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Internal Investigations

How to Conduct an Anti-Corruption Investigation: Ten Factors to Consider at the Outset (Part One of Two)

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It is just a routine afternoon in the office until the mail comes. Sandwiched between a CLE advertisement and your local bar publication is an envelope from the DOJ. You open it and find a letter to your company and a subpoena ordering the production of documents related to payments by company employees to certain foreign officials in order to obtain a government contract. How do you respond? What actions do you take? What should you be aware of as counsel as you navigate the internal response and ensuing investigation?

While no two anti-corruption investigations are the same, this two-part article series walks through the anatomy of a typical investigation and identifies key considerations and best practices at each stage to aid both in-house and outside counsel. The first article details typical triggers for investigations and explains ten crucial factors that a company should consider at the start of the investigation. The second article in the series will discuss, among other things, formulating an investigative plan, best practices for cross-border investigations, the self-reporting calculus and concerns collateral to the investigation.

How Investigations Begin: Triggers for Investigations

Even if a company has a robust compliance program, it is difficult to prevent all corruption violations. Sometimes the company may not have an opportunity to correct an issue that exists before a government-driven investigation starts, such as if a whistleblower has gone to the government but not alerted the company.

Typical triggers for investigations – whether internal investigations conducted by the company or investigations required by government action, such as a subpoena – include the following:

- *Government whistleblowers*: Company employees, either out of frustration with the way that their complaints have been handled internally, because they are angry with the company for some other reason, such as a serious personnel action, or because they want to get a whistleblower bounty from the government, may report their corruption concerns to the government without informing the company or at the same time as informing the company.
- *Company internal reporting mechanisms:* Company employees often report potential issues internally – through a compliance hotline, when a supervisor has detected a problem, or if an accounting employee detects a red flag, etc. This posture allows the company to have more options about how to conduct the investigation.
- *Industry sweeps*: The DOJ and SEC have repeatedly expanded an original investigation into one company to cover other companies because they are in the same industry, use the same problematic third party or deal

with the same government agencies that have been under suspicion in another case.

- *Information from competitors*: Competitors who have lost out on government contract tenders or other competitive situations sometimes accuse the winning company of corruption. In addition, if currently under investigation, companies may try to implicate their competitors to curry favor with the government.
- *Information from other ongoing government investigations*: Sometimes internal or government investigations regarding other issues, such as sanctions or insider trading, can lead to the discovery of corruption issues.
- *World Bank referrals*: The World Bank has its own corruption arm. When it discovers violations, it refers those violations to the enforcement agencies of the countries implicated. See Mara V.J. Senn, Jocelyn Wiesner & Heather Hosmer, "The Cross-Debarment Crossfire: the World Bank's Debarment of SNL-Lavalin," IBA Anti-Corruption Newsletter, Vol. 5, Number 2, September 2013.
- *Referrals from other countries' enforcers*: As other countries strengthen their anti-corruption enforcement, and as they conduct their own investigations, they may identify issues over which U.S. enforcers have jurisdiction or with which they would like cooperation from the U.S. enforcers. See, e.g., Mara V.J. Senn & Mauricio Almar, "The Essentials of the New Canadian Anti-Corruption Requirements," The FCPA Report, Vol. 2, No. 6 (Mar. 20, 2013).
- *Press stories*: As seen in the Wal-Mart case, where *The New York Times* uncovered potential FCPA violations, sometimes investigative journalism or leaks to the press can result in public stories about corruption allegations that can trigger government investigations. See "A Guide to Disclosing Corruption Investigations in SEC Filings: Compendium of SEC Filings (Part Four of Four)," The FCPA Report, Vol. 2, No. 12 (Jun. 12, 2013) (detailing Wal-Mart's disclosures).

INVESTIGATION TIP

Stay abreast of whether industry-specific reporting requirements or ongoing industry sweeps make your company particularly susceptible to government scrutiny, and take appropriate preventative actions to ensure compliance.

Ten Initial Considerations

Regardless of how a company learns of anti-corruption allegations and regardless of how specific those allegations are, it is critical that companies consider the following factors upon discovery of such allegations:

1) What is the nature and scope of the issue?

The specific nature and scope of the issues raised in allegations may affect the decision about whether to launch an investigation and the scope of any investigation. Allegations that trigger an investigation can range from the very specific (the CFO in India paid government official X $120,000 on May 1, 2013) to the very vague (it seems like something illegal is going on in Indonesia).

The purpose of any investigation is to determine whether there is merit to the allegations; and, if so, to ascertain how widespread any issue is and remedy any issues discovered. A specific act of misconduct may require a relatively discrete response or may expose a systematic problem. Vague

allegations or allegations of widespread misconduct may require a more comprehensive and multi-faceted approach or could be determined to be completely unfounded.

Regardless of the initial scope of an investigation, it is normal for it to evolve over time. New issues may come to light or similar issues may arise in different geographic locations. As the issue or issues change or grow, the company's response needs to address those changes. In addition, if at a later time the company does report to the government, the government may require a different scope, which may change the focus and direction of the investigation.

2) Will outside counsel be of use in addressing the allegations or strengthening privilege claims?

Although much more expensive than using in-house resources, outside counsel have a degree of independence from the company that in-house counsel do not. Additionally, in most, but not all, companies, outside counsel with experience in anti-corruption investigations can bring added substantive knowledge, particularly if the investigation involves complex areas of law or cross-border investigations, and with assessing employment concerns and reporting obligations. Using outside counsel can also help in-house counsel preserve relationships within the company, including with individuals targeted in the investigation. Additionally, relying on outside counsel may help strengthen claims of privilege with respect to an internal investigation. This is particularly true in foreign jurisdictions that do not recognize the attorney-client privilege between in-house counsel and other company employees. Companies need to be aware that privilege issues are likely to arise in connection with any external investigation or ensuing collateral litigation, and should expect that any non-privileged information will be subject to discovery.

3) What is the relevant legal framework?

Allegations of corrupt conduct or inadequate recordkeeping can raise concerns under a variety of U.S. and international laws. These include:

The FCPA

The FCPA has two primary provisions: anti-bribery provisions and books and records provisions. The anti-bribery provisions apply to "issuers," "domestic concerns," and "persons" other than issuers or domestic concerns, who violate the FCPA while in the territory of the United States. These provisions prohibit offering or providing "anything of value" to "foreign officials" in order to obtain or retain business or an unfair advantage. The FCPA defines "anything of value" and "foreign official" broadly, prohibiting even indirect bribes. There is a limited exception for facilitating payments to secure the performance of routine governmental actions, and the statute recognizes affirmative defenses for compliance with local law and reasonable business expenses. Violators are subject to civil and criminal enforcement. DOJ enforces the FCPA's criminal provisions and is generally responsible for civil enforcement of the anti-bribery provisions.

The FCPA's books and records provisions apply to "issuers" (generally, these are companies listed on the U.S. stock exchanges or that have American Depository Receipts trading on U.S. exchanges). These provisions require companies to maintain accurate books and records and devise and maintain a system of internal accounting controls. Inadequate books and records constitute an independent FCPA violation, *even in the absence of a bribe being paid*. The broad scope of these provisions cover entries related to foreign subsidiaries that are consolidated into the parent's books. They apply to all

payments, not just those that would be material. Moreover, there is no intent requirement, and a company can violate the books and records provisions even if it had no intent to break the law or keep inaccurate records. The SEC has jurisdiction over issuers and generally handles civil enforcement of the FCPA's books and records provisions. When DOJ and SEC both have jurisdiction, it is common for both agencies to bring enforcement actions. See, e.g., "Compliance Lessons from Total S.A.'s $398 Million FCPA Settlement: Foreign Cooperation, Compliance Monitors, Broad Jurisdiction and the Effect of Reluctant Cooperation with the DOJ and SEC," The FCPA Report, Vol. 2, No. 12 (Jun. 12, 2013).

FCPA jurisdiction extends to U.S. entities, subsidiaries incorporated in the U.S., and U.S. citizens, nationals, or residents acting anywhere in the world. U.S. parent companies can also be held liable for acts of foreign subsidiaries if they authorize, direct or control improper actions of a foreign subsidiary, have knowledge of a subsidiary's improper actions and the ability to control a foreign, non-issuer subsidiary, have a foreign subsidiary acting as the agent of the parent, or have a foreign subsidiary as an alter ego of the company. Foreign-based issuers can be held liable if they use "the mails or any means or instrumentality of interstate commerce" in furtherance of a proscribed foreign bribery offense. This has been interpreted very broadly to require as little as making wire transfers through or to intermediary or end banks in the United States.

The FCPA has a higher standard for foreign non-issuer companies and non-U.S. people – they must have engaged in corrupt conduct "while in the territory of the United States." Foreign companies that are "issuers" and majority-owned subsidiaries of issuers are also subject to SEC books and records jurisdiction.

Other U.S. Laws

FCPA cases have also invoked the Travel Act, which involves using interstate or foreign travel or commerce to violate state commercial bribery laws as well as certain other criminal laws. In addition, allegations involving corruption or inadequate books and records may raise potential SEC disclosure obligations, duties to protect whistleblowers and corporate assets, and internal policies and procedures. Finally, depending on the facts, it is possible that once the investigation goes public, the company will face shareholder class action lawsuits.

Anti-Corruption Laws in Other Countries

With the increase in anti-corruption enforcement by other countries and international organizations like the World Bank, any legal analysis must take into consideration other countries' anti-corruption laws. Some have extraterritorial reach; others are triggered only by actions taken within or involving the territory, citizens or businesses of the country from where the law emanates.

As an example of a non-U.S. anti-corruption regime, the U.K. Bribery Act applies to the worldwide entities of companies that are "carrying on a business" in the U.K., even if the crime occurs *entirely outside the U.K.* For example, if a Brazilian-headquartered company carries on business in the U.K., the U.K.'s Serious Fraud Office (SFO) has jurisdiction over any improper payments to government officials by that company's operations in Japan, even if the improper payments have no connection whatsoever to either Brazil or the U.K.

The Bribery Act, which is enforced by the SFO, prohibits offering, promising, requesting, giving, receiving, or accepting

a financial or other advantage and intending the advantage to induce or reward a person to improperly perform a relevant function or activity. A guidance document issued by the U.K.'s Ministry of Justice sets forth six "guiding principles" that regulators are to use when evaluating a company's anti-corruption programs. These include proportionate procedures, top-level commitment, risk assessment, due diligence, communication (including training staff), and monitoring and review. (See U.K. Bribery Act Guidance at 20-31.) As with the FCPA, a strong compliance program can prevent or mitigate liability. Compliance with the FCPA does not necessarily ensure compliance with the Bribery Act, however, which is broader in certain respects than the FCPA, such as in its prohibition of facilitating payments and its liability for both bribe givers and takers.

4) Is the corporation at risk of liability?

Even if the allegations appear to concern isolated actions by an individual, a company may be found liable for the corrupt actions of its director, employee, or agent. Under the doctrine of *respondeat superior*, a corporation may be held liable for acts of directors, officers, employees and agents for actions that were within the scope of their duties and were intended, at least in part, to benefit the corporation. As laid out in the FCPA Resource Guide, DOJ and SEC apply this principle to FCPA enforcement actions. Moreover, if an agency relationship exists between a parent and subsidiary, under the principle of respondeat superior, a parent may be liable for bribery committed by employees of a subsidiary. Federal prosecutors are specifically instructed not to limit their focus in corruption cases solely to individuals or the corporation, but to consider both as potential targets. (U.S. Attorneys' Manual: Principles of Fed. Prosecution of Bus. Orgs., § 9-28.200.)

The U.S. Attorneys' Manual instructs U.S. attorneys that in determining the proper treatment of a corporate target, including whether to bring charges and negotiate pleas or other agreements, the government should consider the corporation's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents," [USAM 9-28-300A(4)] and its implementation of "remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies." USAM § 9-28.300A(6).

With respect to sentencing, federal guidelines provide a specified and significant reduction in the sentencing calculation "[i]f the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct . . . ." USSG §8C2.5(g)(1). Other countries' laws may also require disclosure.

5) Will the allegations become public, either through SEC disclosures or leaks?

Investigations can become public in many different ways. Therefore, it is essential to involve the company's public relations department right away to make sure that the company is speaking with a unified voice and to allow the company to strategically determine how to deal with

questions about the investigation, both at the beginning and as it evolves. If the investigation is likely to be high profile, involves very senior individuals or includes potentially sensational facts, it may be advisable to hire a crisis-management/PR firm.

6) Do the allegations need to be reported to the government?

An initial consideration, and an issue that will likely last throughout the investigation, is whether and when to report anti-corruption allegations to regulators; and if so, what information should be disclosed, and to whom? Nothing in U.S. law requires companies to report corruption allegations to the U.S. government. Rather, reporting allegations is taken into consideration in charging determinations and through the U.S. Sentencing Guidelines as to whether the company gets cooperation credit for purposes of calculating any fine or criminal action. USSG §8C2.5(g)(1).

Moreover, disclosure in SEC filings is required if the impact of the wrongdoing meets the SEC's materiality and other requirements. See "A Guide to Disclosing Corruption Investigations in SEC Filings (Part One of Four)," The FCPA Report, Vol. 2, No. 9 (May 1, 2013) (discussing when to disclose FCPA investigations).

Reporting to the government prior to conducting an internal inquiry presents the potential of reporting allegations that end up being completely unfounded or inconsequential, causing undue harm to the company. Once allegations are reported to the government, companies typically lose control of an investigation – regulators will have their own interests, requests, and timelines.

Regulators will not limit themselves to seeking evidence of just anti-corruption violations, but will look for violations of any sort, which may turn up in documents produced to the government. Finally, although the Sentencing Guidelines indicate that corporations are to be rewarded for self-reporting, and U.S. enforcers have asserted that this occurs in practice,[1] studies indicate that there are no strong objective indicia that companies benefit from self-reporting in FCPA cases.[2] This is particularly true if the company fully cooperates, even if the government becomes aware of the issue other than through a report from the company.

On the other hand, it is important to consider whether reporting to the government could garner additional goodwill and cooperation credit. In addition, the government may already know of the allegations through a whistleblower or some other means. The Dodd-Frank Act encourages employees to report alleged wrongdoing by offering monetary awards to whistleblowers and providing whistleblower protection. If there is reason to believe that the allegations have been reported, the company needs to consider whether the benefits of early reporting outweigh the potential risks. But under the Sentencing Guidelines, the company will receive less credit if the government believes the company faces "an imminent threat of disclosure" because it knew that the government would soon become aware of the problem by a different means. Another complicating factor is whether to report to enforcement officials of foreign governments at the same time as reporting to the U.S. government. These determinations must be made on a case-by-case basis.

7) What steps should the company take to preserve relevant documents?

Preserving relevant documents is a critical and time-sensitive step when responding to allegations of illegal conduct, whether from an internal report or a government-initiated

investigation. The last thing that a company wants is to be charged with obstruction.[3]

In the litigation context, the typical method of preserving documents is to circulate a document retention notice and institute a litigation hold. These are often appropriate tools in the anti-corruption context. But there are also countervailing considerations. For example, issuing a document retention notice may alert company suspects to the fact of an investigation and increase the risk that they will destroy evidence or take other actions to obstruct an investigation.

If there is a reason to believe that an alleged perpetrator may take such actions, covert document preservation and collection strategies may be appropriate, as discussed in greater detail in part two of this article. Before covert approaches are used, however, it is important to be aware of and comply with all relevant data privacy laws. As discussed in part two of this article series, this is particularly important in foreign jurisdictions such as the E.U., where data privacy laws protect individuals' privacy with respect to personal information and authorize civil actions when such protections are violated.

8) Should company suspects and/or third-party agents be interviewed?

It may be tempting to jump in and quickly start interviewing company suspects about the allegations. However, doing so creates a risk that other suspects will be alerted to the investigation and increases the risk of spoliation and obstruction of the investigation. If the allegations concern actions involving third-party agents, it may be useful to interview the agents, but again, only if this can be done without disclosing the allegations and the investigation. When considering with whom to speak regarding allegations, keep in mind whether certain company executives or representatives would be likely company witnesses in a resulting enforcement action. If so, isolating those persons from the investigation can help preserve the confidentiality of the investigation. In addition, if the company decides that it is important that the legal function run the investigation to ensure free communication regarding potential liability, privilege should be established by involving lawyers.

9) Should the company hire a private investigator?

A private investigator may be useful to address certain allegations regarding corrupt conduct. For example, if the allegations involve conduct by a former employee whose current location is unknown, an investigator may be able to help find the individual and identify relevant information or documents he or she may have. An investigator also may be useful in identifying private bank accounts that may have been used in connection with alleged misconduct. Using an investigator creates additional risks, however, such as the possibility that the investigator may disclose the investigation, create potentially harmful documents that may not be covered by the attorney-client privilege, or violate privacy laws or other laws during the course of its investigation. Whenever a private investigator is involved, consider whether information provided to the investigator is protected by the attorney-client privilege. Private investigators should be carefully managed to address these concerns.

10) Should the company consider alternatives to a full-blown investigation?

Finally, a full-scale anti-corruption investigation is likely to be costly and disruptive. Depending on the outcome of the many considerations highlighted above, it may be appropriate to consider taking intermediate steps before launching an investigation.

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[1] See, e.g., Lanny A. Breuer, former Assistant Attorney General, Criminal Division, Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009) ("The Sentencing Guidelines and the Principles of Federal Prosecution of Business Organizations obviously encourage [voluntary disclosure], and the Department has repeatedly stated that a company will receive meaningful credit for that disclosure and that cooperation."); "In Recent Remarks, Assistant Attorney General Lanny Breuer Discusses Deferred Prosecution Agreements, Civil Forfeiture and FCPA Enforcement against Individuals," The FCPA Report, Vol. 1, No.11 (Nov. 7, 2012).

[2] A recent study conducted by two New York University Law School professors that involved a statistical analysis of FCPA settlements from 2004 through 2011 found "no evidence to support the hypothesis that voluntary disclosure or cooperation or remediation correlates with reduced total monetary penalties." Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 21 (NYU Law and Economics Research Paper Series, Working Paper No. 12-15, 2012).

[3] *See, e.g.,* 18 U.S.C. § 1519 (titled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy"); "Strategies for Preserving Data Before and During an FCPA Investigation," The FCPA Report, Vol. 1, No. 12 (Nov. 14, 2012).