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Internal Investigations

How to Conduct an Anti-Corruption Investigation: Developing and Implementing the Investigation Plan (Part Two of Two)

By Mara V.J. Senn & Michelle K. Albert, *Arnold & Porter LLP*

Once you have discovered that your company is the subject of an anti-corruption investigation – either one prompted internally or by the government – an investigation plan must be formulated and effectuated. How can your company marshal resources most efficiently to ensure a thorough investigation? What are the best methods for conducting interviews and collecting documents? What should the company do in response to any issues identified by the investigation, and what collateral consequences should it be prepared to deal with?

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. This, the second article in the series, discusses, among other things, developing an investigative plan, strategies for witness interviews and document collection, ten best practices for cross-border investigations, managing the self-reporting calculus and handling remediation and other concerns at the end of the investigation. The first article detailed typical triggers for investigations and explained ten crucial factors that a company should consider at the start of the investigation.

Develop an Investigation Plan

The decision has been made – usually by company leadership, in consultation with counsel – to initiate an anti-corruption investigation. Now the company needs an investigation plan that defines the investigation objectives, identifies available internal and external resources and provides a blueprint for the investigation. It is helpful to have a pre-existing general investigation plan in place that will assist in choosing appropriate functional area personnel and subject matter experts in assisting with the investigation, as well as pre-defined reporting lines for the progress of the investigation. These may have to be adjusted based on the specific facts of the case.

Assess Internal Resources and Populate the Investigative Team

It is important to assess the availability and suitability of internal resources for an anti-corruption investigation.

First, the company must determine who will lead the investigation. Typically, this will include the legal department, and potentially the internal audit department and senior management, assuming they are not involved in the allegations. If outside counsel is retained, a main in-house point of contact is helpful to facilitate coordination and to ensure that outside counsel has access to the information and personnel that they need. Employees potentially involved in the alleged conduct should not have a role in the investigation.

If the company has an audit committee, the investigation team needs to determine when to brief the committee.

Depending on the nature and scope of the allegations, as well as the capacity of internal resources, it is often appropriate to have the investigation team report to the audit committee or to independent members of the board. That reporting structure will make it more likely that the investigation will be perceived by the government or others as more independent than if the internal management is driving the investigation.

Because anti-corruption allegations involve payments and financial transactions, accounting resources are critical to an anti-corruption investigation. Depending on the strength and scope of internal accounting resources, a corporation's accounting department may be able to provide the needed analysis of financial records collected during an investigation. If the issue involves complex accounting issues or a large volume of records, however, it may be necessary to engage outside experts. Deciding whether to use outside forensic experts primarily involves balancing the need for additional expertise or manpower with the added cost. Similarly, if document collection or analysis will require complex computer imaging or recovery techniques, there may be a need to engage outside experts to assist with this process, as discussed below.

Involving the IT and HR departments can also be beneficial. IT is an essential resource to determine how the company's electronic information is preserved across the various international offices, how to navigate differing systems that may exist internationally, from legacy companies or from changes in IT systems, and how to preserve and collect electronic information most effectively and efficiently. The IT department can also help to preserve the electronic resources of departing employees that otherwise may be destroyed in the normal course of business. See "Strategies for Preserving Data Before and During an FCPA Investigation," The FCPA Report, Vol. 1, No. 12 (Nov. 14, 2012). HR is helpful in alerting the investigations team about upcoming departures of employees that may be relevant to the investigation and may also have knowledge of previous investigations of the relevant employees.

Detail Methods of Obtaining Information

The investigation plan should list the people that need to be interviewed and the information that needs to be collected, as well as a timeline for when that should be done and in which order. For example, if one of the potential interviewees is expected to leave the company for retirement or for another job, interviewing that person should take priority to ensure that the person will be available to the company for an interview. In addition, the investigation plan should consider the best way to preserve documents of employees who are leaving the company or changing positions within the company.

One question to address in developing an investigation plan is whether to utilize overt or covert information collection strategies, or a combination of both. Reasons to use covert strategies, at least during the initial stages of an internal investigation, include minimizing the risk of spoliation of evidence, disruption to business, and negative publicity. Of course, if the investigation has been made public, it is likely that any wrongdoers are already on notice, and promptly taking steps to preserve and gather information may be a more useful strategy.

If the company has not already done so, communicating with the person reporting the allegation typically is important to better understand the allegations, get the full story, and may be useful to identify individuals with relevant information and the location of potentially relevant documents.

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INVESTIGATION TIP

When presenting to the government about compliance efforts, the most effective presentations include in-house compliance, internal audit or staff personnel and accompanying outside attorney.

Implement the Investigation Plan

Now that a plan is in place, the company gets to the meat of an anti-corruption investigation: gathering the necessary documentary and other information to achieve the investigation objectives. Information typically comes from two primary sources: documents and witness interviews.

Issues in Document Identification and Collection

Before collecting documents to review, companies have to determine the location of potentially relevant documents. Document collection continues to become increasingly complex as the universe of electronically-stored material grows and diversifies, and as workers increasingly utilize smart phones and other personal electronic devices for work-related activity. The investigation should identify all potential document custodians and the location of all potentially relevant documents, including:

- **Hard copy materials:** This includes materials located in document custodians' offices, centralized project files, personnel files and off-site storage.
- **Individuals' work computers and other storage devices:** Computer hard drives and external data storage devices such as CDs, DVDs and flash drives.
- **Corporate servers:** In addition to the "usual suspects" (e-mail, Word, PDF, Excel and other similar file types), relevant information may be contained in other types of data such as instant messages and even internet history.
- **Individuals' work-related personal devices:** Devices such as Blackberries and smart phones may contain relevant documents (such as e-mails, voice mails, and text messages).
- **Personal computers and devices such as tablets that have work-related information.**
- **Voice messages.**
- **Devices used by document custodians prior to their last upgrade.**

A growing challenge in document collection, particularly in cross-border investigations, is the need to image electronic devices such as laptops, tablets and smart phones. Forensic imaging is important to preserve metadata that can indicate facts about when a document was created, edited, accessed and destroyed. The diversity of mobile devices and operating systems presents unique challenges in collecting documents from these sources. Depending on the breadth and complexity of the document collection and the availability of internal company resources, the company may need to engage data collection experts to assist with collecting electronic documents.

Local data protection laws may apply to documents collected in other countries. Many countries have more stringent laws than the U.S. This may pose challenges in collecting documents from custodians or locations in those countries. For example, the E.U. recognizes a right to data privacy. German data privacy law can impose criminal penalties for improperly removing private information from a live server. To address notification requirements, individuals may need to sign a written consent form prior to collecting information from them. Individuals in countries with data privacy laws may have recourse to local data privacy authorities and may report the attempted data collection or file a complaint. See

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"Conflicting Compliance Obligations: How to Navigate Data Privacy Laws While Performing Internal Investigations and Promoting FCPA Compliance in the E.U. (Part Three of Three)," The FCPA Report, Vol. 2, No. 3 (Feb. 6, 2013). Because of ever-evolving standards and requirements, it is advisable to engage local counsel to ensure compliance with local data privacy laws.

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U.S. regulators have made clear that they do not look kindly on companies who say that they cannot produce documents because of foreign data privacy laws or other similar impediments. They claim that these laws are rarely enforced, that in other situations, companies ignore these requirements and that work-arounds can be reached with the enforcement agencies of that country.

Reviewing Relevant Documents

The volume of potentially responsive documents in an anti-corruption investigation (particularly a cross-border one) can be daunting. It is important to prioritize and review the most relevant material first by identifying key search terms, taking steps to eliminate false hits (and duplicates), and focusing on targeted relationships and key individuals.

In reviewing financial records, it may be necessary to work with the accounting department and/or engage external accounting experts in order to identify and review accounting documents to detect improper transactions. Backup for each transaction is often kept in hard copy and all of it may not be included in the electronic accounting system. The team reviewing such documents should understand that a series of small-value transactions or numerous similar transactions may be indicators of a widespread issue. Moreover, the FCPA applies to transactions involving "anything of value," and does not contain a *de minimis* exception. Thus, looking for and identifying patterns that may reflect corrupt actions by one or more company employees, such as meals or small gifts being purchased for government officials, is important. See "Gifts, Travel, Entertainment and Anti-Corruption Compliance: Sources of Authority, Best Practices and Benchmarking," The FCPA Report, Vol. 2, No. 22 (Nov. 6, 2013).

If a company is responding to a government subpoena or document request, a working familiarity with the documents and the issues is helpful. This will allow the company to negotiate the scope of the requested documents, and the general scope of the investigation, early on in its discussions with the government. The company wants to ensure that the government receives relevant documents and information while at the same time decreasing the collection, review and production costs, which are often one of the largest costs in an investigation. A working knowledge of the case also may allow the company to carve out sources of documents that may be expensive to collect but yield few relevant documents.

Strategies for Witness Interviews

Witness interviews in an anti-corruption investigation should be addressed in the investigation plan. An investigation plan typically should address who is to be interviewed, the order of interviews, techniques to control interviews and procedures for notification of managers or supervisors.

In general, witness interviews should occur in the following order: (1) the reporting party; (2) other witnesses with knowledge who can provide factual background and information; (3) individuals directly involved in the reported issue, but not the individual/s who engaged in the reportedly improper conduct; and (4) the subject/s of the allegations. This order facilitates gathering as much information as

possible about the reported issue before interviewing the subject or suspect. However, if there is concern that the subject will become aware of the allegations and adjust his story accordingly, it may be advisable to interview this person first to keep the element of surprise.

Maintaining confidentiality and privilege with respect to witness interviews is an important but often difficult task. Regardless of who conducts the interview, it is essential to emphasize to the witness that the interview is confidential and may not be discussed with any third parties.

Preserving the Privilege in Interviews

Having a lawyer conduct witness interviews will strengthen subsequent claims of privilege. If a lawyer does conduct interviews, however, in order to avoid potential conflicts of interest and to comply with the attorney's ethical obligations, it is essential to provide *Upjohn* warnings before conducting the interview.

An *Upjohn* warning informs the witness that the lawyer represents the corporation or entity conducting the interview, and only that entity, and not the individual being interviewed. The warning should also inform the employee that the interview is being conducted as part of an investigation for the purpose of determining the facts and circumstances of the specific allegations in order to advise the corporation or entity how best to proceed. The warning should tell the witness that his or her communications with the interviewing attorney are protected by the attorney-client privilege and, in order for the communication to be subject to the privilege, it must be kept in confidence, such that the witness may not disclose the substance of the interview to any third party, whether inside or outside of the company. The warning should further clarify that the attorney-client privilege belongs solely to the corporation, not to the witness, and that as a result, the corporation may choose to waive the privilege (without notifying the witness) and reveal the discussion to third parties. An interview should not proceed until such warnings are provided and the lawyer confirms that the individual understands and is willing to proceed.

Moreover, when dealing with an unrepresented individual, under the Model Rules of Professional Conduct, if an attorney knows or reasonably should know that the person misunderstands the lawyer's role in the matter, the lawyer is obligated to make reasonable efforts to correct the misunderstanding. The lawyer may not give legal advice to such a person other than the advice to obtain a lawyer, if the lawyer knows or should know that the interests of the individual have a reasonable possibility of being in conflict with the interests of the client.

Regardless of whether an attorney conducts the interview/s, it may be useful to have two individuals present during an interview. The second individual should not be involved in the underlying facts of the investigation, but should have some familiarity with the subject matter and with established investigation protocols. That individual may assist by taking notes during the interview. Notes taken by an attorney during an interview are most likely to be covered by the attorney-client privilege, particularly if they contain the attorney's mental impressions.

It is also important to be aware of cultural issues when dealing with a cross-border investigation.

Top Ten Best Practices for Cross-Border Investigations

1. **Offer Interview Translation:** Try to offer non-native speakers the opportunity to have a translator attend an

interview. This may put the interviewee at ease and can clear up any language misunderstandings.

2. **Avoid Cultural Pitfalls:** Try to consult local counsel or local employees to identify cultural pitfalls that may be faced in interviews and document collection.
3. **Observe Data Privacy Restrictions:** Consult with local counsel about data protection issues to ensure compliance with local laws.
4. **Comply with Labor Requirements:** Consult with local counsel or local employees about possible local labor requirements, such as allowing a union representative or others to attend an interview.
5. **Be Aware of Other Legal Requirements:** Consult with local counsel about other applicable local laws that may be relevant.
6. **Put Forms in Native Language:** If interviewees sign a form as part of the interview, such as a data collection consent form, be sure to have a copy in the interviewee's native language to minimize confusion and resistance.
7. **Preserve the Attorney-Client Privilege:** Remember that many foreign jurisdictions do not recognize the attorney-client privilege between in-house counsel and company employees. Therefore, external counsel or possibly U.S.-based in-house counsel should be used in non-U.S. interviews to preserve the privilege.
8. **Prepare for Local Enforcement Actions:** Local enforcement agencies may find out about the investigation or may be informed by the U.S. government. Be aware of the approach that the local enforcement agencies typically take, such as dawn raids, arrests, etc., to be able to inform the investigation team and/or local operations and to minimize disruption.
9. **Prepare for Security Risks:** The investigation team should be aware of potential security issues that exist in the location of the interviews and document collections. The company should take reasonable precautions to ensure the safety of their team. In some instances, it may be more cost effective to send the interviewees to another location or to conduct phone or video interviews.
10. **Protect Whistleblowers:** Although U.S. whistleblower protections may not apply in foreign jurisdictions, it is a best practice to ensure that whistleblowers are not retaliated against, no matter where they are located. Federal sentencing guidelines provide for a reduction in the sentencing calculation for companies with an effective compliance and ethics program in place at the time of an offense (§8C2.5(f)(1)) which, according to the guidelines, includes having and publicizing a system for employees or agents to report "potential or actual criminal conduct without fear of retaliation." §8B2.1(b)(5)(C).[1]

The Self-Reporting Calculus

Once documents have been collected and reviewed, the data has been analyzed and witness interviews are completed, the investigation team can evaluate the information and develop conclusions regarding whether the allegations are substantiated, the scope of any identified misconduct or violations, remedial actions and any new areas for further investigation (such as indications of related issues in other countries). In addition, for all investigations, it is important to document any investigation as it goes along.

If the allegations are substantiated and there has been a potential FCPA violation, as discussed in part one of this

article series, federal law encourages, but does not require, companies to self-report wrongful conduct. As a U.S. government enforcer recently said, if the anti-corruption allegations are substantiated but the problem is "small and discrete" in nature, he would not expect to hear from the company through a self-report.[2] If the company chooses not to report illicit conduct, this could raise potential liability issues under various federal statutes. It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement to a government official, 18 U.S.C. §1001; to obstruct justice, 18 U.S.C. §1519; and to commit perjury in sworn proceedings, 18 U.S.C. §1621. There is also a concern that employees may have reported the issue to the authorities already.

If the company decides to self-report, one U.S. government enforcer recently stated that the most effective means of cooperation is early production of documents, including translations into English and arranging for foreign witnesses to be interviewed in the U.S.[3] Companies will need to consider how to best maintain the attorney-client privilege with respect to information gathered and legal advice provided during the investigation.

Ensuring that regulators have enough facts to convince them that the company conducted a thorough and adequate anti-corruption investigation without waiving privilege with respect to the investigation can be challenging. Once materials are given to the government, the privilege attached to those materials may be waived, including lists of witnesses interviewed and interview outlines and memoranda.

Consequently, best practices in presenting information to government regulators regarding the findings of anti-corruption investigations include describing orally what witnesses said factually and summarizing information uncovered in the investigation, rather than providing notes or other materials recording impressions from interviews. Attorneys typically make presentations to regulators rather than simply providing them with copies of analysis materials.

As a general matter, it is best to produce documents maintained by the company in the regular course of business as requested and negotiated, but maintain work product and attorney-client communications confidential. In fact, according to the Filip letter, the government may not request that a company waive privilege and is not supposed to consider that in the determination of cooperation. In some rare cases, however, it may be necessary or desirable to waive privilege on narrow issues, such as a defense of advice of counsel, which requires waiver to prove the defense.

Final Steps and Collateral Concerns

Remediation

One of the most important functions of an investigation is the opportunity to fix issues identified, both on the employee level and on the structural corporate level. As a U.S. enforcement official recently said, companies should start doing compliance and remediation in parallel to the investigation right away.[4] The aim of remediation is to put into place policies and procedures that would have stopped the original problem. To the extent that a compliance presentation is made to the government, the government wants to feel comfortable that the company will catch problems even if it cannot prevent them. The government also wants the company to show it that, by the time the presentation occurs, the company has already begun to put these safeguards in place. See "When, Why and How Should

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Companies Discipline Employees for FCPA Violations?," The FCPA Report, Vol. 1, No. 8 (Sep. 19, 2012).

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The investigation may highlight remedial actions that need to be taken within the company. For individuals who are found to have engaged in wrongdoing, the company needs to determine an appropriate and proportionate response, up to and including termination. If employee termination is a possibility, it is important to review any existing termination agreements prior to taking such remedial actions. Outside counsel can help develop a strategy to address any employment actions.

In addition, if any books and records violations are substantiated, internal record-keeping practices and/or auditing protocols may need to be reviewed, changed or clarified. New or supplemental trainings may be necessary to ensure compliance for the future.

Finally, if the problem was not immediately detected, new policies and procedures should be put into place to allow early detection and prevention of similar problems.

The Importance of Documentation

Regardless of whether the investigation involves the government, the steps of the investigation should be documented and preserved in such a way that even if no one involved in the initial investigation remains at the company, the process, facts, reasoning, outcome and resulting remediation of the investigation will be fully comprehensible to a person picking up the file. That way, if a government investigation is ever launched on a similar issue, the company will have documentation of the reasonable steps it took to remedy this issue and why the issue was not reported.

Handling Collateral Consequences

Collateral litigation is possible at any time during an investigation. For example, shareholders may bring class actions against the corporation or whistleblowers may bring claims of retaliation. The company should account for the potential for collateral litigation in structuring and conducting its investigation, and when making the decision whether to self-report. In any litigation in which the company is pitted against employees, directors, or officers, privilege issues are likely to resurface. This is one of the reasons why it is essential for lawyers to provide adequate *Upjohn* warnings when interviewing company employees and officers.

Government Negotiations

In cases where the government is involved in the investigation, finding an optimal resolution is crucial. Often, in parallel investigations, which are becoming more commonplace as international cooperation increases, foreign government enforcers will also be investigating the same issues. Usually, it is desirable for companies to come to a universal resolution if possible. This allows the investigation to have a definitive end and the total criminal liability and fines to be negotiated all at once.

As to U.S. government enforcement officials, it is often helpful to use reported FCPA settlements to distinguish or analogize to the company's case, as well as discussing specific Sentencing Guidelines calculations. See "FCPA Corporate

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Settlements of 2013: Details, Trends and Compliance Takeways," The FCPA Report, Vol. 2, No. 25 (Dec. 18, 2013). Most importantly, once a company is cooperating with the government in an investigation, it needs to do as much as possible, within the bounds of privilege and its own interests, to help the government find a quick resolution to the investigation. Typically, the quicker the investigation, the less expensive and less disruptive it is.

Conclusion

Each investigation has unique facts and involves unique individuals, but the same general issues arise repeatedly. Although it is impossible to predict the course and outcome of a particular investigation, it is helpful to have pre-existing investigation processes and procedures in place that address the issues and considerations raised in this article. By helping to streamline the procedural aspects of an investigation, the substantive investigation itself can be conducted much more smoothly and efficiently. An effective investigation, in turn, can help a company quickly evaluate allegations of corruption, remediate any identified problems, and inform the company's calculus regarding cooperation with regulators and law enforcement.

Mara V.J. Senn is a white collar partner in Arnold & Porter LLP's Washington, D.C. office. She regularly leads multi-jurisdictional FCPA internal investigations and responds to FCPA government inquiries and investigations in a wide variety of industry sectors and countries. She advises clients on high-level strategy on all fronts, including the investigation, whether and how to discipline current employees and agents, how FCPA issues affect the business, and ways to ameliorate corporate structures to avoid problems in the future. She also counsels clients on FCPA compliance, including conducting analyses to identify weaknesses in compliance systems, designing and implementing comprehensive compliance programs, and preparing agreements and due diligence structures to monitor third-party agents.

Michelle K. Albert is an associate in Arnold & Porter's litigation and environmental practice groups based in the Denver office. Her practice encompasses complex civil litigation in federal and state courts, arbitration proceedings and mediation. She assists clients with multi-national FCPA investigations as well as compliance with the FCPA and environmental laws.

[1] Additionally, some foreign jurisdictions, such as the U.K. and certain other E.U. states, provide varying degrees of whistleblower protection. *See generally*, Mark Worth, Transparency Int'l, *Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU*, 5 (Nov. 5, 2013) (finding that four E.U. countries have "legal frameworks for whistleblower protection that are considered to be advanced: Luxembourg, Romania, Slovenia and the [U.K.]," sixteen others have "partial legal protections," and the remaining seven have "very limited or no legal frameworks").

[2] Charles Duross and Kara Brockmeyer, The Anti-Corruption Year in Review: The U.S. DOJ and SEC Discuss FCPA Enforcement Priorities, Cross-Border Collaboration and the Significant Cases of 2013, ACI Conference, Nov. 19, 2013 (2013 Duross and Brockmeyer ACI Speech). See also "Charles Duross and Kara Brockmeyer Discuss Five FCPA Enforcement Trends That Matter to Regulators: Individual Prosecutions, Administrative Proceedings, Global Coordination, Corporate Monitors and Third Parties (Part One of Two)," The FCPA Report, Vol. 2, No. 24 (Dec. 4, 2013).

[3] 2013 Duross and Brockmeyer ACI Speech.

[4] 2013 Duross and Brockmeyer ACI Speech.