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

As a general rule, it is advisable that a company should notify enforcement authorities if, during an internal investigation, it becomes known that a criminal offence has been committed. Special attention should be paid to avoid situations where not disclosing information regarding wrongdoing may constitute a concealment of a serious crime, which itself is treated as a criminal offence. Also, a company should avoid situations where non-disclosure may lead to the violation of third-party interests, as this would most probably create additional legal and reputational risks. For the sake of compliance, less serious findings, falling under administrative jurisdiction, should also be reported to the state authorities; however, in such cases the balance between the pros and cons for the company may be different. Depending on the authority that a company informs, there are specifics of the procedure; however, in most cases there are no complex or burdensome rules above basic requirements that a company should follow when formalising the relevant documentation.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

In cases where conducting an internal investigation is not required by law, an entity can decide on the method of the investigation and format applicable to the completion of the investigation. Thus, an outside counsel involved in the investigation may rely on the internal procedures and instructions of the client when reporting the outcome of the investigation. At that point, an entity might prefer results of the investigation or some part of it not to be reflected in any written document in order to not uncover internal problems to outside observers. Formalising results of the investigation in writing may create additional regulatory and compliance risks for the entity as some of the facts may serve as a reason for increased attention from law enforcement authorities or provoke conflicts within the organisation in the future. In some cases, findings of the internal investigation must be reported in writing and even to the public authorities. In particular, the Cabinet of Ministers has adopted a special Decree regulating internal investigations in relation to state officers and officials who exercise public functions. Findings of such an investigation must be documented in accordance with this Decree.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

There are no explicit rules that oblige a commercial entity to notify, get approval or somehow liaise with authorities before starting an internal investigation. Such rules may be applied to public organisations and state-owned enterprises by institutional regulations. In some cases, it might make sense to get in touch with the authorities with regard to a planned or ongoing internal investigation. This may be useful when such communication can reduce legal risks for the entity, improve effectiveness of the investigation itself or help to achieve any other goal for the benefit of the entity.

# 3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

Law enforcement agencies may benefit from being involved in or having access to information received during internal investigations for their statutory purposes. However, the applicable laws do not provide for the obligation of commercial entities to involve public agencies into their internal investigations. Entities that are subject to special institutional regulations (e.g. state-owned enterprises) may have in their by-laws specific provisions on the necessity to involve competent public agencies in the process of their internal investigations.

#### 3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

In Ukraine, each type of official investigation is regulated by a specific set of laws and regulations. Procedures for criminal investigations are set forth by the Criminal Procedural Code of Ukraine, while all other public investigations are subject to their specific regulations. In particular, the law On Public Service sets forth the fundamentals of any regulatory investigation with regard to public officers' activity. A number of public authorities have their enactments that regulate details of investigations that may be conducted by such authorities, within the areas of their competence. Respectively, each procedure, applicable to a specific kind of public investigation, establishes rights of a subject entity to influence the process of the investigation by challenging in a court, or in the investigating authorities themselves, the correctness of the investigators' actions.

# 3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

There are a number of enactments and international treaties that regulate cooperation of Ukrainian law enforcement authorities with foreign ones in the area of criminal procedures; for example treaties between Ukraine and China (1992), the USA (1998), Brazil (2002), India (2002), etc. However, in Ukraine it is a recognised problem that Ukrainian investigation agencies do not have sufficient instruments for the coordination of their activity with the foreign agencies. Entities that are subjected to public investigation in multiple jurisdictions by a Ukrainian authority in most cases would find themselves in a quite comfortable situation, as the Ukrainian authorities have proven to be comparatively inefficient when dealing with cross-border matters, though this is not an absolute rule. Correspondingly, a foreign entity having a branch in Ukraine that

falls within the scope of a public investigation by a foreign authority may also find it quite easy to deal with, as it is usual for Ukrainian authorities to be non-cooperative or inefficient, although, again, this should not be carelessly counted on. While being subjected to a multijurisdictional investigation, strategies may vary depending on the goals of the entity. If the entity aspires to cooperate with the investigating authority, then it would be reasonable to facilitate coordination between Ukrainian and foreign authorities; for example, by providing a Ukrainian authority with competence aid in some matters. In the opposite scenario, if the entity is opposed to the investigation for any reason, it might work well to identify the points of inconsistency between the regulations of the different jurisdictions and use them for its own benefit.

### 4 The Investigation Process

#### 4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

Multinational companies with branches in Ukraine may encounter a comparatively law-compliant culture of the local personnel, especially those companies who have production and other extensive facilities where a large number of low-qualified personnel are engaged. Internal fraud is unfortunately a widespread phenomenon across the country, the effect of which is enhanced by traditional nepotism and the conspiracy of silence. This, of course, should not be extended to all by presumption, but should be taken into account when building an internal compliance structure of the business; also, one should expect quite a low level of cooperation from the law enforcement authorities. Generally recognised high-level corruption is also an important factor, as there could be occasions where those affected by the investigations resort to corrupt actions to hinder the investigations by various means, including the controversial involvement of the law enforcement bodies and obtainment of court rulings.

### 4.2 What steps should typically be included in an investigation plan?

The methodology of each internal investigation varies from one to another in its specific stages and features depending on the circumstances of each particular case. At the same time, the fundamentals of the process remain mostly the same, except for some very extraordinary occasions. At Zavadetskyi Advocates, we typically start with an initial analysis of the situation, which includes a consideration of the external and internal environment of the case, the governance structure of the client entity, profiles of the individuals involved in the issue, and a factual composition of the case. The following discovery process is divided into two major parts: working with documents and other material evidence; and working with individuals. While working with materials, specialised expert examinations may be required which the investigator should arrange. The work with individuals consists mostly of interviews and taking written explanations. Simultaneously, with this discovery process an analytical activity with regard to the discovered facts continues, as well as the formation of further tactics and specific actions. Then a shortlist of remaining questions is usually produced, and the next step consists of addressing this narrowed circle of concern. After the analysis has been done, we produce a report. The report may be presented to the client in a written form or delivered orally.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

There may be various reasons for retaining an outside counsel for conducting an internal investigation, but the two main reasons and the most often seen are the need for special expertise and the unwillingness to involve internal personnel in this work (in order to avoid conflicts and secure a normal routine workflow). Internal investigations is a specific area of practice that by its methodology stands aside even from investigations of law enforcement authorities. A counsel for conducting an internal investigation should be competent in the investigation techniques itself as well as in the industry where the client entity operates. Moreover, it is important that such counsel is not only knowledgeable in the respective areas but also has hands-on experience in similar matters paired with managerial skills. In Ukraine, corporate investigations do not fall within the scope of any discipline taught by high schools, therefore a Ukrainian counsel should preferably have investigation experience from law enforcement and regulatory agencies, or representative experience from an attorneys' practice.

## 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

There is no specific regulation on internal investigation practices in Ukraine, therefore there are no specific standards for this activity. However, if this activity falls within the scope of the Ukrainian advocates practice, then it is subject to regulation by the special law On Advocacy which establishes guarantees of advocates' activity. Advocate-client information is privileged in Ukraine, which means that it cannot be legally obtained by any third persons, including enforcement authorities, unless based on the agreement of the advocate's client. Thus, it is advisable that entities assigning corporate investigations to outside counsels retain advocates as the main contractor for this work.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Some professions pertinent to corporate investigations are specifically regulated, such as forensic experts, auditors, evaluators, and there are provisions of law that give a special status to the information obtained or produced by these professionals during their work for clients. However, none of the professions have privileges compared to those of the advocates. Thus, it would be to the client's benefit if an advocate operates as a main provider of the service and interacts with all of the other third parties under the auspices of the advocate-client privilege.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

The Law On Advocacy is the only enactment that establishes specific counsel-client privileges in Ukraine and it regulates activities of admitted advocates only. Although it is not prohibited for an advocate to work in-house in any corporation, such work would not be treated as an advocate-client relationship. Therefore, legal privileges would be applicable only in cases where work is performed under the advocate-client agreement where the advocate operates as an outside counsel.

#### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Entities may recommend that a client entity should keep privileged documents in the possession of the advocate. This also may be arranged by allocating a separate room in the company's premises to an advocate, and in this case, such an allocation must be confirmed by a written arrangement and the room should be specifically marked.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

All laws that regulate the activity of law enforcement agencies in Ukraine provide for the agencies' obligation to protect confidential information from disclosure irrespective of whether such information was provided to them voluntarily or obtained compulsorily. The law also obliges third parties, who became acquainted with this information (experts, interpreters, lawyers, etc.) to keep it confidential.

### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

There are several laws that establish fundamental principles and rules on data protection, specifically Laws On Protection of Personal Data, On State Secrecy, On Access to Public Information, and On Information. All data with protected access and use can be divided into two basic categories: personal data; and data "with restricted access". Personal data includes information regarding individuals, such as the whereabouts of residence and assets, health condition, income, religion and, generally, any information that characterises a person as an individual. The data with restricted access is classified into privileged, commercial and state secrecy. Based on the named laws, each governmental institution that deals with the protected data is obliged to adopt special internal rules on handling the protected data. For example, the National Bank of Ukraine has introduced Rules on Dealing with Information that Represents Banking Secrecy. If such information gets into the scope of an internal investigation, it must be handled in accordance with the named Rules.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

It is neither a common practice in Ukraine, nor a law requirement, except for the rules of the criminal investigation. In the criminal procedure, there is a concept of "injunctive measures", according to which a court ruling may be issued for the preservation of evidence, including documents. Such a court ruling is obligatory and noncompliance may entail serious legal sanctions on the violator. Therefore, if a party cares about the preservation of documents or other evidence, then it would make sense to consider initiating a criminal investigation of the case if this falls within the scope of possible criminal responsibility, which in most cases would not hinder the process of a corporate investigation. At the same time, it is possible to increase legal risks on the side of the possessor of the documents if there is an apprehension that the possessor may have wilfully or by negligence disposed of the documents under consideration, thus hindering the investigation. A counsel who handles the process may formally inform the possessor of the documents about the nature of the documents in question, their importance and possible consequences of their improper handling. If the documents were then destroyed or otherwise spoiled, the possessor might be subjected to the relevant legal liability. When the preservation of documents is considered, it usually means that the documents may serve as evidence related to the subject of the investigation. If the preservation of documents is initiated within the criminal investigation, then that would be sufficient for the possessor to receive just a court ruling, and no specific description of the investigation would be required except for the minimum prescribed by law. There are no specific requirements in law for the recording of compliance with the preservation notice.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

In this case it would be appropriate if an entity refers to professional advice in relation to every jurisdiction related to the matter. Failure to comply with the applicable rules in any of the related jurisdictions may undermine the whole investigation.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

Enforcement agencies in Ukraine operate based on the strict process rules. These rules also establish requirements for the procedural and material aspects of the evidence collection. These are illustrated best by the criminal procedure rules. Documents collected by the investigation authority must satisfy several requirements, in particular they must be pertinent and admissible. Pertinence is a material characteristic, meaning that information contained in the document or the way the document has been produced impacts the qualification of the case. Admissibility is a procedural characteristic, meaning that the documents have been collected in a way allowed by the law. With regard to corporate investigations conducted without

involvement of the enforcement agencies, these procedural criteria play less of a role but nonetheless should be taken into account as there is always a possibility that a corporate investigation may evolve into a criminal prosecution of the wrongdoers.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

IT plays an indispensable role in the collection of documents as far as the documents include electronic versions or are electronically registered. Therefore, IT specialists are highly engaged in the collection of relevant documents. When the entity conducting the investigation is large, it can happen so that it has an extensive bureaucratic mechanism in operation that deals with the documentation workflow; in this case, the internal service may be of use for the purposes of collecting necessary documents. Accounting, Compliance and Legal departments usually take a great part in the documentation circulating within organisations and their resources should also be used while collecting the documents.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Predictive coding may be used as a method for analysing large volumes of information. When presenting evidence in the public investigation procedure or in court, a party, on the prosecution or defence side, would be required to explain the techniques used in the process of preparing the evidence for consideration. Therefore, to create an admissible evidence, the predictive coding technique must be reliable in terms of its ability to comprehensively and thoroughly process information and sort out the really irrelevant portion of it.

### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Interviews of individuals within corporate investigations are subject to the general regulations on human rights and personal data protection. There are no rules in Ukraine specifically applicable to interviews apart from the public investigations and court hearings. Also, an entity does not need to consult with any authorities before initiating these interviews. However, it should be noted that an interview within a corporate investigation would be an action fully dependent on the person interviewed and refusal to participate in such an interview could not be challenged.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

An employee would have a right to refuse to cooperate with the employer during an internal investigation. Moreover, the labour laws in the majority of cases would protect the employee from a dismissal on that ground. The requirement to cooperate within an

internal investigation may be included in the labour contract and this may provide additional comfort to the employer. However, this instrument may be well-disputed in court and the practice is so that commitments on the side of the employee, exceeding provisions of the labour laws, gets the more support in court the higher is the level of the employee within the corporation.

# 7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

As interviews conducted during internal investigations are not specifically regulated by the Ukrainian laws, it remains at the discretion of the parties whether to make any legal representation and what this should consist of. However, it must be kept in mind that if an interviewee has requested legal representation and the appointment of a representative then the company would not have a right to refuse it.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

An interview should be conducted with strict adherence to the laws that regulate human rights, data protection and other aspects of entity-individual relations. Deviations from these rules may not only hinder the investigation but also create additional legal risks for the entity. When circumstances allow, the interviewed person should be informed of the nature of the investigation and of his/her rights during the process. At the same time, some interviewees may not be allowed to know some aspects of the investigation in order to allow for unbiased presentation of facts by them. Also, when interviewing persons who are suspected of wrongdoings, conflict of interests must be taken into account when defining the content and procedure of the interview. It is advisable that a company engages specialists in psychology as well as in law for conducting efficient interviews.

### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

It is historically conditioned that many local citizens in Ukraine negatively perceive any entities and individuals who conduct inquiries into activity of a person. There is a widespread lack of trust to law protection and enforcement institutions in the country, therefore many people are inclined to resign themselves to unfairness or to defend it on their own. These habits have been improving gradually during recent decades but should still be considered as important factors.

## 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

In that case we would advise first of all to determine to what extent the information disclosed by a whistleblower is correct. If the information disclosed proves to be correct then much depends on the policies and culture of the company in relation to such occasions. The general advice would be to elaborate corrective measures and to inform all interested parties of it and of the intention of the company to improve its state of affairs. During the interview of the whistleblower it is important to give proper legal qualification of the situation and to inform the interviewee of the consequences of crossing the legally permitted line of disclosure. Also, conflict of interest should be taken into account as whistleblowers are often persons who pursue their personal interests when handling the information about the company. With regards to the rights of whistleblowers, the most important statement of law would be article 11 of the Law On Access to Public Information, granting a discharge from liability for disclosure of restricted information in case when a disclosing person acted *bona fide* for the prevention or exposure of illegal activities. The Criminal Code also provides for criminal responsibility for gross violations of the employees' rights, in particular in cases when whistleblowers are punished by the employers for exposing corrupt activities.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

This may be appropriate in some cases; in particular, when the benefits of getting information are perceived to exceed the loss from granting immunity to a disclosing person. However, it should not be forgotten that, in accordance with the Criminal Code of Ukraine, non-reporting of some serious crimes constitutes a crime itself.

## 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

This aspect in relation to corporate investigations is not specifically regulated. The general approach, based on the applicable laws, would be that a person has a right to amend his or her statements should there be a good reason for that. If a case develops into a formal investigation, witness statements made during official interrogations would always prevail over those made during the internal investigation even if they are different from each other.

#### 7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

It is provided by law, namely article 59 of the Constitution (in relation to all activities) and by all procedure codes of Ukraine (in relation to any official procedure), that any person can be represented by an advocate if he/she wishes so. Refusal to allow such representation may be treated as a substantial violation of personal rights and undermines the legality of the whole investigation or its specific stages. Regarding enforcement authorities, there is no requirement for them to be present during interviews within internal investigations.

### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

It is common to produce a written report. However, in some cases clients prefer to get information orally and not to fix it anywhere. The benefits of not documenting the findings are obvious because of the secrecy that may be guaranteed if the information is reported orally. However, a recipient of the report should understand that having obtained the report orally would most probably mark the end of the investigation process. In order to report the findings to the enforcement authorities, or to exercise any formal actions based on the investigation results, it would be necessary to have the outcome of the investigation, as well as the gathered evidence, documented.

### 8.2 How should the investigation report be structured and what topics should it address?

A client may request for a specific structure of the report. A typical report would consist of "boilerplate" provisions and the customised essential part. The boilerplate section would include a presentation of the investigators' party, the client, time and place of the action, etc. The essential part should be structured in accordance with the specifics of the particular investigation and should contain descriptions of: case circumstances; actions taken; methods applied; persons involved; analysis of evidence gathered; legal or accounting qualifications; and conclusions made. A good report would contain advice on mitigation of the negative consequences and actions to be taken to reduce future risks.



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Oleksandr Zavadetskyi was admitted to the Ukrainian advocacy practice in 2001, and has gained substantial hands-on experience in White-Collar Crime, Litigation and Finance Regulation.

In the area of criminal advocacy, Oleksandr has represented clients both on defence and complainant sides in various cases. A specific feature of Oleksandr's expertise is his vast experience in representing commercial entities, including foreign ones, in criminal procedures.

Oleksandr's representative experience in business law includes many successful high-profile deals such as: numerous IPOs and private placements in London, Frankfurt, Vienna and Kyiv; domestic and cross-border M&A transactions; the establishment of funds; advice to asset managers and management of legal affairs of many investment vehicles with branches across numerous jurisdictions; the management of recovery and restructuring of international banks' NPL multi-billion portfolios in the Corporate and Retail sectors; the administration and protection of personal assets in various jurisdictions; and investment projects in Ukraine, Russia, EU, Australia, Asia and Africa.

### Zavadetskyi Advocates

Protecting the Values

Zavadetskyi Advocates is a Litigation, Advocacy and Law consultancy firm based in Kyiv. Its Dispute Resolution practice intersects in the domains of Civil. Commercial and Public Litigation and is substantially influenced by its Criminal Law expertise.

The firm works for clients from various countries and industries, including large multinational corporations and financial institutions as well as individuals, in various issues pertaining to both business and private matters, proceeds with cases of any level of complexity, and concentrates on a results-oriented approach to clients' needs.

The firm has been providing White-Collar advice, defence and representation in criminal courts and within criminal investigations to Ukrainian and international businesses and their stakeholders – entities as well as individuals – for years. Also, the firm assists companies, their officers and owners in a wide range of matters related to various aspects of special regulations such as Anti-Bribery, Regulatory Compliance and Investigations, and Anti-Money Laundering.

## United Arab Emirates

Morgan, Lewis & Bockius LLP





### 1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

When deciding whether to conduct an internal investigation, the company should take into consideration a number of factors including: (i) whether an investigation is required by any specific law; (ii) the scope and severity of the alleged misconduct; (iii) whether the alleged misconduct could be a potential violation of law and regulation; (iv) the potential for, or interest in, litigation by government regulators; and (v) the overall benefits and risk to the cooperation and the employees, the officers, directors and employees of such an investigation.

The legal framework governing fraud, bribery and corruption in the United Arab Emirates (the "UAE") is governed by Federal Law No. 3 of 1987 as amended (the "UAE Penal Code"). Federal Law No. 35 of 1992 as amended (the "Penal Procedures Law") prescribes the procedures under the UAE Penal Code. However, there are a number of other laws at Federal and Emirate level that may apply, and they also contain provisions dealing with foreign and domestic fraud. The UAE has ratified a number of international conventions aimed at combatting corruption and has more recently introduced Federal Law No. 19 of 2016 on Combatting Commercial Fraud which sets out further penalties applicable to both corporate bodies and individuals who commit, or attempt to commit, corporate fraud.

Federal Law No. 4 of 2002 as amended (the "Anti-money Laundering Law") and Cabinet Resolution No. 38 of 2014 (the "Anti-money Laundering Regulations") apply to organisations in the UAE regulated by the SCA and the UAE Central Bank. The UAE Central Bank and the SCA also issue circulars and mandatory procedures which apply to regulated entities.

The UAE Penal Code provides that corporate bodies, with the exception of governmental agencies and certain public entities, are responsible for any criminal act committed by their representatives, directors or agents. Individuals can also be subject to a range of penalties including fines, imprisonment and a bar on doing business and/or entering the UAE. Anyone directly harmed as the result of a crime is also entitled to pursue a civil action before the UAE courts.

The UAE has a number of free trade zones governed by their own framework of regulations, for example, the Dubai International Financial Centre (the "DIFC"). UAE criminal law applies in the DIFC but the civil and commercial laws of the UAE do not, as the DIFC has its own set of commercial laws based on the laws of England & Wales. This guide does not specifically deal with the jurisdiction or laws of the DIFC, or any other free trade zones which may have additional regulations which will apply within free zone entities.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Not all reports of employee misconduct within a company will necessitate an internal investigation conducted either by outside counsel or by management. Where the alleged misconduct involves an individual employee, and does not implicate potential violations of Federal or Emirate based laws, the in-house counsel, often in conjunction with the company's internal audit department, will initially investigate the allegations and submit recommendations to management for the appropriate "next steps". These next steps may include immediate remedial and personnel actions, and may also include voluntary disclosure to the authorities.

Within the UAE, the existence of documented evidence will be critical, so the collation of appropriate material and existence of witnesses to provide written statements will also be important, especially if the investigation gives rise to potential (and reportable) violation of the applicable laws and regulations.

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Once allegations of fraudulent or unethical practice have arisen, it is advisable for the company to carry out some discreet checks and data scrutiny to find credible evidence that will back up the whistle-blower's complaint. If such evidence exists, the decision can then be taken to conduct a more thorough internal investigation.

There is no legal protection offered to whistle-blowers under UAE law. Failure by an individual to notify the competent authorities about a crime of which they have knowledge is considered an offence under the UAE Penal Code. However, if the whistle-blower's allegations are considered false and the allegations were made in bad faith, then the whistle-blower may face criminal charges as well as a civil claim from the party against whom the complaint is wrongly made. Despite this, with respect to a person involved in

a bribe or as an intermediary, there is some protection afforded if they immediately report the crime to the judicial or administrative authorities. In those circumstances, such a person can be exempted from punishment.

The limited protection offered to whistle-blowers, along with the potential penalties (both civil and criminal), often deters an individual from making a complaint that lacks credibility. For this reason, companies should always take a whistle-blower's complaint seriously and ensure that all reasonable steps are taken to assess its credibility. However, for companies with offices in other jurisdictions, the existence of a fraud or bribery may give rise to a reportable violation in the US or the UK (in accordance with the FCPA or the UK Bribery Act). In those situations, it is common for whistle-blowers to report directly to the authorities in the US or the UK

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

In most cases, the company will engage external counsel to conduct the investigation and the company itself will be the "client" for the purpose of investigation. If, during the course of the investigation, any of the employees seek to be separately represented, then the company may assist and seek additional counsel. The company and external counsel would be responsible to manage any potential conflicts

At the outset of the investigation, the company should establish a small and independent internal management team (comprising of senior individuals who have no involvement with the matters giving rise to the allegations or the individuals involved). Depending on the size of the investigation, the team will usually consist of one or more members of the legal team, the head of the relevant business unit, a representative from the IT department and a member of the human resources department. Communications between external advisers and the company should be limited to the internal investigation team in order to ensure confidentiality.

It must be noted that in a large number of corporate crime cases, the directors or senior directors (those managing the company's affairs) will be responsible for the alleged misconduct. In such circumstances, it is very often the parent company or shareholders who will enlist the assistance of external counsel and be the "client" to whom the findings will be reported.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Pursuant to the UAE Penal Code, a party who takes the initiative to report to the authorities the existence of an offence before it is discovered by the Public Prosecutor can be exempted from individual criminal liability. The Public Prosecutor, at their own discretion, may also dismiss a criminal complaint or abstain from prosecuting a briber or intermediary who informs the judicial or administrative authorities of the crime, or who confesses the crime before it is discovered.

Pursuant to UAE Central Bank and SCA regulations, directors or employees have knowledge of money laundering but fail to report will be committing a criminal offence.

In the UAE, early and consistent cooperation with the authorities may justify a less aggressive regulatory response and/or a mitigated penalty.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

When it becomes apparent during an investigation that a crime has been committed, pursuant to UAE Law, there is a legal obligation for the company and or the individual to inform the relevant authorities. Failure to notify the authorities is of itself an offence pursuant to the UAE Penal Code.

The main authorities involved in the prosecution, investigation and enforcement of fraud, bribery and corruption are the UAE police, the Public Prosecutor and the criminal courts. Disclosure can either be made directly to the police in the Emirate in which the crime is committed, or directly to the Public Prosecutor. However, with some offences a report should also be made to the UAE Central Bank and the SCA. Importantly, all material submitted to the authorities must be submitted in Arabic.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

A written report is not required by the authorities; however, where a company wishes to demonstrate a crime has been committed and to pursue criminal and/or a civil complaint against a "fraudster" for example, a collation of relevant evidence will be necessary in order to file a complaint.

If, during the police investigation, the police or the Public Prosecutor require additional information, they have the right to request such information. Companies involved in litigation as a result of an investigation within the UAE, are not, however, under an ongoing duty of disclosure.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

During the investigation phase of any police or public prosecution investigation, individuals and companies must always co-operate with the authorities.

In addition, if certain offences have been committed, such as under the Anti-Money Laundering Law, then there is an obligation to inform the authorities of any such suspicious transactions.

Cooperation with the authorities may justify a less aggressive regulatory response and/or a mitigated penalty; however, this is by no means guaranteed.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

Local authorities, once notified of alleged misconduct, will carry out their own independent investigation. This could take place in parallel to the internal investigation or, alternatively, the authorities may want to take control. The Public Prosecution is headed by the Attorney General, and directly or indirectly in charge of all criminal investigations. They are the only government body entitled to instigate criminal charges and subsequently prosecute.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

It is not possible to limit the scope of a criminal investigation as the police have far-reaching investigative powers. The police have the power to collect all information and evidence necessary for the investigation of criminal offences. In terms of compelling disclosure, the UAE Penal Procedures Law gives the Public Prosecutor the power to order the accused to surrender anything that the Public Prosecutor deems is in the possession of the accused which should be seized. Usually, this will mean computer hard drives, physical files and passwords for online file sites must be handed over.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Federal Law No. 39 of 2006 on International Judicial Co-operation in Criminal Matters establishes a number of circumstances in which UAE state authorities can request assistance from judicial authorities.

Many global companies now implement standardised anti-bribery and anti-corruption policies (albeit with minor differences to comply with local laws) across each of their international offices. These policies recognise international best practice in dealing with investigations and responding to corruption allegations, in line with local legislation, and legislation that possibly has extra-territorial reach. Global policies allow an organisation to adopt a coordinated and efficient approach should they face investigations in multiple jurisdictions.

### 4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

One difficulty in conducting investigations in the UAE is the reluctance for individuals to cooperate. The limited protection offered to whistle-blowers, the strict penalties for false accusations or defamation and the risk of an individual losing their employment and residency (if their employment is terminated) visa, can often

make individuals hesitant to report allegations. Arabic is the language to use with respect to all Court proceedings which will also extend to any public prosecutor and police interviews. This could mean that large amounts of evidence require translation in order to be submitted to the authorities or to Court with respect to a civil or criminal matter, and that individuals may feel intimidated when a translator is required.

### 4.2 What steps should typically be included in an investigation plan?

Once notified, the organisation should establish a small and independent internal management team (comprising of senior individuals who have no involvement with the matters giving rise to the allegations or the individuals involved).

While there is no set structure to carrying out the investigation process and the methodology will depend on the facts, usual steps will include:

- testing the credibility of the complaint and assessing potential violations of law (in the event the allegation is proven) and establishing an Investigation Protocol to maintain confidentiality;
- gathering and preserving evidence;
- review of evidence;
- identification of key personnel and third parties critical to the investigation and initial interviews with each;
- consideration of evidence and identification of any potential disclosures required; and
- cooperation with the regulators and prosecuting agencies (if applicable).
- 4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Once the investigation has commenced, consideration should immediately be given to engaging specialists, including forensic consultants, IT experts and even public relations teams. Where investigations involve alleged bribery or corruption, factual discovery and legal analysis may need to be conducted quickly. This will almost always require the engagement of external legal counsel who will have the skills and experience to conduct a thorough and efficient investigation process.

## 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

The concept of attorney-client privilege that exists in the UK or USA is not recognised in the UAE. UAE law does recognises the concept of "advocate-client" privilege, and appreciates that an advocate's work product is privileged; however, this is not always applicable across the legal profession as an "advocate" is an Emirati local licensed to appear before the UAE courts.

A licensed local Emirati advocate must not reveal any confidential information without the consent of his client, unless he has belief

that his client intends to commit a crime. In addition, interrogating a licensed local Emirati advocate or searching his office is not allowed without the prior consent of the Public Prosecutor. However, this only applies to licensed local Emirati advocates who have the right to appear before the courts of the UAE. Most legal professionals who work in the UAE tend to be categorised as "legal consultants" who are not afforded the same protection. Legal consultants include the majority of legal professionals who work at international law firms and who are not Emirati by birth. However, these legal consultants are also governed by their respective professional obligations depending on where they are admitted which would include the duty of confidentially.

In practice, it is very unlikely that the Public Prosecutor would oblige an attorney to breach confidentiality and the product of legal advice should not be provided readily to the authorities. Despite this, unless with respect to advice produced by a licensed Emirati advocate, theoretically the Public Prosecutor as part of a criminal investigation could direct the search and seizure of any documents which could assist the investigation of a criminal case.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Confidentiality between the client and third parties engaged by outside counsel would be governed by the confidentiality terms under the agreement for services. There would also be an implied duty of confidentiality where a third party is instructed; however there are no special rules governing such a relationship and it is always prudent to ensure that the third party enters into an express confidentiality agreement.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

In-house counsel would be considered to be providing their services on an employment basis and there are no special protections addressing privilege. However, all employees have a duty of confidentiality to their employer and must not reveal secrets under the UAE labour law. As set out in question 5.1 above, privilege only attaches to work with respect to licensed Emirati advocates.

## 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Marking documents "Privileged and Confidential" could go some way towards notifying any regulator that the parties intend the document to be privileged. However, working with a licensed local Emirati advocate (often under the instruction of an international law firm) may also help to protect confidential documents from disclosure.

#### 5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

The results of an internal investigation will be kept confidential by the authorities. There is a possibility the internal investigation may be referenced in Court during the prosecution of a criminal case; however, documents used in criminal cases are not available to the public.

### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The UAE does not have a specific "data protection law". Certain federal laws recognise an individual's right to privacy as well as protect companies' confidential information. Such federal laws include criminal, civil, commercial and labour provisions.

An individual right to privacy is overarching and should be borne in mind when carrying out internal investigations. The UAE Penal Code prohibits publishing any information relating to the "secrets" of the private or family life of individuals, even if they are true.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Preserving all relevant evidence relating to the alleged offence will be crucial and will likely be requested by the authorities at some stage. Any gaps in data, either because it was lost, destroyed or is in the possession of a former employee, will impede the organisation from carrying out a full investigation into what happened and may prove detrimental to the company in any subsequent litigation. Although the UAE does not recognise in its laws or regulations the concept of a "preservation note", companies should ensure that when they conduct an internal investigation, all data is preserved.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

The factors that must be considered will depend on which jurisdictions are involved. Local legal advice should be sought in each case. However, it should be noted that the UAE is not generally considered a jurisdiction with an adequate data protection regime with respect to EU law and caution should be used when transferring personal data to the UAE as part of an investigation.

#### 6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

The types of documents deemed important for collection will depend on the allegations. Emails and other types of correspondence will usually be important in any form of investigation. If the alleged offence relates to corporate fraud such as embezzlement and money laundering, it will be vital to collate interim and annual financial reports, board of directors' reports, audit reports, balance sheets, cash flow statements, documents relating to the annual budget and profit and loss accounts.

The police have the power to collect all necessary information and evidence for investigation and indictment of criminal offences.

## 6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

The data review process can be assisted using a data management platform that allows for a proportionate and targeted review of documents uploaded on the company's systems – primarily emails and other forms of communications. eDiscovery is now assisted by complex technology that can be tailored to suit the type of investigation, including audio review, web-based review software and enhanced chat review. Predictive coding can be used to work with large-scale, multilingual corpuses. Such resources are often offered by external forensic teams.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

The data review process can be assisted using a data management platform which utilises predictive coding techniques. There is nothing prohibiting the use of such techniques. However, the Cyber Crime Law (Federal Law by Decree No. 5 of 2012) contains offences for the dissemination of any information obtained through "computer technology" without authorisation. In this situation, all forensic accountants and data reviewers must ensure they have the right to access, review and share (for example, to external counsel) any of the data they extract and collate. If they fail to obtain, in writing, the appropriate authorisations, they may be held criminally liable for dissemination of confidential information.

### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Conducting interviews with employees (both current and former) is necessary in any internal investigation. There is no requirement to consult with authorities during an internal investigation.

Where the potential offence involves a transaction involving the proceeds of crime then it is important to ensure that carrying out interviews would not amount to "tipping off" as set out in in (Federal Law No. 4 of 2002). Tipping off any person who was involved with a suspicious transaction that it is being scrutinised by authorities would amount to a criminal offence leading to fines and potentially imprisonment.

It is also important to note that covert recording in the UAE is a crime. Recording or copying any conversation conducted in private without the prior consent of the participants is regarded as an invasion of privacy under the UAE Penal Code. The person responsible for recording the conversation will be committing a crime and any evidence obtained through the recordings will not be admissible in court.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Under UAE labour law there is no specific requirement for employees to cooperate with their employer's internal investigations. However,

there may be a term in the employee's employment contract that requires them to cooperate with an internal investigation and any failure to do so may be a disciplinary matter.

Failure for an individual to notify the competent authorities of a crime of which they have knowledge is a criminal offence under the UAE Penal Code. Moreover, any individual who, having knowledge of a crime, conceals any evidence of the crime, by delivering knowingly false information, shall be committing a criminal offence.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

There is no requirement to provide legal representation to witnesses prior to internal interviews.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

Interviews should be conducted by experienced interviewers and accurately recorded in a witness statement. The witness should sign his statement to confirm that the content of the statement is true and correct. Best practice in the UAE would be for the witness to sign each page of the statement and confirm that he is of sound mind and that the statement is made out of free will. Witness interviews should always be conducted with a minimum of three people in the room, so if required, the additional person can also affirm the nature of the interview and the answers provided by the witness.

### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

For internal investigations, you are not permitted to record the interviews, without obtaining the prior written consent of the witness. Although not required by law, you should consider the native language of the witness and provide a translator.

For any police interview, the language of the interview will always be Arabic, and translators must be requested by the witness. The witness will be required to sign a statement at the end of the interview in Arabic, so they should always have it read for them in their native language.

#### 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

An organisation should take all reasonable steps to protect employees reporting suspected fraud or corruption. While there is limited statutory protection offered to whistle-blowers in the UAE, it is nevertheless advisable for organisations to have in place a comprehensive whistle-blowing policy which outlines the procedures a whistle-blower should follow in order to raise a complaint internally and the steps that the company will take to investigate such complaints. This will allow the organisation to protect the company's interests by ensuring that individuals are not treated detrimentally for raising suspicions of corporate fraud, while allowing the company to investigate such allegations before the competent authorities are notified.

During an investigation, information regarding the complaint and investigation should remain confidential and access should be limited to those individuals who require it (such as the internal investigation team). The identity of the whistle-blower should also be kept confidential and interviews conducted in private. The company should demonstrate that it will not tolerate any detriment to anyone reporting suspected corruption; and take action against individuals who threaten or cause action to any person reporting suspected fraud.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

It is not possible for an employer to grant "immunity" or "amnesty" to an employee if it arises that the employee has committed or been involved in the commission of a crime. The decision as to whether or not to prosecute individuals for criminal offences in the UAE is the sole decision of the Public Prosecutor and in some cases the Attorney General. However, it would be theoretically possible for an employer to agree not to bring a civil claim against that employee such as by entering into a settlement agreement.

#### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

For Public Prosecutor interviews, see the comments at question 7.5 above.

When conducting an internal investigation, a witness should sign a statement confirming that the content is a true reflection of the interview and their recollection of facts. A witness should therefore thoroughly review the statement to ensure that it is correct before signing. A witness may be required to give evidence in Court or again to the Public Prosecutor, and if the company wishes to rely on the witness statement in any subsequent proceeding, it should also be recorded that they are willing to do this. The statement should be witnessed by all the people in the room at the time of the interview.

#### 7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

There are no special requirements concerning witness interviews for internal investigations.

### 8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

No. It is usual for companies to require for their internal records an outcome-based report only with a record of the outcome of the investigation.

### 8.2 How should the investigation report be structured and what topics should it address?

See above at question 8.1.



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# **USA**

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- 1 The Decision to Conduct an Internal Investigation
- 1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Publicly traded companies, financial services institutions, and other entities may, under certain circumstances, be subject to statutory and regulatory obligations to conduct internal investigations, depending on the nature of the alleged or suspected misconduct.

For example, the Sarbanes-Oxley Act of 2002 (SOX) requires corporate officers of US issuers, foreign private issuers, and other publicly traded entities that are registered with the Securities and Exchange Commission (SEC) to certify that each periodic financial report filed with the SEC fairly presents, in all material respects, the issuer's financial condition and results of operations. In connection with such certifications, an entity may need to investigate allegations or suspicions of misconduct that could materially affect its financial condition. SOX further requires that publicly traded companies establish audit committees responsible for developing procedures for investigating complaints of financial fraud involving auditing, accounting, or internal controls issues. Such procedures may call for internal investigations under certain circumstances.

Broker-dealers, and certain other regulated entities that are required to register for membership in self-regulatory organisations (SROs), may be subject to SRO rules that require members to investigate suspicions or allegations concerning certain types of misconduct. For example, the Financial Industry Regulatory Authority (FINRA), which, together with the SEC, regulates brokerage and exchange activities, requires member firms to promptly investigate any trades that may violate insider-trading provisions of the Securities Exchange Act of 1934 or related SEC or FINRA rules and regulations.

Certain agencies and authorities, including the SEC, Department of Justice (DOJ), and Commodity Futures Trading Commission (CFTC), grant leniency or cooperation credit to entities that self-report violations. As a general rule, businesses that identify, investigate, and self-report misconduct prior to a government investigation will receive more significant cooperation credit.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Entities should consider factors such as the scope and significance of the potential misconduct, including whether it could give rise to civil or criminal liability, whether the employees involved are still employed, whether the conduct could be ongoing, whether it could impact the entity's publicly filed financial statements, and the likelihood that the potential misconduct will come to the attention of criminal or civil authorities or regulators (for instance, if the conduct has a nexus to pending investigations or actions).

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Companies should assess whistleblower complaints on a factspecific, case-by-case basis, including with respect to the nature of the allegations, the whistleblower's knowledge, the existence of corroborating information (including prior similar complaints), and the potential consequences of the allegations.

A company's response to a whistleblower complaint may impact whether the SEC chooses to bring an enforcement action against the company, pursuant to the SEC's Whistleblower Program, established under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which encourages whistleblowers to report misconduct internally prior to approaching the SEC.

Whistleblowers employed by publicly traded companies are afforded significant protections under the Dodd-Frank Act and SOX. Public companies may face civil or criminal liability for discriminating or retaliating against whistleblowers who provide information to supervisors or government officials.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

The client should be defined at the start of outside counsel's engagement and set out unambiguously in the engagement letter, based on discussions with the individual or entity representative seeking representation. Outside counsel may represent corporate officers and other employees in addition to the corporate entity, but only if those individuals' interests do not diverge from the entity's interests. Where corporate and individual interests diverge, the affected individuals should be advised to retain their own counsel, or the entity may arrange separate counsel for them. Often, employees with similar roles and common interests, but whose interests may diverge from those of the entity, can be represented jointly by "pool counsel".

Individuals whose conduct is or may become the focus of the investigation should not be permitted to conduct or influence the direction of the investigation and should be excluded from the investigation's reporting structure while the investigation is in progress.

### 2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Regulators and civil and criminal enforcement authorities typically take an entity's timely and voluntary disclosure into account in determining whether to criminally charge or bring a civil enforcement action against the entity. Voluntary disclosure may result in a more favourable resolution or reduced penalty, particularly if the entity self-discloses prior to being informed of any government investigation.

For example, the DOJ, SEC, and CFTC generally consider an entity's prompt and full self-disclosure of misconduct and willingness to cooperate alongside other factors, including the quality of the cooperation, the nature and seriousness of the offence, the extent of wrongdoing within the entity and in the ranks of corporate management, the entity's history of similar misconduct (if any), the effectiveness of the entity's pre-existing compliance programme, the manner in which the entity detected the misconduct, and remedial steps taken.

Generally, in order to receive cooperation credit from the DOJ, an entity must identify all individuals involved in or responsible for the misconduct and provide all facts relating to the misconduct. Similarly, the CFTC views full cooperation as including disclosure of the identities of any individual wrongdoers.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

In light of the benefits of cooperation credit and voluntary disclosure, an entity should consider approaching the relevant authorities once it has developed information indicative of a violation of civil or criminal law. An entity can report well-founded suspicions before any conclusions have been drawn, though premature self-reporting may subject an entity to government scrutiny that may later prove unnecessary if the investigation does not ultimately establish misconduct.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

Oral disclosures and communications are generally preferable because they are more protective of attorney-client privilege and work product and present less risk of prematurely solidifying findings or conclusions that may change as further information is developed. Such disclosures may be accompanied by a sampling of key documents or transaction-related information, as appropriate. That said, under certain circumstances, an entity may have an interest in publicly disclosing its findings, in which case a written report may be preferable. US regulators and authorities typically do not require entities to report the findings of internal investigations in writing, though they may ask an entity to produce a copy of its written report if such a report has been prepared.

### 3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

Entities are not required to confer with government authorities when initiating internal investigations, though banking institutions may apprise their prudential regulators of internal investigations as part of ordinary-course dialogue concerning bank supervision and examination.

If an entity is aware that it is the subject of a related government investigation, it may benefit from promptly disclosing the scope and status of its internal investigation to the relevant authorities, as this may position the entity to influence or limit the scope of the government's investigation and increase the entity's cooperation credit.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

The DOJ, SEC, CFTC, and other authorities generally do not expect to be involved in internal investigations. To the contrary, authorities often rely on entities to disclose potential issues or misconduct – in line with the guidelines and criteria for voluntary disclosure and cooperation credit outlined above – before taking investigative steps or other actions of their own. However, in the event that the entity is actively cooperating with a government investigation, the investigating authority may request regular updates as to the status of the entity's internal investigation and may request that the entity take or refrain from taking actions in that internal investigation.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

A corporate entity's ability to guide the scope of a government investigation is typically most robust when the entity informs law enforcement agencies that it is undertaking a thorough internal investigation and fully cooperates with and voluntarily discloses its findings to the relevant authorities. Of course, absent judicial intervention, an entity cannot control the scope of a government investigation, and ultimately the extent and nature of the investigation is within the government's discretion. To the extent an entity is not cooperating, it may seek judicial intervention to limit requests from civil or criminal enforcement agencies on grounds including undue burden and protection of the attorney-client privilege, but its options will be far more limited than when it is in a cooperative posture.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Cooperation between US authorities and law enforcement and regulatory agencies outside the US has become increasingly common over the past decade.

If multiple authorities across jurisdictions are conducting separate investigations concerning the same or overlapping activity, the corporate entity should ensure that any information the authorities receive is consistent. The entity also should identify opportunities to eliminate duplicative work, reduce the burden on relevant employees, and harmonise investigative efforts to address the different authorities' needs and interests more efficiently. For example, counsel might coordinate employee testimony with multiple authorities to avoid repeated requests for substantially the same information.

Entities may also seek a coordinated or global resolution of multiple investigations, though such a resolution may be difficult to achieve, depending on the timing and focus of the investigations.

### 4 The Investigation Process

#### 4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

The scope, burden, and pressures of investigations in the US are substantial and growing. The most complex internal investigations today involve large multinational corporations with witnesses and relevant conduct occurring in multiple jurisdictions, and massive volumes of electronic data stored in the US and abroad, which may be subject to a variety of different data-protection regimes that may require, among other things, review of key materials outside the US. To the extent an entity chooses to disclose the results of its internal investigation to government authorities, the unique nature of the US legal and regulatory environment - including: corporate criminal liability for illegal acts of employees and agents acting within the scope of their duties; potentially severe collateral consequences of corporate criminal convictions; increasingly aggressive prosecutions of financial institutions and multinational firms; and pressure to identify culpable individuals, if any makes it increasingly challenging for entities to navigate internal investigations, disclosures to regulators and authorities, and criminal and civil enforcement actions. Furthermore, materials disclosed to government entities generally will not be deemed privileged, and may be subject to disclosure to civil litigants seeking monetary judgments against the entity on the basis of the alleged misconduct that is the subject of the internal investigation.

### 4.2 What steps should typically be included in an investigation plan?

An investigation plan should provide a clear scope, including the activities or practices at issue, the business, division, or entity to be reviewed, and the relevant time period. The plan should also set out the investigative steps to be taken, typically including document preservation, collection, and review, witness interviews, and expert analysis if needed. Ideally, the plan should lay out a roadmap to the investigation while providing sufficient flexibility to address new issues and areas that may arise in the course of the investigation.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Entities should retain outside counsel to assist with investigations involving suspected civil or criminal violations, government subpoenas or voluntary requests, potential misconduct by members of management, and issues of similar significance. An entity should look to outside counsel with experience handling such matters and interfacing with government authorities.

Depending on the facts and circumstances of the underlying activity, corporations should consider retaining forensic consultants and other experts in consultation with outside counsel. Experts should be engaged by outside counsel to ensure that any communications with and materials provided by such experts in connection with the investigation are protected by the attorney-client privilege and attorney work product doctrine.

## 5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

US law recognises the attorney-client privilege, "common interest" or "joint defence" doctrine, and attorney work product doctrine.

The attorney-client privilege protects confidential communications reflecting a client's request for, or counsel's provision of, legal advice. Although the privilege shields the contents of the communication from discovery, the underlying facts are not protected even though they may happen to be reflected in an otherwise privileged communication. The common interest or joint defence doctrine extends the attorney-client privilege to communications with third parties (and their attorneys), if the client and the third party share a common legal interest and the communications are made in furtherance of that shared interest.

In contrast to the attorney-client privilege, which protects communications between a lawyer and client, the attorney work product doctrine protects materials prepared by attorneys or their agents in anticipation of litigation. Work product may be "ordinary" work product (e.g., gathered facts), "opinion" work product (reflecting an attorney's mental impressions, conclusions, opinions, or theories), or a combination of the two. The government or a private litigant can ask a court to compel the production of ordinary work product on a showing of substantial need, but opinion work product is virtually never discoverable.

To preserve these privileges and protections, individuals involved with an internal investigation should keep privileged materials and communications confidential, and privileged documents should be clearly marked. In preparing investigative materials such as interview memoranda or reports, counsel should include mental impressions and opinions and avoid *verbatim* transcripts or bare recitations of fact

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Communications with and materials prepared by document review vendors, forensic consultants, or other third parties engaged by in-house or outside counsel are protected by the attorney-client privilege and attorney work product doctrine, if the vendors act as agents of counsel for purposes of helping counsel develop the information necessary to render legal advice to the client. Each vendor's engagement letter should clearly define the nature and purpose of the relationship between counsel and the agent.

#### 5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

US privilege law applies equally to in-house and outside counsel. However, communications with and materials prepared by in-house counsel may face stricter scrutiny, particularly if in-house attorneys also provide business advice or other non-legal advice to employees.

### 5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Privileged and confidential materials created by or for counsel in the course of an investigation should be marked privileged and confidential, and the applicable privilege should be clearly indicated on the document, preferably on each page. Pre-existing documents that are reviewed and identified as privileged during an investigation should be marked as such to avoid inadvertent productions or disclosures of privileged material in the future.

#### 5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

US authorities do not necessarily keep the voluntarily disclosed results of internal investigations confidential. Entities may, and typically do, attempt to limit further disclosure of materials that they provide to US authorities, including through requests for confidential treatment of such materials under the Freedom of Information Act (FOIA) or through contractual limitations in proffer agreements. However, entities generally have little control or visibility as to whether law-enforcement agencies share the information with other domestic or foreign authorities.

### 6 Data Collection and Data Privacy Issues

### 6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

Unlike some other jurisdictions, the US does not have a specific data-protection or data-privacy regime applicable to internal investigations. With respect to documents, communications, and other records housed in the US, certain categories of non-relevant personal information may be redacted from materials provided to a government authority pursuant to a subpoena or voluntary request.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

An entity is legally required to retain and preserve all relevant documents and data only when litigation or a civil or criminal government investigation exists or is reasonably anticipated or foreseeable. Failure to preserve data once this duty arises can carry significant sanctions for evidence spoliation, tampering, or obstruction of justice, as well as potential criminal liability under SOX (and potential civil or criminal liability under other statutes) for the wilful alteration or destruction of a document or other record for purposes of impeding, obstructing, or influencing any matter within the jurisdiction of a US agency.

In light of the potentially severe consequences of failure to preserve data and the difficulty in determining precisely when a government investigation can be reasonably anticipated, entities often take a conservative approach and issue preservation notices to employees who are likely to possess relevant documents and data whenever an internal investigation is initiated. Such notices should state the existence of the investigation, briefly set out the relevant areas or activities in sufficient detail so that employees can identify documents and data that must be preserved, explain the importance of data retention, and identify potential locations and categories of relevant data and documents.

### 6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Non-US legal and procedural requirements – including bank-secrecy laws, data-privacy restrictions, and even protections for materials deemed to be state secrets – can impede and delay the gathering of information for an internal investigation. While US authorities understand that some foreign jurisdictions have complex and restrictive data-privacy, data-protection and bank-secrecy regimes, they nevertheless expect corporate entities to deliver the information that they request, and to identify ways to obtain that information without contravening foreign laws. Engaging local counsel who can offer insight into non-US data-protection regimes is critical to this effort. In many cases, if employees give informed consent, that consent may facilitate swifter data collection and production. Alternatively, the DOJ and other US authorities may be able to obtain such information directly, pursuant to a mutual legal assistance treaty (MLAT) with the relevant foreign government.

#### 6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

Any documents of relevance to the potential issues and underlying activity should be collected. Typical examples include electronic communications, audio communications, policies and procedures, internal audit reports, payment messages, trade records, and account statements.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Corporate entities typically engage third-party vendors to extract and store large volumes of potentially relevant data for review, and often work with employees in parallel to gather pertinent documents manually in a more targeted fashion. In the course of an investigation, witness interviews may lead to further sources of relevant data. In the event that an investigation calls for analysis of complex financial or trade data, experts in that area may be retained to assist.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Generally, corporate entities, outside counsel, and document review vendors select a population of documents for review from a voluminous data set through a combination of search terms, date ranges, and custodians (i.e., employees with whom particular documents are associated). The resulting documents typically undergo at least two levels of review. If an entity is cooperating with and voluntarily disclosing information to the authorities, counsel should discuss these review parameters with the prosecutors or enforcement staff to ensure that they are comfortable with the proposed approach.

Some entities use predictive coding and other forms of technology-assisted review (TAR) *in lieu* of search terms and first-level document review. TAR has not yet been widely used to identify materials responsive to government requests and investigations, but in the event of a wholly voluntary proactive disclosure by an entity, the DOJ, SEC, and other authorities might be receptive to the use of TAR in connection with that entity's internal investigation.

### 7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Entities need not consult with any authorities prior to initiating witness interviews in connection with an internal investigation. However, if an entity is cooperating with a parallel, non-public government investigation, the entity should be mindful of the risk of disclosing that government investigation by, for example, seeking to interview third parties or former employees. Furthermore, authorities may request that a cooperating entity provide advance notice of any witness interviews. In some cases, US authorities may even request that the entity refrain from conducting certain interviews in order to allow the authorities to conduct those interviews first.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

While employees are not required to cooperate with internal investigations, and may decline to participate in a witness interview for any reason, they may be subject to a variety of sanctions for failure to cooperate, including loss of compensation or suspension or termination of employment.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

An entity is not required to supply legal representation for a witness, though it is relatively common to advise an employee to retain counsel if his interests diverge from those of the entity or if he may face criminal charges; and often the entity will pay counsel's fees, depending on the particular circumstances, including the corporate bylaws and applicable local law.

### 7.4 What are best practices for conducting witness interviews in your jurisdiction?

Some witness interviews – including interviews of whistleblowers, if any – may be conducted early in the investigation to explore the scope of the potential issues, identify sources of relevant materials, and frame document review parameters. Further interviews are typically conducted after relevant documents have been identified, often including second interviews of witnesses interviewed in the initial stage of the investigation. Interviews often begin with lower-level employees and proceed up the reporting chain.

Counsel should not create audio or video recordings of witness interviews, and ideally only one set of written notes should be taken. Attorneys should avoid preparing *verbatim* transcripts of interviews, as attorney work product protection for transcripts is weaker than for notes reflecting counsel's mental impressions.

### 7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Many employee interviews are cordial, informal, and non-confrontational in the US. However, each employee interview typically begins with a formal instruction known as an "Upjohn warning", which is intended to ensure, among other things, that the witness, under settled law, cannot later claim that in-house or outside counsel represented the witness, cannot limit counsel's ability to share the content of the interview with government authorities, and keeps the interview confidential.

### 7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Whistleblowers employed by public companies are afforded significant protections under the Dodd-Frank Act and SOX. Publicly traded companies may face civil or criminal liability for discriminating or retaliating against whistleblowers who provide information to supervisors or government officials. In interviewing a whistleblower, in-house or outside counsel should signal that

the entity is taking the complaint seriously and should assure the whistleblower that the company is committed to its policies of non-retaliation and non-discrimination.

#### 7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Entities should not promise immunity or amnesty to employees in the course of an investigation, both because information developed at a later stage may make such immunity inappropriate and because of the need to retain flexibility with respect to remediation. While government authorities typically do not dictate whether or how an entity should discipline its employees, authorities may form an unfavourable view of an entity that continues to employ an individual involved in misconduct, particularly in a supervisory role, and especially if the individual is criminally charged or the subject of a civil enforcement action. In the context of a negotiated resolution of corporate criminal liability, government authorities may insist that employees involved in misconduct no longer remain at the company.

#### 7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Employees are not entitled to review memoranda of interviews reflecting their statements, and requests of this kind are not typically granted. However, employees should be permitted to supplement their prior statements at any time.

### 7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

Government authorities need not be present at employee interviews during internal investigations and generally are not present.

Employees whose interests do not diverge from that of the corporate entity are often interviewed in the course of an internal investigation, and there is no requirement that such employees be represented by counsel or that counsel be present for such interviews. If an employee is represented by counsel in connection

with the investigation, counsel will generally attend all interviews of the employee. While counsel's presence is not required by statute pertaining to internal investigations, ethical rules in many states prohibit counsel from contacting represented parties in the absence of their counsel in connection with the matter in which the party is represented – though a party may, with counsel's consent, waive counsel's presence under certain circumstances.

### 8 Investigation Report

# 8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

The decision whether to draft a written report largely depends on case-specific factors. Factors against a written report include the risk of disclosure and privilege waiver and related reputational and litigation risk. Factors in favour might include the complexity of the facts and issues or the need to document the thoroughness of the investigation or explain particular remedial decisions. Moreover, if an entity has an interest in publicly disclosing the findings of its internal investigation, a written report may be preferable.

### 8.2 How should the investigation report be structured and what topics should it address?

A written report might include an executive summary, background of the investigation, factual findings, legal conclusions, and recommendations for remediation. Alternatively, the client may prefer to exclude legal conclusions and recommendations from the report in light of the risks of privilege waiver, litigation, and reputational harm. Ultimately, the structure of the report, the topics addressed, and the organisation of those topics will depend on the particulars of the investigation.

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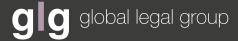


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