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Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
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A Year Since the First CJIP: Has France Taken a Seat at the Global Anti-Corruption Enforcement Table?

Matthew Cowie

Karen Coppens

Dechert LLP

Lisa Osofsky, Director of the UK Serious Fraud Office ("SFO") recently stated that "*DPAs are spreading across the globe*".[1] The Director was commenting on the fact that numerous countries including France, Singapore, Canada, Poland, Australia, and Argentina have, in recent years, followed models for diverting corporates from trial processes, often referred to as deferred prosecution agreements ("DPAs").

The French DPA is the *Convention Judiciaire d'Intérêt Public* ("CJIP"). Since the enactment of Law No. 2016-1691 of December 2016, known as Sapin II,[2] in December 2016 and its entry into force in June 2017, French authorities have entered into five CJIPs with companies.[3] Given the French authorities have made a high-paced start using this enforcement tool, we examine the central features of the CJIP process illustrating, where helpful, the emerging similarities and differences between CJIPs and US/UK DPAs. We conclude with some themes of how the global enforcement landscape may develop now that France has announced itself as a credible and active enforcer of corporate fraud and bribery cases,[4] and set forth some thoughts regarding likely enforcement trajectory.

1. Overview of the French DPA

Sapin II was, in part, a response to international criticism that France was not enforcing international bribery laws[5] and also domestic concerns that multi-million and billion dollar fines were being paid primarily to US regulators.[6]

Sapin II authorises the French Public Prosecutor (including the Parquet National Financier ("PNF")) to offer and negotiate CJIPs with companies facing a criminal investigation without the risks associated with a public and often lengthy process and trial.

A CJIP can only be concluded for the specific offences of corruption, influence peddling, and laundering of the proceeds of tax fraud and related or "connected" offences,[7] and must be "validated" by a judge during a public hearing. The judge will determine whether the company should be offered a CJIP by determining: (i) whether it is appropriate to enter into a settlement; (ii) whether all procedural rules have been followed during the negotiations between the company and the Prosecutor; (iii) whether the fine imposed is lawful (as fines in France are capped at 30% of the annual turnover of a company over the past three years[8]); and (iv) the fine's proportionality to the gains derived from the company's wrongdoing. As a general matter and similarly to the UK DPA, if the judge approves the CJIP, the validation order does not amount to an admission of guilt[9] and does not have the effect of a conviction. To date, the French authorities have shown themselves willing to settle significant cases speedily. The statement of facts and validation orders of the French judges are accessible short documents similar to some US Department of Justice ("DOJ") indictments and statements of fact. The level of scrutiny by the French judges during the validation Court hearings appears reasonable and is closer to the US approach than the UK.

Companies will have 10 days to reject the validation order of the CJIP.[10] A criminal investigation and trial will follow if the judge rejects the CJIP or if the company uses its statutory right to reject the agreement. Whereas there are few UK or US prosecutions of companies, given the French trial tradition, the French authorities are comfortable in taking a company to trial where a CJIP is unavailable or has failed. Documents provided by the company to the French Public Prosecutor during the CJIP cooperation process cannot be used against the company. In the UK, documents disclosed to the SFO prior to the DPA negotiations commencing may be used by the Prosecutor against the company if the Court rejects the DPA agreement or the settlement negotiations break down. However, documents revealing that the company entered into negotiations for a DPA cannot be used against the company, i.e. draft DPA documents or statements made by the company to the SFO.[11]

As with both the UK and US DPAs, CJIPs are disclosed to the public by way of a press release and the fine is published on the website of the French Anti-Corruption Agency ("AFA").

2. Authorities in France

The PNF, assisted by the *Office central de lutte contre la corruption et les infractions financières et fiscales* ("OCLCIFF"), is the lead French investigating and prosecuting agency and is roughly equivalent to the UK SFO and the DOJ in the US. The PNF is tasked with bringing bribery and overseas corruption prosecutions. The PNF signs CJIPs but a separate judge will review and validate the CJIP by way of a validation order.

The AFA, established by Sapin II, has broad powers and has various responsibilities including: (i) ensuring that companies implement a robust compliance programme; (ii) monitoring companies that have entered into CJIPs; and (iii) ensuring that companies comply with Article 694-4 of the French Code of Criminal Procedure[12] or more commonly referred to as the French Blocking Statute (the "FBS") (described in detail below).[13]

3. Self-Reporting

In France, companies can now decide to take a traditionally adversarial approach to a fraud or corruption allegation or seek to cooperate with the PNF. Companies with enforcement issues previously had no incentive to self-report wrongdoing and would

traditionally seek to avoid years of proceedings in the French Courts. Post-CJIP, the decision of whether to proactively and voluntarily disclose corporate wrongdoing remains a complex one to be worked through with French Outside Counsel, but the CJIP provides an alternative route to resolution with the French authorities. Under Sapin II, a company does not have a mandatory legal obligation to self-report to the authorities. Unlike the UK and US, the French prosecuting authority, the PNF, has not issued any self-reporting guidance to companies with a potentially reportable issue.

In the UK, the DPA Code states that "*considerable weight*" will be given to a "*genuinely proactive approach*" to a company-led investigation[14] and in the US, the DOJ has made significant efforts to encourage companies to fully cooperate with investigations and to self-report wrongdoing.[15] As the recent UK Rolls-Royce PLC ("Rolls-Royce")[16] and the US Panasonic Avionics Corporation ("Panasonic") DPAs[17] respectively demonstrate, the decision not to self-report wrongdoing is not fatal to DPA prospects provided that a company proactively cooperates with the authorities (as described below).

Similarly, recent CJIPs demonstrate that the French Prosecutors do not view a lack of self-reporting as an inhibition or absolute bar to obtaining a CJIP. From reported cases, a company's failure to self-report has only been considered at the sentencing stage as an aggravating factor to be taken into account in calculating the fine. In HSBC Private Bank (Suisse) SA ("HSBC"),[18] the judgment stated that HSBC "*did not voluntarily disclose the facts to the French criminal authorities, nor acknowledged its criminal liability during the course of the investigation*" and "*only offered minimal cooperation in the investigation*".[19] Failures to disclose and cooperate, in addition to the seriousness of the conduct and the fact that the wrongdoing was committed over several years, justified imposing an additional penalty of €71,575,422.

More recently, in May 2018, SAS Poujaud ("Poujaud") entered into a CJIP. The CJIP specifically referred to the fact that Poujaud had failed to self-report to the authorities and the company's failure was considered an aggravating factor and had an impact on the determination of the appropriate fine to be imposed on the company.[20]

French companies would therefore do well to carefully consider self-reporting, bearing in mind that a cooperative voluntary disclosure to the authorities may contribute towards a reduction in any sanction. Where faced with a multi-jurisdictional case with the UK and US as potential enforcers, it would make little sense to cooperate and obtain sentencing discounts in those countries whilst not disclosing conduct in France. However, in doing so, the company will have to skillfully navigate the effect of the FBS (as discussed below).

4. Cooperation

The SFO and DOJ expect companies to fully cooperate during the course of an investigation in order to benefit from a DPA. If a company does not cooperate with the authorities in the UK or the US, it is unlikely to be offered a DPA. But what does cooperation actually mean and what is required in France to secure a CJIP?

The French stance on cooperation credit remains to be publicly clarified. Though expected, the French authorities are yet to issue guidelines with regard to the CJIP framework and it is unclear what level, degree and approach to cooperation is expected of companies. As in the UK and US, from decided cases, failures to cooperate do not act as a bar to obtaining a CJIP. Instead, the French authorities regard cooperation as a mitigating factor when it comes to assessing sanctions against an implicated company. In the Société Générale SA ("Société Générale") CJIP signed on 24 May 2018,[21] the company received substantial credit because the company undertook a thorough internal investigation, voluntarily produced relevant documents to the authorities and provided regular updates regarding facts discovered and the status of the investigation.[22]

In contrast, in the HSBC CJIP,[23] the Court noted the company's minimal cooperation. However, the PNF recognised that as the investigation had started prior to the introduction of the CJIP system, the French legal system did not provide for a legal mechanism encouraging full cooperation.[24]

5. Sanctions

As mentioned above, Sapin II imposes a maximum cap on imposed fines once a CJIP is agreed. In HSBC, the Court included the entirety of the unlawful gain (€86.4 million) in the total public interest fine of €157,975,422. The authorities imposed additional financial penalties because of the seriousness of the facts and because the criminality was over a significant period of time.[25]

In Société Générale, the Court imposed a fine of €250,155,755 (the same amount that was paid to the DOJ). The PNF determined that Société Générale obtained an improper gain of €334,874,863 of which half was taken into account in the CJIP given the sharing agreement with the DOJ (i.e. €167,437,431). The CJIP set an additional penalty in the amount of €82,713,324, taking into account aggravating factors such as the exceptional seriousness of the misconduct and the fact that the offences were committed over a number of years.[26]

6. Extent of Investigation

In the UK and the US, provided that a company can demonstrate sufficient and ongoing compliance and remediation measures (and/or accept a monitor in appropriate cases), the SFO is likely to "draw a line" under the conduct under investigation where the investigation has already uncovered a sufficiently representative scope of conduct. Additionally, in the Rolls-Royce DPA, the SFO gave the company certain undertakings or immunities from prosecution for further related conduct and for conduct prior to the date of the DPA.

In France, the PNF takes public interest factors into account and, similarly, can take an overview of the total conduct disclosed to it. In all five CJIPs to date, the investigations had started prior to the introduction of Sapin II but were all concluded within one year since the entry into force of Sapin II. The French authorities have speedily brought these investigations to a close in a relatively short timeframe. The PNF has demonstrated its willingness to pragmatically engage with companies to avoid lengthy investigations and to encourage admissions and efficiency during the review and cooperation process.

7. Working With Other Enforcers

The recent international cooperation between the French and US authorities, illustrated by the Société Générale CJIP, will likely force companies with liability in multiple jurisdictions to consider at the outset of an investigation how and when to engage with different regulators and how to work towards a coordinated global resolution of all outstanding liabilities.

In Société Générale, the US opened an investigation into the company's activities in 2014. The PNF opened its investigation in 2016. The cooperation between the DOJ and the PNF resulted in a joint settlement in May 2018 of roughly equivalent financial penalties. Société Générale was illustrative of the PNF's comfort in working with the US authorities as equal partners and relationships

formed during that case are likely to lead to further cooperation between the authorities.

Nonetheless, the FBS plays a critical role in the Sapin II framework. The FBS applies to any communication of information that is intended to be used for prosecution by foreign authorities. The FBS prevents French companies from disclosing French commercial information to overseas investigating authorities. The FBS is significant where a company implicated by FBS issues seeks to cooperate with/provide information to international prosecuting authorities. Historically, overseas authorities (including the DOJ) have found ways to circumvent the FBS and to neutralise its purpose and effect. To date, the mood music from France is that the FBS is to be respected going forward. Where multiple authorities, including France, have an interest in a matter, the PNF appears willing to partner with friendly authorities and cooperate through mutual legal assistance or by forming Joint Investigation Teams.

8. Enforcement Trajectory

Since Sapin II, the PNF has made a strong start to French anti-corruption enforcement. The PNF has been procedurally nimble and pragmatic in concluding cases with significant financial penalties. The PNF has embraced lawyer-led investigations in order to facilitate speedy access to justice for corporates. The PNF has also partnered with the DOJ without domestic legislation such as the FBS becoming an inhibition to settlement. We anticipate that the PNF is likely to develop strong relationships with other enforcement authorities going forward and act in partnership with them.

In conclusion, in a year and a half since the entry into force of Sapin II, the French authorities have established themselves as active enforcers in complex international fraud and bribery cases.

Endnotes

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3. The following companies have entered into CJIPs: HSBC Private Bank (Suisse) SA; SAS SET Environnement; SAS Kaefer Wanner; SAS Poujaud; and Société Générale S.A.
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6. The DOJ actively pursued French companies such as Technip S.A., Alcatel-Lucent S.A., Total S.A. and Alstom S.A. Technip S.A. agreed to pay a $240 million criminal penalty to the DOJ and $98 million in disgorgement of profits to the SEC; Alcatel-Lucent S.A. agreed to a DOJ $92 million penalty and a $45 million settlement with the SEC; Total SA entered into one of the highest combined FCPA penalties, a $245.2 million penalty to the DOJ and a $153 million penalty to the SEC; and Alstom SA agreed to pay a $772.290 million penalty to the DOJ, the second largest registered foreign bribery penalty under the FCPA.
7. The French Code of Criminal Procedure – Article 41-1-2.
8. *Ibid*.
9. The company will not have to admit any liability provided the criminal proceedings ("*action publique*") have not yet commenced. Under French law, the CJIP procedure does not amount to the commencement of a criminal proceeding. However, if a company has been indicted or is under investigation by a French Magistrate ("*juge d'instruction*") who then decides to offer to the company the opportunity to enter into negotiations for a CJIP, the company may be required to admit guilt.
10. Law No. 2016-1691 of 9 December 2016 – Article 22-2.
11. Section 13 of Schedule 17 to the Crime and Courts Act 2013; *CPS & SFO, Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013* (1st edition), 11 February 2014, page 9, para 4.4 i–ii, 4.6 i–v: https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf.
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Matthew Cowie
Dechert LLP
160 Queen Victoria Street
London EC4V 4QQ
United Kingdom

Tel: +44 20 7184 7417
Email: matthew.cowie@dechert.com
URL: www.dechert.com

Matthew Cowie, partner in Dechert's White Collar practice, has extensive experience advising on fraud and corruption issues including internal investigations and government enforcement matters. Mr. Cowie's recent experience includes defending a number of senior executives and CEOs in the engineering, oil and gas and transportation sectors in separate Serious Fraud Office investigations.

Noted as having an "*an excellent grasp of the law along with the ability to ensure that involved parties work together in a collaborative way when possible*" (*The Legal 500 UK 2018*), Mr. Cowie also advises on compliance best practices for UK and multinational corporates, particularly with regard to anti-corruption and other corporate governance policies and procedures. Before moving to private practice in 2010, he spent 11 years in the Serious Fraud Office where he successfully brought the first two overseas corruption prosecutions of UK corporates whilst working alongside the Department of Justice, the Securities and Exchange Commission and the Office of Foreign Assets Control.

Karen Coppens
Dechert LLP
160 Queen Victoria Street
London EC4V 4QQ
United Kingdom

Tel: +44 20 7184 7601
Email: karen.coppens@dechert.com
URL: www.dechert.com

Karen Coppens is a criminal defence and investigations lawyer who focuses her practice on the investigation and defence of multi-jurisdictional crimes such as bribery, corruption, money laundering and fraud. She has acted for various Governments and Heads of State and some of the world's leading companies in sectors as diverse as the aeronautical industry, pharmaceuticals, telecommunications, mining, construction, banking and finance. Ms. Coppens has experience of dealing with various authorities/regulators such as the French Parquet National Financier, the UK's Serious Fraud Office, National Crime Agency, Financial Conduct Authority and police, and the Crown Prosecution Service (and their overseas equivalents).

Ms. Coppens was included in the 2018 editions of *Global Investigations Review 30* which lists the top 30 firms in this area of law ("*in London, the firm also boasts senior associate Karen Coppens*") and *Global Investigations Review's* "Women in Investigations" profile that highlights 100 remarkable women from around the world for their accomplishments in this area of law. She was also recognised by *Superlawyers UK* for fraud and criminal law, and has received various awards for her efforts in training more junior lawyers.

Chapter 2

Bribery and Corruption: Investigations and Negotiations Across Jurisdictions

Rahman Ravelli

Aziz Rahman

Bribery Allegations

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[1] should be seen as the result of a decades-long 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.

2018 has been notable for seeing the first company convicted in the UK for the Act's Section 7 offence of failure to prevent bribery (which we cover in the Prosecutions section).

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)[2] and the Prevention of Corruption Act 1906 (as amended).[3] 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. For example, in 2017, three senior employees of the FH Bertling Group were given 20-month suspended prison sentences and fined under the 1906 Act for making corrupt payments to Angola's state oil company.[4] It is also worth noting that there will 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

Skansen and Section 7

We mentioned earlier that 2018 saw the first prosecution for failure to prevent bribery under Section 7 of the Bribery Act. And the case, involving office refurbishment company Skansen,[5] has to be of concern for those who want to tackle bribery in their business.

Skansen won two contracts in 2013, worth a total of £6 million, after its managing director paid bribes to secure the work. In January 2014, Skansen appointed a new chief executive officer. He started an internal investigation, introduced an anti-bribery policy, stopped another bribe being paid, dismissed the managing director, filed a Suspicious Activity Report (SAR) to the National Crime Agency (NCA) and reported the matter to the City of London Police. Skansen also cooperated fully with the police investigation – and yet was charged with failure to prevent bribery.

Under Section 7, a company has a defence if it can show that it had adequate procedures in place to prevent bribery. Skansen emphasised that it had an ethos of acting with honesty, had financial controls in place and clauses in contracts preventing bribery – but was found guilty of the offence. This shows how high the bar is set when it comes to a company proving it had adequate procedures in place. When convicted, Skansen was a dormant company without assets. One cynical reading of this case is that prosecutors looking for a failure to prevent conviction may aim for the "low-hanging fruit": the easier targets with fewer resources to defend themselves. Another reading is that prosecutors may believe it is too difficult to secure a conviction for the Section 1 of the Bribery Act offence of giving bribes – as they must prove that the directing mind and will of the company was involved – so they look to Section 7 to secure easier convictions.

Many will need to tread very carefully and take expert advice if they suspect wrongdoing in their workplace. The irony is that the Bribery Act does not go into any detail about what would constitute adequate procedures – and yet it expects companies to have them. Guidance from the Ministry of Justice[6] refers to the need for procedures to be proportionate to the risk, have commitment from the top levels of

a company and involve risk assessment, due diligence, training and monitoring. But the same guidance then adds that the adequacy of procedures will actually depend on the facts in each case.

Section 2 of the Criminal Justice Act

As we have mentioned, 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 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.[7]

Section 2 and Interviews

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 an 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 during the interview. 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 an 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. The SFO informed them that the presence of solicitors in interviews may prejudice the investigation.

The three men were unsuccessful in their application for a judicial review[8] 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.[9] The SFO's stance on Section 2, therefore, remains in force.

Section 2 and Documents

In 2018, the SFO received a further boost regarding its use of Section 2 powers. The High Court has held that the SFO can, under Section 2, compel companies and individuals to produce material that is held abroad, subject to there being a sufficient connection to the UK.

In this case,[10] a UK-based subsidiary of the US company KBR was being investigated by the SFO over suspected bribery and corruption offences. KBR was also being investigated in the US by the Department of Justice (DOJ) and Securities and Exchange Commission for similar suspected offences. In April 2017, the SFO issued a Section 2 notice requiring the subsidiary to produce certain documents. The subsidiary provided documents that were located in the UK, including documents that had been sent to it from outside the UK.

The SFO believed that the subsidiary was drawing a distinction between the documents it held in the UK and documents held outside the UK that were beyond its control. It therefore issued another Section 2 notice, this time addressed to KBR, requesting documents held by it and not just the subsidiary. KBR objected to this and argued that Section 2 did not operate outside the UK.

But Lord Justice Gross disagreed, stating that although territorial limits had not been identified in the Criminal Justice Act the SFO could conduct investigations with an international dimension and the purpose of Section 2 might be frustrated if there was a restriction on its use. He did not say that Section 2 would extend to all foreign companies regarding documents held abroad but referred to the need for a principled balance, with it being used in other countries in cases where there was a "sufficient connection" between the company and the UK.

While not granting complete freedom to use Section 2 around the world, this ruling certainly extends the SFO's ability to use it beyond UK borders when necessary.

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.

SFO and Intelligence

It should also be noted that the new SFO Director Lisa Osofsky has already used her speech at the Cambridge International Symposium on Economic Crime 2018[11] to signal her intention to seek increased levels of cooperation with other UK law enforcement agencies. She also wants closer relationships with the SFO's international counterparts, international regulators, non-governmental organisations and the private sector in order to enhance its intelligence gathering. Osofsky also spoke of her desire to "focus on the SFO's strategic use of cutting edge technology" to enhance its obtaining of data and intelligence.

This all means that the scarcity of Bribery Act convictions so far 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 and with credibility 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 it 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 by "coming clean" could be used against them if the self-reporting is not handled properly.

Legal Professional Privilege Clarified

There is also the possibility of legal developments rapidly changing 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.[12] 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. Her ruling that documents made by lawyers could not enjoy privilege because they had been created before a point before criminal legal proceedings were contemplated was both a shock to the legal community and a major restriction of privilege.

Yet 2018 has been notable for this decision being reversed, with the restrictions on privilege resulting from Mrs. Justice Andrews' judgment being removed. In September, the Court of Appeal[13] ruled that in-house advice prepared prior to court proceedings is as protected by privilege as that given in the defence of proceedings. The ruling was described by the Law Society as a boost for the principle of lawyer-client confidentiality. Without the protection of privilege this ruling offers, companies and their legal representatives conducting an internal investigation would have had to proceed with immense caution to avoid creating material that backs their case, only for it to be taken and used against them by the authorities. Thankfully, that is no longer the case.

The SFO has indicated that it will not appeal this decision. This may be because the new SFO Director comes from an American legal background and the US legal system holds the concept of legal privilege dear. But whatever the reason, the ruling and the SFO's decision not to challenge it is a welcome development and a boost for internal investigations.

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

DPAs were introduced under the provisions of Schedule 17 of the Crime and Courts Act 2013.[14] 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 it.

Speaking at a corporate crime conference in 2018,[15] Camilla de Silva, the SFO's Joint Head of Bribery and Corruption, said:

"DPAs are not, the so-called, "cost of business". The SFO sees DPAs, in appropriate cases, as enhancing public confidence in UK plc and the criminal justice system.

Under the DPA regime in appropriate cases the SFO will seek assurance the company has genuinely reviewed its internal controls, policies and procedures regarding compliance and as necessary, adopt new or modify existing controls, policies and procedures in order to ensure it complies with all applicable anti-corruption laws and most importantly that these are actually embedded into the business. The ultimate responsibility for identifying, assessing and addressing risks remains with the board of directors and is a critical factor in any DPA discussion."

She added: "We recognise that a DPA is an attractive solution for a company. Herein lies the advantage; if it secures an agreement and complies with its terms, the company will account to the court for its wrongdoing yet avoid a conviction and all the consequent damage that might do to its ability to conduct business in the future. The bar is therefore necessarily a high one."

Da Silva has previously warned companies not to "be tempted to go down the "impression of cooperation" route as we will see through that".[16] DPAs, it is clear, have to be earned.

The SFO will only invite a company to enter into an agreement to defer prosecution where the company has genuinely cooperated with the SFO. The DPA Code provides that cooperation will include identifying relevant witnesses, and disclosing their accounts and the documents shown to them.

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[17] 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[18] stated clearly that if those under investigation did not offer openness when investigations were underway 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[19] 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.

But change for change's sake will never be enough. Any action to reform a company in the wake of bribery allegations being made must prove an awareness of the failings and a determination to correct them. 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 for a corporate to call in outside expertise to take a considered, impartial look at what needs to be changed in order to prevent repeat problems and convince the authorities of the 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 not exaggerating 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 and know how to prioritise its dealings with the various countries' authorities. 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.

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. Such a case can involve 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 challenge in such situations is to devise a joined-up approach to deal with parallel investigations. Thought needs to be given to what material needs to be disclosed to the authorities in two (or possibly more) countries. The company must do what is required so that it is considered to be cooperating fully with all the agencies involved. The implications of submitting documents to one agency and/or another need to be examined carefully. A company cannot be seen to be treating one investigating agency better than another or withholding some documents.

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.

One thing that many multinational cases have in common, apart from allegations of bribery, is that they are 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.

When it comes to investigations being complicated, multinational and involving scrutiny of a company's working practices, the case of Glencore[20] – which is ongoing at the time of writing – is one of the most notable examples.

The Swiss-based mining giant became the subject of a US corruption investigation into its business in the Democratic Republic of Congo, Venezuela and Nigeria. When it announced that it had received a subpoena from the DOJ, requesting documents as part of an inquiry into bribery and money laundering, its share price fell by more than 8% and $6 billion was wiped off its share value. Glencore set up a committee made up of board members, including company chairman Tony Hayward, to coordinate its response to the subpoena and announced a $1 billion buy-back of shares to calm investors' nerves. Glencore is facing the possible prospect of a UK investigation by the SFO[21] and a major legal action brought in the US by lawyers acting for investors, who allege that the company made misleading statements and failed to disclose information to the market.

Comprehensive

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.

So while it might sound obvious, it still needs saying: any investigation has to be a comprehensive examination of a company's workings. Only by taking such a thorough approach can a company be sure there are no more "skeletons in the cupboard" that may be found later by the authorities. If an investigation is not thorough enough it is of little or no value, especially if it fails to uncover all of the wrongdoing.

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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Aziz Rahman
Rahman Ravelli
36 Whitefriars Street
London, EC4Y 8BQ
United Kingdom

Tel: +44 203 947 1539
Email: aziz.rahman@rahmanravelli.co.uk
URL: www.rahmanravelli.co.uk

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. His 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 and 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. As a result, he has an unrivalled ability when it comes to defending bribery and corruption allegations that involve many agencies and a number of countries.

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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.

Why President Trump's Deregulation Agenda Does Not Mean Firms Should Cut Compliance Budgets

Claiborne (Clay) W. Porter

Ellen Zimiles

Navigant Consulting, Inc.

I. Introduction

The Trump administration has been lauded by some for ushering in a new era of deregulation. Executives with long-term vision, however, recognise that regulations can "snap back" just as quickly as they are weakened, leaving companies that have slashed compliance budgets and personnel at a disadvantage in the current climate of continuing regulatory enforcement. In short, the financial and reputational costs of addressing regulatory snapback – ramping up the compliance programme, hiring more personnel, and restarting the hard task of creating a "culture of compliance" – far outweigh any feel-good initial cost savings that might be gained from scaling back compliance programmes.

II. The Current Administration's Regulatory and Enforcement Agenda

President Trump crystallised his administration's stance on regulation in June 2017, stating "[w]e will get rid of the redundancy and duplication that wastes your time and your money".[1] Indeed, Executive Order 13,771's two-for-one policy,[2] which requires federal agencies to identify two regulations to eliminate for each new regulation issued, solidified a new era of deregulation. The Trump administration has begun curtailing rules in several major economic sectors, including the financial, energy, telecom, and healthcare sectors. In the financial sector, recent changes include revisions to the Sarbanes-Oxley Act and the Dodd-Frank Act, while the Consumer Financial Protection Bureau (CFPB) is uncertain of its future and mission.[3] The repeal of net neutrality and internet privacy rules heralds a less-regulated telecom sector, and changes to defined standards of essential health benefits[4] and qualified health plans[5] reflect an easing of healthcare sector regulations. These changes, along with a multitude of changes to lesser-known regulations, show deregulation spanning a clear majority of the entire economy.

At the same time the Executive Branch is curtailing regulations and beating the very familiar drum of deregulation, it is also issuing executive orders that call for greater enforcement of certain laws, including those relating to money laundering, consumer fraud, and violent crime. For example, just 10 days after the issuance of Executive Order 13,771's two-for-one policy, President Trump issued Executive Order 13,773, which aims to "strengthen enforcement of Federal law", to combat corruption, cybercrime, financial crimes, and money laundering.[6] Similarly, on July 11, 2018, more than 18 months after the issuance of Executive Order 13,773, the administration issued Executive Order 13,844, which orders the creation of a task force to guard against consumer fraud and to protect market integrity.[7] Executive Order 13,844 is, however, written so broadly that it impacts every major industry and business sector in the United States, and only time will tell if it ends up having any impact.

III. Congressional Attitudes Toward Deregulation

Traditional stereotypes that Republicans propose and Democrats oppose deregulation do not always hold true. For instance, Sen. Elizabeth Warren, D-Mass., signalled a willingness to ease capital restraints on small regional and community banks[8] and Democratic Senators Mark Warner, Tim Kaine, and Heidi Heitkamp,[9] and 13 others, voted in favour of legislation that scales back federal oversight under the Dodd-Frank Act. Likewise, Republican Senators Richard Shelby and Bob Corker called for better CFPB oversight of financial institutions in the wake of recent bank scandals.[10] Republican Senators Chuck Grassley, John Cornyn and Orrin Hatch broadly support anti-money laundering (AML) laws, and put forth a bipartisan bill to modernise and close loopholes in the existing AML regulations.[11] In addition, Republican Representatives Scott Taylor and Carlos Curbelo, among others, oppose EPA cuts favouring the energy industry[12] and Republican Representatives Mike Coffman and Susan Collins opposed the Federal Communications Commission's repeal of net neutrality.[13] As these examples show, support for regulatory pause does not fall cleanly along party lines, which makes future regulatory and law enforcement priorities all the more difficult for corporate compliance departments to predict.

IV. Thinking Critically About Compliance Cutbacks

Following through on the lure of deep cuts in compliance spending when no one is looking is short-sighted and costlier in the long run, especially when there is so much uncertainty in current regulatory, law enforcement, and legislative priorities. Moreover, the U.S. is no longer the only country that is aggressively investigating and penalising companies that maintain poor compliance programmes. Organisations that "stay the course" and keep their compliance function robust are better able to weather non-U.S. regulatory inquiries and the potential for regulatory snapback. To that end, smart managers understand that the following considerations should guide their ongoing compliance decisions.

A. **Multinational firms must consider regulators in multiple jurisdictions**. Multinational businesses should know that

changes to U.S. regulations will not always result in changes to nondomestic regulations. A strong, domestic compliance programme that aligns with global standards helps ensure that U.S.-based operations do not run afoul of foreign regulations, breach the trust of regulatory stakeholders, or subject the firm to penalties and legal fees in other markets.

B. **Updating a compliance programme to address deregulation may cost more than programme maintenance**. Although deregulation could result in fewer regulatory obligations for businesses, fewer obligations does not necessarily result in fewer compliance costs. Slashing the budget and removing compliance resources can result in numerous other tangible costs, such as increases in legal and consulting spend, development of new training materials, retraining compliance staff, and execution of staff evaluations, to name a few. In addition, there are other, well-known intangible costs that may result, including alienated high performers, reduced workforce morale, and diminished productivity. Finally, where there is uncertainty in the government's approach to enforcement, smart organisations double down on their compliance efforts to avoid unpredictable outcomes.

C. **Regulatory cycles**. Over the past 300 years, the financial sector exhibited a cycle of deregulation and regulation that ultimately correlated with respective market booms and busts.[14] If past is prologue, a period of increased financial sector regulation is not far off. In addition, a sample of post-9/11, "significant regulations",[15] as defined in Executive Order 12,866, shows a pattern of regulatory wax and wane, seemingly uncorrelated with traditional notions of political preference for regulations.[16] Accordingly, firms should avoid betting on sustained deregulation because Executive Branch rhetoric may not bear out in practice – firms should instead focus on building sustainable, resilient compliance programmes.

D. **Trends in regulatory enforcement actions and fines in the financial sector**. Despite widespread deregulation, managers should be careful not to correlate fewer regulations with a decrease in enforcement. Particularly in the context of the Foreign Corrupt Practices Act (FCPA), the Bank Secrecy Act (BSA) and AML fines in the financial sector, the current deregulation trend had little effect on the enforcement of highly regulated aspects of the business. Data indicates that BSA/AML enforcement actions in all of 2017 and the first quarter of 2018 alone each surpassed $1 billion in total fines from U.S. enforcement agencies.[17] In addition, the Office of the Comptroller of the Currency recently levied a $100 million fine against a large U.S. financial institution. Furthermore, BSA enforcement agencies, like the FinCEN, increase the civil penalty adjustment tables year over year,[18] with an emphasis on the responsibility of institutions, increasingly large monetary penalties, and a greater focus on individual liability.[19] Similarly, FCPA civil monetary penalties levied by the SEC were more than $2 billion in 2016 and just under $2 billion in 2017.[20] The aggregate number of enforcement actions and dollars of fines for violations of both BSA/AML and FCPA regimes show distinct upward trends over the past decade.

E. **Compliance programmes affirm corporations' commitment to cooperating with the government**. At the International Association of Defense Counsel's "Corporate Compliance College", Deputy Attorney General Rod Rosenstein urged companies to work with the Department of Justice (DOJ). "When you work with us, you help us uphold the rule of law and ultimately help create the kind of legal environment where your companies can thrive."[21] Rosenstein noted that corporations can be held liable for certain bad acts by their employees, and that if a corporation wants the DOJ to treat the corporate entity as a victim, "it should act like a victim and help ensure that the perpetrators are held accountable".[22] Rosenstein also said, "[s]trong compliance programs are a company's first line of defense",[23] and, "[w]hen something does go wrong, law enforcement should give the greatest consideration to companies that have effective compliance programs in place and timely report the conduct to law enforcement. … An investment in a strong compliance program can pay dividends if you find your company named as a subject or target".[24]

F. **Risk of legal damage and reputational harm**. Compliance consists not only of adherence to laws and regulations, but also strong governance and sound risk management practices, which generate a culture of compliance and accountability, and allow a business to identify and remediate internal issues. When considering cuts to compliance budgets, one of the most relevant considerations is whether the business is willing to expose itself to the risks of significant legal damages and reputational harm. Legal damages are costly and create unnecessary distractions for the business and its stakeholders. More than ever, reputation serves as an indicator of an organisation's health to outsiders, and reputational harm can have a real and lasting impact on public perception of a business.

G. **Compliance as a means of accessing new markets**. By fostering a strong compliance programme, companies with an international footprint have an opportunity to not only improve credibility in the public eye but also to allow the company to safely enter markets it previously could not. As an example, maintaining a robust sanctions programme could allow for the safe, secure, and compliant sale of more products and services in emerging markets due to a strengthened ability to manage the additional risks.

H. **Now is the time for investments in RegTech**. Regardless of deregulation, current technological advances present an opportunity to bolster and even invest more in a compliance programme. Forward-looking managers will invest in the implementation of cutting-edge regulatory technology, such as automation, robotics, machine learning, and artificial intelligence, to improve the strength and efficiency of their compliance programmes. Such investments now will yield future cost savings and the benefit of a more effective programme.

V. Conclusion

The diminution of a compliance department based on a presidential administration's perceived deregulation agenda may in the long run cause damage to a company that far outweighs any short-term cost savings. A company with a strong compliance framework, robust governance, and a sound risk management programme is poised to weather regulatory change and uncertainty, but also withstand the inevitable regulatory snapback when administrations change – as they always do.

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Claiborne (Clay) W. Porter
Navigant Consulting, Inc.
1200 19th Street, NW
Suite 700
Washington, DC 20036
USA

Tel: +1 202 973 7211
Email: claiborne.porter@navigant.com
URL: www.navigant.com

Claiborne (Clay) W. Porter is Head of Investigations and a Managing Director in the Global Investigations & Compliance practice at Navigant. Through his supervisory roles and as a Trial Attorney in the United States Department of Justice's Money Laundering and Asset Recovery Section (MLARS), Clay gained extensive experience managing complex, international and domestic financial investigations in matters relating to money laundering, the Bank Secrecy Act (BSA)/AML laws and regulations, U.S. economic sanctions, and anti-corruption and anti-bribery laws.

Professional Experience:

Prior to joining Navigant, Clay held several senior positions in MLARS. As the Acting Principal Deputy Chief of MLARS, Clay supervised the work of approximately 150 attorneys and staff in connection with the various litigating, policy and forfeiture programme management units within MLARS. Additionally, he supervised the government's efforts to trace, find, and forfeit the proceeds of high-level foreign corruption and prosecute the companies and individuals who launder corruption proceeds. Clay also assisted Departmental and interagency policymakers in developing legislative, regulatory, and policy initiatives to combat global illicit finance, in addition to supervising the DOJ's efforts to find and return forfeited criminal proceeds to victims of crime.

As Chief of the Bank Integrity Unit, Clay supervised the attorneys who were leading the Department's efforts to investigate and prosecute, where warranted, companies and their employees who violate the BSA and U.S. economic sanctions laws and regulations, as well as companies and individuals who launder the proceeds of bribery and corruption. Additionally, Clay interacted on a daily basis with U.S. and foreign law enforcement, bank regulators, OFAC, and FinCEN.

Education:

Juris Doctorate: Tulane University School of Law.

Bachelor of Science: Radford University.

Ellen Zimiles
Navigant Consulting, Inc.
685 Third Avenue
14th Floor
New York, NY 10017
USA

Tel: +1 212 554 2602
Email: ellen.zimiles@navigant.com
URL: www.navigant.com

Ellen Zimiles is Navigant's Financial Services Advisory and Compliance Segment Leader and has more than 30 years of litigation and investigation experience, including 10 years as a federal prosecutor.

Professional Experience:

Before coming to Navigant, Ellen co-founded Daylight Forensic & Advisory, an international consulting firm, which was funded by private equity. She ran the firm prior to Daylight being acquired by Navigant. Prior to Daylight, Ellen was a principal at a "Big Four" accounting firm, where she coordinated the forensic practice across all industry segments and was practice leader for the financial services industry. She is a leading authority on anti-money laundering programmes, corporate governance, foreign and domestic public corruption matters, regulatory and corporate compliance, and fraud control. Ellen has worked with a multitude of financial institutions preparing for regulatory exams. She also has extensive experience in developing remediation programmes, serving as a regulatory liaison and independent monitor, as well as advising organisations that are the subject of a monitorship.

Before her Big Four experience, Ellen was an assistant United States attorney in the Southern District of New York for more than 10 years. She served in the civil and criminal divisions and was chief of the forfeiture unit for more than six years. Ellen was responsible for many high-profile money laundering, fraud and forfeiture cases. In recognition for her contributions as a federal prosecutor, Ellen received the United States Department of Justice's John Marshall Award for Outstanding Service and the United States Department of Health and Human Services' Integrity Award.

Ellen earned a bachelor's degree at Brooklyn College and a law degree at Syracuse University College of Law, where she served as an editor of the law review.

Education:

Juris Doctorate: Syracuse University College of Law.

Bachelors of Science: Brooklyn College.

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Argentina

Nicolas Durrieu

Durrieu Abogados S.C.

Mariana Mercedes Piccirilli

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?

Law No. 27,401 on Corporate Criminal Liability for Corruption Acts is the main statute that addresses internal investigations in Argentina's legal framework. In addition, the Anti-Corruption Office has issued a regulation on the forgoing statute. There are no legal consequences for failing to comply with these regulations. Nevertheless, if a crime is committed and the corporation or individuals (according to section 41 of the Criminal Code) do not collaborate with the investigation, it could be considered as an aggravated element. On the other hand, Law No. 27,401 also states that collaboration with the investigation could be considered as a mitigating factor. There are also other regulations such as General Regulation No. 606/2012 on Corporate Governance of the National Securities Commission, which requires listed corporations to have whistleblower lines and investigation protocols (Recommendation VIII), and Central Bank Communication No. 5838, which states that collaboration would be taken into account when applying a punishment.

Moreover, based on corporate governance and regulatory obligations, directors (or a similar corporate body, as part of its fiduciary duties) should take action in the same regard.

1.2 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 general principle is that all reports should be investigated unless it is evidently inappropriate. The opening or rejection of an investigation must be substantiated and previously regulated by the corporation. The credibility of the complaint will depend on the level of detail provided about the facts and whether or not there is a conflict of interest with the accused.

Article 23 of Law No. 27,401 recommends that legal entities may have a "whistleblower line for reporting irregularities, open to third parties and properly disseminated" (subsection III) and a "policy for the protection of whistleblowers against retaliation" (subsection IV). In this regard, the Anti-Corruption Office requires, amongst others, the anonymity of the complainant.

In criminal law, we find Law No. 25,764 which created the National Program for the Protection of Witnesses and Accused Persons, under the management of the Ministry of Justice and Human Rights. In addition, Law No. 27,319 establishes in article 13 the figure of the "informer" (whistleblower), although this is limited to complex crimes. The Ministry of Security regulates this through Resolution IF-2017-20113088 of 13/09/2017, which establishes compensation based on the recovery of assets.

1.3 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 Board of Directors must approve and conduct investigations when the allegations are particularly serious or may have serious reputational consequences. Depending on the size of the company, there might be a special investigation subcommittee or the responsibility may be delegated to an Audit Committee. If any member of the Board of Directors is involved, they should be excluded or, in the case of an international company, the parent corporation must conduct the investigation. In cases of lower risk, the investigation could be led by the Compliance, Internal Audit, Legal or Human Resources department, depending on the topic. Any department that is involved in the facts should be inhibited from the ongoing investigation. Nevertheless, it is paramount to take preapproved internal protocols into account. Once incorporated into the investigative team, each individual should sign an Avoidance of Conflict of Interest Clause, in addition to a Non-disclosure Agreement.

Furthermore, the regulation of Law No. 27,401 of the Anti-Corruption Office states that corporations must establish a prior investigation protocol which must include specifically "the involvement and exclusion of the investigations of the different internal areas according to its possible implications".

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?

Recent regulations which contemplate leniency agreements or collaboration agreements for corporations that decide to self-report have been approved.

Regarding individuals in criminal cases, Law No. 27,304 reduces the sentence of the defendant who provides accurate and verifiable information to avoid or prevent the perpetration of a crime, clarifies the purpose of the investigation, reveals the identity of other offenders and discloses significant information that contributes to expediting the investigation or revealing the location of victims, assets or proceeds, amongst others, of crimes. As for corporations, article 9 of Law No. 27,401 on Criminal Corporate Liability and article 60 of Law No. 27,430 on Antitrust both establish immunity to legal entities that self-report. The latter also grants this right to individuals. In both cases, the self-report must be "spontaneous"; that is, not motivated by a state investigation. Its absence should be considered as a mitigating element.

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?

Companies are advised to self-report when it is in the company's best interest (for example, to enter into a leniency agreement or as part of a defence strategy to appear as the victim rather than the perpetrator). If a Brazilian company is also legally bound to report under foreign laws, whether because it has American depositary shares listed on the New York Stock Exchange or a subsidiary in the United Kingdom, then it should consider self-reporting to the public authorities of such foreign countries as well.

The practical steps vary according to the jurisdictional authority over the misconduct. Companies should retain specialised counsel prior to self-reporting to ensure they get the best possible deal.

In Argentina, there is no legal obligation to disclose investigations, so it is up to the legal entities' discretion.

Nevertheless, there are some exceptions: 1) corporations that are publicly listed at the National Securities Commission must inform any fact or situation that could substantially affect the placement of securities of the issuer, the course of the securities' trading or the development of its activities; 2) public servants have the duty to report crimes that occur in the exercise of their office in accordance with article 177 of the Federal Criminal Procedure Code. This is particularly important in Argentina since there are state-owned corporations and private corporations with partially public ownership; and 3) obliged subjects, in order to prevent money laundering, have the duty, according to Law No. 25,246, to make a Suspicious Operating Report to the Financial Information Unit.

Apart from these cases, the disclosure should be made when a judicial proceeding is initiated against legal entities as self-defence or a mitigating factor. In addition, as mentioned in question 2.1, in order to receive an immunity deal, a self-report should be made before any law enforcement agency submits a report.

If the corporation is a victim of a crime and there are assets to be recovered, it should be reported to the authorities in the first stages of the investigation. In addition, the corporation should present itself within the proceedings as a private prosecutor in order to have control of the case.

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?

If the corporation decides to report the investigation, the required format will depend on the authority that shall receive it. For crimes, it must be submitted before a prosecutor or judge in writing, and if possible, it must have the following requirements according to article 176 of the Criminal Procedure Code: the relation to the facts, with the circumstances of place, time and manner of execution; and the indication of its participants, victims, witnesses and other elements that may lead to its verification and legal qualification. If the corporation is willing to receive an immunity deal according to Law No. 27,401 on Corruption it should also return the illegally obtained proceeds. It may also be submitted orally to the police and by the internet in some jurisdictions (i.e. the City of Buenos Aires). Law enforcement agencies generally establish their own format and, in general, in writing.

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?

Corporations should ask for legal advice as soon as they receive information about the investigation and should not engage the authorities without legal representation.

It may be necessary to agree on the scope of the investigation with the authorities before moving forward. Allowing the authorities to intervene will depend on several factors. In general, the internal investigation will begin when there is evidence or assets that can only be obtained by a court order (i.e. wire-tapping, search warrant or seizure of assets), and therefore other authorities' collaboration will be required. Allowing them to participate in the investigation will be of undoubted value. The timing will depend on the urgency of the test measures and if the corporation wants to prosecute the matter.

3.2 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 entity is not legally allowed to limit the authorities' investigation. However, it can be positively influenced in order to collaborate with such investigation.

3.3 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?

Argentina collaborates with foreign authorities in investigations as a

member of bilateral, regional and multilateral treaties. For instance, Law No. 26,004 on the Mutual Assistance Agreement in Criminal Matters of Mercosur, Bolivia and Chile and Law. No. 26,139 on the Inter-American Convention on Mutual Legal Assistance in Criminal Matters. For countries which do not share a treaty, Law No. 24,767 on International Cooperation in Criminal Matters is subsidiarily applied.

In addition, the Financial Information Unit exchanges data on a regular basis with its counterparts through the Egmont network; similarly, the Federal Revenue Agency will also do so with its own network.

In cross-border cases, overlapping investigations for the same facts might occur, violating the double jeopardy principle. If the corporation is a defendant, it is a good strategy to keep the investigation within the country's borders. If the corporation is a victim, it should present charges (private prosecution) in order to have more control of the proceedings.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

1) Starting phase: determination of the object of the investigation, which may vary throughout, and the provisions or offences that could have been infringed or committed; identification of potential investigators; identification of witnesses and assignment of responsibilities for research leadership; identification of possible implications of corporate reputational damage; assessment of immediate measures to stop the commission of the event, recover the assets and preserve the evidence; and upon commencement of any investigation, it is advisable to provide to all persons who will have access to the relevant data with a written protocol describing the applicable rules on personal protection of data and communications, and setting forth the ground rules for data-collection activities. Having such a protocol or other written record of data protection means compliance measures in place may be useful in responding to or defending against potential employee objections to the investigation on privacy grounds.
2) Information gathering phase: chain of custody; information of open or public sources; and preservation of electronic information. In some cases, the intervention of a notary ensures good practice.
3) Disposition of the evidence phase: analysis and interpretation of the evidence.

4.2 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 lawyers will provide support, both to strengthen the independence and credibility of the investigation process and to strengthen the attorney-client privilege.

According to the provisions of the Anti-Corruption Office, the ultimate supervisor of an investigation, notwithstanding the follow-up and approval of the board, is that of an internal officer (compliance officer, auditor or in-house counsel). However, it is established that when management is involved, it is good practice for the investigation to be handled by an external lawyer in order to preserve greater independence. It is also established that legal advice should come from a provider that is not the regular one for the organisation. Similar provisions are required in Recommendation VIII of General Regulation No. 606/2012.

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 communications and the work product derived from the provided legal advice are protected by several regulations, especially and directly by Law No. 23,187 on the Exercise of the Profession of Lawyer in the Federal Capital: Hierarchy, Duties and Rights, as well as the Ethic Code of each bar association (24 districts).

As for Law No. 23,187, article 6 states that lawyers have a specific obligation to preserve the attorney-client privilege, unless this is waived by the client. Similarly, article 7 provides, amongst other rights, the "inviolability of the law firm in defense of the constitutional guarantee of the defense in court". The most important bar association in Argentina is the Public Bar Association of the Federal Capital; its Ethic Code provides in article 10 that lawyers must strictly preserve the attorney-client privilege, and refuse to answer questions, even from judges, law enforcement agencies or other competent authorities, that could breach the attorney-client privilege, with the sole exception of the client's consent for doing so or the necessity to exercise the self-defence right. In addition, the article sets forth that lawyers must defend the privacy of their law firm's premises and of all documents that have been entrusted to them.

The Federal Criminal Procedure Code illustrates several provisions related to the attorney-client privilege: 1) article 244 forbids lawyers from testifying in court about any information provided from the client; 2) article 232 states that the court may order the presentation of people or documents before it, but this order may not target people who can or should refrain from declaring as a witnesses by reason of kinship, professional secrecy or state secrecy; 3) article 237 impedes the seizure of letters or documents that are sent or delivered to attorneys for the exercise of their duties; and 4) article 255 also excludes attorneys from being cited as expert witnesses in criminal proceedings where legal privilege could be infringed.

In addition, article 444 of the Federal Civil and Commercial Procedure Code sets forth that a witness may refuse to answer a question if such might reveal information protected by professional secrecy. Article 318 of the Civil and Commercial Code states that correspondence can be filed as evidence by its recipient, except for confidential correspondence, which cannot be used without the sender's consent. Moreover, third parties cannot file confidential correspondence without the sender's and the recipient's consent.

Finally, article 156 of the Criminal Code asserts a punishment for the person who reveals, with no just cause, any secret information which could cause damage. Secrecy obligations only cease when a client consents to the disclosure or if disclosure is necessary for the attorney's self-defence.

In Argentina, the best way to ensure the attorney-client privilege is: 1) to start a conversation stating that it falls under this right; 2) regarding documents, in order to have the right stated in article 7 of Law No. 23,187, it is recommended to provide in-house counsel with an office that is publicly identified and separate from the rest of

the administrative offices. In addition, sensitive documents should be kept at the outside counsel's law firm. All documents must be visibly labelled with the attorney's name and with a statement that they fall under the "attorney-client privilege"; and 3) to be enrolled at a bar association.

The protection takes place as long as the advice is made on the occasion or in the exercise of the profession. Therefore, it is advisable to have an outside counsel involved, who charges professional fees and/or formally accepts an ongoing external investigation (if applicable) as soon as possible. If there is a search warrant and information of the internal investigation is seized, the forgoing facts will definitely apply.

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 Argentine law, all communications and documentation are protected from disclosure if they fall within the scope of the attorney-client privilege, as long as the regulations described in question 5.1 are fulfilled. As a matter of fact, some scholars argue that communications with agents of the client fall within the scope of the attorney-client privilege as far as the client is involved in the communications.

When other professionals (i.e. notaries and accountants) intervene in the relationship, they are ruled by their own ethical or legal regulations on professional secrecy.

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

In Argentina there are no legal provisions that establish exceptions to the attorney-client privilege. Therefore, there should be no differences between the two of them as long as they are enrolled at the bar association.

Nevertheless, at the moment, case law and doctrine have not addressed the extension of the privilege to internal lawyers. Some scholars wonder whether a judge might use evidence produced under the control of an in-house counsel which has been obtained from a search warrant or wire-tapping.

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

Law enforcement conducting the search warrant will probably seize all documents that are related to the objects stated on the warrant, so they might include documents produced within an internal investigation. Since article 237 of the Federal Criminal Procedure Code forbids the seizure of letters or documents that are sent or delivered to attorneys for the exercise of their duties, in order to protect the documents, these should be visibly labelled with the attorney's name and the phrase "attorney-client privilege" or similar. The lawyer might have to challenge the use of privileged documents or information as evidence before the judge.

As mentioned in question 5.1, the most convenient procedure is for an outside lawyer to intervene in the investigation and that, as far as possible, sensitive documents are kept at his law firm since he has greater guarantees regarding search warrants.

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?

Any information that is collected by law enforcement agencies can be used for their investigation. Regarding federal cases, during the investigation phase, the proceedings are always confidential except for the prosecutor, private prosecutor or the defendant, according to article 204 of the Federal Criminal Procedure Code. Nevertheless, there are some exceptions: 1) interested parties may require access to the files (article 131); 2) trials are oral and public; and 3) sentences are accessible to the public. Therefore, information and documents collected can be mentioned in those cases.

Similar provisions usually apply to proceedings conducted by law enforcement agencies, because although they have their own regulations, they generally subsidiarily apply the Federal Criminal Procedure Code.

6 Data Collection and Data Privacy Issues

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

In Argentina, the most comprehensive statutory regulation regarding the protection of personal data is Data Protection Law No. 25,326, which is regulated by Decree No. 1558/2001. There are also other regulations issued by the Data Protection Agency. The provisions cover individuals and the corporation's personal data, whether they are stored in public or private files, records, databases and other means of electronic records.

The Ministry of Justice has issued, in 2018, a protocol on evidence gathering for criminal cases. Although it is addressed to prosecutors and federal agencies, it might apply to internal investigations.

Law No. 26,388 on Cybercrime has included and amended several crimes in the Criminal Code. Among others, it punishes illegitimate entry to databases. Specialised prosecutors and federal agencies on cybercrime were created in the past few years.

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 to issue a document preservation notice to individuals who may have documents. Some corporations' protocols, mainly multinationals, establish by default that emails and other documents should be deleted after a certain period of time. In those cases, it is important to request the preservation of the documents not only to the individual who may have them but also to the IT department. In general terms, the preservation notice involves all documents related to the investigation, both physical and electronic.

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 law does not clearly distinguish whether its application is

restricted to local databases or also covers databases located outside Argentina that contain the personal data of Argentine and foreign data subjects. Thus, it could be argued that Argentine law enforcement has no jurisdiction. Argentina is part of several international treaties on international cooperation that can apply to the gathering of documents abroad; please see question 3.3.

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

The most valuable information are emails, chats, calls or any other communication because it can give us many details about the wrongdoing scheme or lead us to more information or documents. Those pieces of evidence should be addressed first. Nevertheless, it must be noted that some jurisdictions and law enforcement agencies are not used to electronic evidence; as such, they would prefer evidence in paper format.

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 corporation and the importance of the matter investigated, corporations would use internal or external resources. Forensic consultancy firms are the most efficient resources and should intervene in the early stages of the investigation in order to have a successful 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?

Predictive coding is usually conducted by law enforcement and experts' reports. Moreover, some courthouses consider this as the only possible legal way to review the documents. The search will be limited to the object of the investigation and, at the same time, the privacy of the owner of the document will be preserved.

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 Labour Contract Law (Law No. 20,744) recognises the right of employers to take reasonable actions to determine whether employees have conducted their obligations properly (articles 64 and 70), including their interview.

On the other hand, article 23 of Law No. 27,401 sets forth that employees' rights must be preserved while internal investigations are conducted. In addition to this, the regulations issued by the Anti-Corruption Office establish that sexual, political, religious, union, or cultural inquiries to witnesses (employee or third party) are forbidden.

Although the corporation does not need to consult any authority before conducting an interview, there must be an adequate balance between the employees' and the corporation's rights, since specialised labour courts in Argentina tend to favour the former.

There are no restrictions to interviewing former employees or third parties. It is common practice to interview them with a hidden camera. Lawyers cannot make any contact with them if there is an ongoing legal dispute with the corporation. In this case, contact could be made through a non-attorney.

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 duty of collaboration that arises from their own employment relationship, according to the Labour Contract Law (articles 64 to 70). As stated in the previous question, the employer has the right to receive information about the work done by the employee, and the employee in turn has the obligation to provide it. Although the employee cannot be forced to participate in the interview, if there is no due justification, his refusal can generate a violation of the aforementioned duty as well as the compliance regulations of the corporation.

However, the employee may refuse to testify if he believes that he could self-incriminate, in accordance to constitutional rights or other rights such as professional secrecy. In addition, witnesses are not allowed to testify when they are a close relative of the person under investigation (article 243 of the Federal Criminal Procedure Code, among other regulations).

On the other hand, during the investigation, the corporation is entitled to suspend for 30 days a suspected employee in order to protect the integrity of evidence. This limitation does not apply when a criminal complaint is filed allowing the corporation to preventively suspend the employee until a final judgment is issued.

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?

In general terms, this is not mandatory. Although in cases where the employer knows that the witness is at risk of criminal charges, labour case law has questioned the interviews conducted without the presence of the employee's lawyer. In criminal case law, the corporation or any other individual is allowed to interview any person within an internal investigation, in order to exercise its right as a victim or defendant, while respecting, at the same time, the constitutional rights of the witness.

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

There are no specific laws or procedures in Argentina providing guidance on how to conduct employee interviews.

If the employee could be involved in the wrongdoing, best practice says that he should be suspended. Nevertheless, we believe that in some cases it is better not to suspend the employee since otherwise he could be warned of the situation and consider himself indirectly dismissed because an investigation was opened against him. In any case, the employee should not be suspended without first interviewing him. Under certain conditions, criminal case law allows hidden camera interviewing. In cases where there is reasonable evidence of the employee's involvement in a crime, he should be fired. The causes of the dismissal should not always be directly linked to an ongoing infraction proceeding, because wrongdoing proceedings do not always end with a conviction.

In accordance with the regulations of the Anti-Corruption Office in Law No. 27,401 on Corporate Criminal Liability, companies should have protocols of action, which have been approved by the board. It is suggested that internal investigation protocols should specify how interviews should be conducted (their registration through electronic or magnetic means), the reason for the interview, the possibility of accessing lockers, inspections of clothing and bags, narcotics consumption tests, video surveillance and access policies to the labour tools that the employer has given to the worker (i.e. cell phones and emails), with the express mention that they can be controlled at any time.

Lastly, the interview should be carried out in a visible place (avoiding closed rooms), preferably recorded, with two witnesses and/or certified by a public notary. All the persons that assist with the interview should sign the final minutes.

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

An Upjohn warning is not required in our legal framework and it may create concerns for the witnesses since it is not common in our culture. If it is mandatory according to company policies, the rights should be indirectly given or hidden during an informal conversation.

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

The answer is the same as question 7.4.

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

Employees are allowed to review their statement but in order to avoid this, it is better to give a copy of the minutes immediately after the interview finishes.

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

Law enforcement authorities should not appear in private interviews. If the witness asks for his legal representative to be present, the right should be granted.

8 Investigation Report

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

First, the person to whom the report will be submitted should be considered in order to determine the vocabulary. An executive summary could be required in the case that the report is addressed to the board. Another issue that must be assessed is if the report is going to be used in court or only for internal use.

As for the structure of the internal investigation summary, it must start with a summary of the precedents: a statement of how the case was detected; the preliminary evidence gathered; the facts; the alleged wrongdoings; the authors and accomplices that were known at the beginning of the investigation; the minutes with the decision of the company opening the investigation; and the appointment of the investigator.

Secondly, a detailed mention of the evidence gathered and the facts, as well the notification and statement of the alleged accused about the existence of the investigation (not mandatory) must be included.

Thirdly, the investigator's conclusion must finally be included, which should suggest to the board the disciplinary action to take or not to take, as well as the cause of the event and the suggested remediation: management change; continuous monitoring; protocol determination; and asset recovery, etc.

Nicolas Durrieu
Durrieu Abogados S.C.
1309 Córdoba Avenue, 6th Floor
City of Buenos Aires (C1055AAD)
Argentina

Tel: +54 11 4811 8008
Email: nd@durrieu.com.ar
URL: www.durrieu.com.ar

Nicolas is a partner at Durrieu Abogados. He graduated as a lawyer from the *Pontificia Universidad Católica Argentina*, and has a Master's degree in International Law, a certificate in National Security Law from *Georgetown University*, and a Master's degree in Criminal Law from the *Universidad Austral*. Before moving to private practice, he was a clerk of National Criminal Courthouse No. 8 in Buenos Aires, consultant on anti-money laundering and asset recovery for the United Nations Office on Drugs and Crime (UNODC), and investigating authority at the Investigation Office of the Ministry of Economy and Finance. He is currently an advisor at the National Senate of Argentina. He also supervised and wrote the book "*Compliance, Anticorrupción y Ley de la Responsabilidad Empresaria*", published in 2018 by *Thomson Reuters*.

Mariana Mercedes Piccirilli
Durrieu Abogados S.C.
1309 Córdoba Avenue, 6th Floor
City of Buenos Aires (C1055AAD)
Argentina

Tel: +54 11 4811 8008
Email: mp@durrieu.com.ar
URL: www.durrieu.com.ar

Mariana graduated as a lawyer from the *Pontificia Universidad Católica Argentina*, has a specialisation in Criminal Law from the *Universidad Austral* and postgraduate degrees in Criminal Tax Law and Criminal Business Law from her *Alma-mater*. She has also participated in several seminars regarding Criminal Law, and was a member of the team awarded first place in the championship *V Modelo Simulado de Tribunal Internacional* organised by the International Law Department of the *Universidad Austral*. She co-authored the "Asset Tracing & Recovery" chapter (the Argentine Chapter) in *The FraudNet World Compendium* (Berlin, 2009).

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Durrieu Abogados is the largest law firm in Argentina specialised in criminal law, white-collar crimes and asset recovery.

The firm frequently handles some of the largest and most complex cases, and it has developed its activity both nationally and internationally. The firm's clientele includes individuals, closed held companies as well as publicly traded multinational corporations.

The firm also has an extensive network of affiliates throughout the country and abroad, which enables it to provide comprehensive assistance on any matter. The experience achieved after more than 70 years in the field of criminal law has allowed the firm to develop different kinds of consulting services, as well as the ability to handle all types of criminal court cases.

Considering present-day requirements, the firm is capable of providing consulting and legal services in Spanish, English, French and Portuguese.

The firm is a member of FraudNet, the International Chamber of Commerce's network of lawyers specialising in anti-fraud and asset recovery, and the American and French Foreign Affairs Offices in Argentina have included us as recommended lawyers for potential inquiries from their citizens.

Australia

Elizabeth Avery

Gilbert + Tobin

Richard Harris

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, regulators do not commonly have the power to compel an entity to conduct an internal investigation, although there are a range of practical measures that a regulator may take to persuade an entity to do so. Financial services licensees can be requested by the Australian Securities and Investments Commission (**ASIC**) to provide answers to questions which may in turn require the investigation of some facts. In limited circumstances, entities which hold a regulatory licence (e.g. a financial services licence) may have a condition imposed on their licence which may require them to conduct some form of internal investigation. However, the imposition of a licence condition is most frequently used to compel an audit (and often independent) to be conducted at the conclusion of an investigation to ensure that an already identified issue has been rectified. Financial services licensees also have certain supervisory obligations as conditions on their licence which may have the effect of requiring them to conduct investigations of issues that come to their attention in order to be able to satisfy the condition.

Internal investigations in Australia are usually conducted on a voluntary basis at an initial stage after the discovery of a compliance or regulatory issue by an entity. A proactive decision to conduct an internal investigation carries many benefits and is typically a course of action that would be recommended for an entity to undertake. Primarily, an internal investigation allows an entity to identify the full nature of the compliance or regulatory issue that it is facing, gauge its level of exposure to regulatory action, and to formulate a strategy in how to respond to the issue and any subsequent or ongoing regulator investigation/s.

In addition, if an entity is an immunity applicant to the Australian Competition and Consumer Commission (**ACCC**) in relation to potential cartel conduct under the ACCC's Immunity Policy, then the ACCC's grant of immunity will depend upon the entity's full cooperation, which will require a full internal investigation of the facts.

The proactive commencement of an internal investigation better prepares a corporation in the event that they are required to respond to the use of compulsory powers by a regulator. For example, ASIC, the financial services regulator, has broad powers in the exercise of its enforcement or investigatory functions including compelling the production of documents, to conduct compulsory examinations of staff members, and to inspect premises and documents. Similar powers exist for the ACCC, the Australian Prudential Regulatory Authority (**APRA**), the Australian Taxation Office (**ATO**), the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) (which has regulatory responsibility for anti-money laundering and counterterrorism financing), and the Office of the Australian Information Commissioner (**OAIC**).

1.2 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?

To enable a corporate entity to consistently determine whether an issue raised by a whistleblower is credible, entities should maintain a whistleblower policy which outlines the framework by which they respond to a complaint by a potential whistleblower and assess their complaint. To determine whether the complaint is credible, a corporate entity should undertake a confidential initial assessment. This should look at the nature of the complaint, the seriousness of the allegations and concerns raised in the complaint, the relevant work history of the complainant, whether supporting evidence is or could be made available, and the significance of the risks posed by the complaint.

In addition, the use of a whistleblower policy will better ensure that a corporate entity does not breach the statutory protections which exist for whistleblowers. The *Corporations Act 2001* (**Corporations Act**) protects certain whistleblower activities and protects whistleblowers from persecution. The Corporations Act contains protections for whistleblowers who meet the statutory 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.

1.3 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?

A determination concerning who should be provided the findings of an internal investigation should take into account how the internal investigation was initiated, the extent to which any regulator might be involved, the extent to which a senior officer of the company may be implicated in the investigation and the sensitivity of the issues being investigated. As a practical matter, this should usually be identified and agreed at the commencement of any investigation retainer. Persons should be excluded from the investigation (or the reports) to the extent that they may improperly influence the investigation's findings. This may either require a whole or partial exclusion. This requires an analysis on a case-by-case basis. The manager of the investigation should clearly document this at the start of an investigation and have a mechanism to review this determination at a regular interval.

Outside counsel should be privy to reviewing these documented determinations to better inform themselves of any internal conflicts. In addition, outside counsel should ensure that the terms of their engagement expressly set out the nature of the reporting relationship, including the extent to which persons may be excluded from the investigation, the extent to which their findings can be subject to alteration by the corporate entity, and a mechanism to resolve any conflicts dispute that may arise over the course 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?

Yes, each of the ACCC, ASIC and the ATO have cooperation policies which consider an entity's willingness to self-report breaches or misconduct. While voluntary disclosure does not necessarily deter a regulator from taking enforcement action, cooperation is typically encouraged from a relationship perspective and may result in immunity from prosecution, joint submissions to a court for an appropriate reduction in penalties, reaching a settlement *in lieu* of litigation or reduced penalties for taxation offences.

The ACCC immunity and cooperation policy for cartel conduct applies to entities and individuals who are whistleblowers in relation to cartel conduct. Immunity is only available to one applicant, typically the "first in", unless they fail to provide "full and frank cooperation", then the "next in the queue" may be eligible. The ACCC's Immunity Policy on cartel conduct only relates to civil matters, as the discretion on whether to recognise cooperation lies with the Commonwealth Director of Public Prosecutions (**CDPP**) in criminal cases. To facilitate immunity being granted at the same time in respect of cartel offences as civil proceedings, where the ACCC considers that the applicant should be granted immunity in relation to civil proceedings, the ACCC will make a recommendation to the CDPP regarding immunity from prosecution.

However, if immunity is not available, the ACCC will generally consider that any "serious cartel conduct" should be recommended for criminal prosecution. Where an entity was not "first in", then the ACCC would generally be prepared to make a submission to the court that the entity should be entitled to a significant discount on penalty for full cooperation.

The ACCC's policy on leniency on enforcement matters generally applies where an entity comes forward with valuable evidence of breaches the ACCC was unaware of, where the ACCC lacks enough evidence to take enforcement action. This may apply to other forms of anti-competitive conduct or where the company is not first in line to report potential cartel conduct. There are various requirements a company needs to meet to qualify for leniency, including that the company promptly terminates its involvement in the anti-competitive conduct on becoming aware of the breach, was not the instigator of, and did not coerce others into the conduct.

Because Australia has a judicial enforcement model, only the court may impose penalties. If the enforcement agency reaches an agreement with an entity to resolve a matter, they cannot set the penalty, but rather may make joint submissions to the court on what an appropriate penalty may be, although this is significantly limited in the criminal sentencing context, where the court must maintain unfettered discretion to impose the sentence.

There are also various criteria the ACCC will take into account in determining whether to reach an agreement on joint submissions to a court on appropriate penalties, which include whether an entity or individual has cooperated with the ACCC, and whether the individuals involved in the conduct were senior managers of the entity or at a lower level.

In some instances, entities are required to self-report breaches to the regulator within prescribed timeframes. An example is the obligation on Australian financial services licensees to make a written report to ASIC of significant breaches or likely breaches within 10 business days of 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?

When disclosure should be made to regulators needs to be assessed on a case-by-case basis. Depending on the industry in which the company operates, the subject matter of the investigation and its outcomes, the company may be obliged to disclose certain aspects on facts identified during the course of the investigation to certain regulators. This is particularly likely in circumstances where there is overlap with an existing or anticipated regulatory investigation and if the company is seeking to self-report conduct in order to try and seek either immunity or leniency for cooperation in respect of penalties. In certain industries, such as the financial services industry, there may be obligations to self-report. Recently, the Australian Treasury has consulted on enhancements to the self-reporting regime for Australian financial services licensees as well as the introduction of a self-reporting regime for credit licensees. Under recent mandatory data breach notification amendments to the *Privacy Act 1988* (Cth) (**Privacy Act**), entities are also required to notify the OAIC and affected individuals where they have reasonable grounds to believe that an "eligible data breach" has occurred.

As noted above, in relation to potential cartel conduct, there may be benefits to early disclosure to the ACCC due to the potential to obtain

immunity from civil and criminal prosecution. In the first instance, an anonymous marker may be obtained from the ACCC, via the potential applicant's legal representative. If the entity decides to "perfect" the marker and seek immunity, it would provide the results of its internal investigation to qualify for conditional immunity.

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?

While the precise reporting requirements for the findings of an internal investigation externally will depend on the nature of the specific investigation being undertaken, in some instances companies may be required to report the findings of internal investigations under statutory and regulatory reporting requirements. In some cases, companies will decide to voluntarily report the investigation's findings for commercial or relationship reasons. The company's legal advisers should give clear guidance about how external communications should be structured so that external communications to the regulator or third parties regarding the investigation do not result in privilege being waived. The ACCC may accept oral "proffers" to avoid a waiver of legal privilege.

For internal communications, it can often be problematic to establish that communications connected with internal investigations are privileged because they are often prepared for multiple purposes and given the sheer number of documents created. Ideally, at the outset of an investigation, companies should develop and implement suitable controls over internal communications and seek to limit communication regarding the investigation to those with a clear "need to know", appropriate confidentiality protocols, and a clear escalation and reporting path to senior management. In order to try and manage the risks of documents being created for multiple purposes, those creating documents regarding the internal investigation should be clear about why a document is being created, and try to separate communications for the purpose of legal advice or litigation, from communications for other purposes.

Depending on the nature of the investigation, it may also be important to consider whether certain officers or employees may have interests that differ from those of the company in respect of the investigation, and for those individuals to be excluded from internal communications regarding the investigation.

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?

While an entity that is the subject of a government investigation is not obliged to liaise with local authorities before commencing an internal investigation, it can be appropriate in some circumstances. This will depend on the company's regulatory engagement strategy (see section 4) and needs to be assessed on a case-by-case basis. If the government investigation and the internal investigation relate to the same conduct and where there is ongoing engagement with the relevant regulator, some level of coordination is often desirable in order to reach a sensible accommodation aimed to reduce inefficiencies. This engagement may sometimes mean a regulator may delay or not proceed with its investigation due to the internal investigation, provided the company commits to frank and full disclosure of the outcomes of the internal investigation. Alternatively, this strategy may also mean the regulator requests the company cease its own investigation due to concerns that it may prejudice the government investigation and any enforcement activity arising out of its investigation.

There may also be benefits through proactive early engagement with regulators in terms of cooperation where the company chooses to voluntarily self-report potential breaches or misconduct, in terms of immunity, leniency or reduced penalties (as discussed in section 2). On the other hand, if companies engage prematurely with regulators this may result in regulatory enquiries before the company is in a position to address and respond.

3.2 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, Australian regulators will not allow an entity to define the scope of the investigation. However, typically, Australian regulators will engage with the entity whose conduct they are investigating and consult on the scope of a compulsory notice. Often, this process is mutually beneficial as a more detailed understanding of the entity's structure, systems, records and processes can assist the regulator in focussing their investigation on the most relevant documents based on the types of information the entity is able to provide (see information on the steps of determining the scope of the investigation and how to assist the regulator in section 4).

3.3 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 for further details.

For companies facing investigation in multiple jurisdictions, it is critical to coordinate the response across those multiple jurisdictions. This 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 steps should typically be included in an investigation plan?

An investigation plan should include the following steps:

1. **Determination of scope**: This involves identifying and defining the scope of the issue that is the subject of the investigation plan. This should include considerations of what will and what will not be investigated, the key risks associated with the issue, the level of sensitivity associated with the issue being investigated, and a preliminary consideration of the potential levels of exposure/significance of the issue being investigated.
2. **Creation of investigation framework**: This will involve consideration of:

(a) Resources – Identifying the resources required including internal staff, I.T., and any external services (e.g. a forensic accountant).

(b) Internal management – Identifying who will be the internal stakeholders responsible for the day-to-day management of the investigation and the supervision of the investigation.

(c) Internal risks – Identifying the level of security around the investigation, the extent to which it needs to be quarantined from others within the organisation, and who will need to be excluded.

(d) External counsel – Planning your engagement of external counsel.

(e) Reporting lines – Determining who will receive progress reports on the investigation, the nature of the reports and the frequency of the reports (e.g. monthly report to the Board).

(f) Timeframe for report – Establishing deadlines for a preliminary and final report to be completed.

3. **Determination of regulatory engagement strategy**: This should include consideration of whether the matter should be voluntarily (or otherwise) reported to a regulator, who should be responsible for liaising with the regulator, and the general approach to dealing with the relevant regulator/s who may be interested in the outcome of the investigation.
4. **Obtaining key documents and evidence**: This will include identifying what evidence is required, as well as who are the key custodians of information, documents, and data necessary for the internal investigation, and undertaking steps to obtain this information.
5. **Review of evidence**: The review of data and documents, including witness interviews where necessary.
6. **Report preparation/writing**: Where necessary this may include a consultation period for a preliminary report to obtain feedback on the report's findings, before these findings are finalised, in order to correct any factual or material errors.
7. **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.

4.2 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 for all regulatory or compliance concerns that may warrant an investigation and, depending on the specifics of the issue, should include outside counsel. As a general rule, given the risks to independence for internal lawyers, significant or sensitive investigations should have ongoing involvement of outside counsel. Outside counsel who are familiar with the business will be able to assist a company to monitor its legal obligations over the course of an investigation, provide important legal advice about the substantive issues being investigated, and also bring an independent and external perspective to the investigation to help guide the company. Additionally, the use of outside counsel can help a company obtain legal privilege over sensitive materials created which may otherwise be subject to disclosure at a later point in time.

Forensic consultants (or other outside resources) should be utilised on a case-by-case basis. Their use may be beneficial:

1. to provide additional levels of expertise that are required for the investigation (e.g. a forensic accountant may be able to investigate complex discrepancies in financial accounts);
2. to provide an additional level of scrutiny to the investigation; and/or
3. to provide independent assurances regarding the reasonableness of the methods or outcomes of 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?

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

Legal professional privilege applies to all confidential communications (whether oral or written) and documents brought into existence for the dominant purpose of obtaining legal advice, or in anticipation of actual or reasonably anticipated litigation. The protection applies to communications between a client and their lawyer, documents which record the content of a protected communication (e.g. a client's file note of a meeting with their lawyer), and documents created for one of the dominant purposes outlined above. It may also apply to certain categories of communications between a lawyer and a third party.

Therefore, communications in the course of an internal investigation that are created for the dominant purpose of obtaining legal advice are protected by law.

In order to ensure that privilege is maintained, an entity should maintain a policy on how it handles privileged material. At a minimum, the policy should set out the following principles:

1. Ensure that privileged communications (including their substance and effect) are kept confidential and not disclosed outside the company. Loss of confidentiality in a communication is likely to be regarded as a waiver of the right to assert privilege.
2. Documents which attract privilege should be clearly marked as such to ensure the document is not inadvertently distributed by a person within the entity who is unaware of its privileged status, as this may amount to a waiver of privilege. In particular, caution should be taken where there is a large volume of documents being disclosed by an entity as this is where inadvertent disclosure most commonly occurs. The entity providing any such large-scale disclosure of documents should also clearly state in their cover letter that any inadvertent disclosure of privileged material is not to be taken as a waiver of privilege.
3. To ensure that confidentiality is maintained, verbal advice should be provided in private to persons who are necessarily required to receive the advice.
4. As in-house counsel must provide independent advice to maintain privilege, an in-house counsel's legal advice should not be mixed with comments about strategic or operational matters. Additionally, the personal loyalties, duties and interests of the in-house lawyer as an employee should not influence the professional legal advice which they give.
5. Care should be taken when providing legal advice to a Board as part of the Board Papers in order to ensure that the communication's dominant purpose is not diluted. Specific procedures should be followed to provide legal advice separately to any other matter.

6. The engagement of an expert during of an investigation and all communications with the expert should be made by a lawyer for the express purpose of the expert providing assistance to the lawyer to give advice. This will help ensure privilege attaches to these communications.

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)?

Yes, legal professional 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.

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

Legal professional privilege may be claimed regardless of whether the lawyer is acting in a role as in-house or outside counsel, provided that the requirements identified in question 5.1 are met.

As in-house counsel may be involved in activities that exceed the remit of a lawyer as part of their day-to-day role within an entity, care must be taken to ensure that the in-house counsel separates the legal advice they provide from other matters of the business in which they may be involved. Failure to do so may mean that the communication over which privilege is asserted is deemed to be for mixed purposes, rather than for the dominant purpose of legal advice or litigation. In these circumstances, privilege will not apply. Furthermore, an in-house lawyer must ensure that their advice is independent for privilege to apply. An in-house lawyer will lack the requisite measure of independence if their advice is at risk of being compromised by virtue of the nature of their employment relationship with their employer. Accordingly, the personal loyalties, duties and interests of the in-house lawyer as an employee should not influence the professional legal advice which they give for privilege to apply. Whether or not an in-house lawyer's advice is considered independent is ordinarily determined on a case-by-case basis assessing the facts surrounding the provision of that specific advice. However, some of the indicia of independence, such as terms of the employment contract, the in-house lawyer's position in the organisational hierarchy of the company, whether the lawyer's remuneration is linked to the financial performance of the business, and to whom the in-house lawyer reports may all be general factors which a court considers as relevant in any such determination.

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

By meeting the best practice principles outlined in question 5.1, an entity can protect documents that are subject to legal professional privilege. In larger internal investigations, it is ordinarily beneficial to implement a protocol governing how privileged documents are to be treated in a consistent manner.

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 voluntary disclosure of an internal investigation to an enforcement agency may not always be confidential. Subject to any agreement with the agency, the enforcement agency may choose to disclose the results publicly.

Additionally, documents provided to an enforcement agency may be subject to disclosure to an applicant who applies under the *Freedom of Information Act 1982* (Cth), legislation which (subject to certain exemptions) provides a right of access to documents held by most government agencies. Legal advice should be sought prior to any voluntary disclosure of an internal investigation about the risks of public disclosure.

6 Data Collection and Data Privacy Issues

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

The key data protection obligations which apply to entities, including in the context of any internal investigations, are contained in the Australian Privacy Principles (**APPs**) in Schedule 1 to the Privacy Act.

Under the Privacy Act, 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 a secondary purpose without consent from the individual or an exception applies.

In this context, the most relevant exceptions are:

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

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?

While there is no legal requirement in Australian jurisdictions to prepare and issue document preservation notices, it is often prudent for companies to do so in order to issue a document preservation notice regarding the investigation. Furthermore, there are common law and legislative duties and obligations in relation to document destruction, including an obligation not to destroy a document which 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.)?

The ACCC has a number of cooperation arrangements and treaties

with counterpart regulators internationally. While each agreement is specific to the particular agencies and the legislation they administer, they generally recognise the benefits which come from cooperation and coordination in improving the effectiveness of their enforcement activities. The extent and type of cooperation can include notification obligations, coordination of enforcement activities, the exchange of information and/or evidence, and agreements to advise of potential conflicts.

The Australian corporate regulator, ASIC, has signed up to the International Organisation of Securities Commissions (**IOSCO**) Multilateral Memorandum of Understanding and other bilateral agreements. The memoranda generally require ASIC and the international agency to use reasonable efforts to provide each other with mutual assistance including providing and exchanging information and, in some circumstances, verifying information and questioning or taking testimony from witnesses.

For the Australian Government and foreign governments to request government-to-government assistance, regulators can also use the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (for criminal matters) or the *Mutual Assistance in Business Regulation Act 1992* (Cth) to exercise information gathering and document compulsion powers (for civil matters). The Attorney-General is responsible for approving and making requests to foreign countries for assistance in investigations.

There are privacy obligations which need to be satisfied before the cross-border disclosure of documents located in Australia containing personal information to third-party overseas recipients. These obligations require the discloser, subject to limited exceptions, to take such steps as are reasonable to ensure that the overseas recipient does not breach the APPs 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?

The types of documents that should be collected in an Australian internal investigation will vary depending on the nature of the investigation. In general, the documents that could be collected include internal reports, documents evidencing processes, management assurance or internal audit reports, standard forms, customer files and data, other internal data, phone recordings, retrieval of messages from phones and tablets, correspondence, financial records, sales and marketing material and staff training instructions or manuals. In some instances, information as well as documents (including in the form of written statements) can be required. Compulsory oral testimony may also be required.

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 internal investigation depend on the nature and scope of the investigation, informed by the particular types of documents and data the entity holds, and the definition of "Document" set out in the investigative notice. The definition of "Document" may include electronic, hard copy and draft documents, voice recordings, texts, emails, spreadsheets and instant message chats. The process for and the identification and collection of relevant documents should be documented in the investigation plan.

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 to locate the documents (see question 4.2). Specialist I.T. and data analytics resources are often required. Entities should also consider whether third-party verification of data or external experts are required.

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?

While Australia has been slow to adopt the use of predictive coding techniques, orders regarding the use of predictive coding have been made in both the Federal Court of Australia and the Victorian Supreme Court. In the case of *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors (No 1) [2016]* VSC 734, the Supreme Court of Victoria approved the use of predictive coding techniques in the process of reviewing approximately four million documents as part of discovery.

Subsequently, the Victorian Supreme Court issued Practice Note SC Gen 5 – Technology in Civil Litigation, which expressly allows predictive coding to be used for larger cases. Generally, while the use of predictive coding is not mentioned in practice notes in other Australian jurisdictions, their approaches to discovery appear sufficiently flexible to allow the use of technology assisted review.

In the case of *Money Max Pty Ltd v QBE Insurance Group Ltd*, the Federal Court ordered the respondent who had used predictive coding as part of the discovery process to provide the applicant a report of the way in which this had been applied.

The Federal Court has issued the Practice Note "Technology and the Court" on 25 October 2016 which provides guidance on electronic discovery in the Federal Court which encourages parties to develop a Standard Document Management Protocol detailing the terms on which documents can be electronically exchanged between the parties, which typically occurs during discovery. The Practice Note provides that this protocol may also set out the parties' agreement regarding the reviewing and processing of documents, including methods that may be used such as predictive coding, de-duplication of documents and email threading.

Whether it makes sense to adopt predictive coding techniques in Australia really depends on the nature of the investigation, its scope and timing. It is frequently used in Australia in developing the review database, and performing keyword searches over those documents to assist in prioritising the 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 are no protections, laws or regulations in Australia which directly apply to interviews of employees, former employees or third parties, and an entity does not need to consult any authority before initiating a witness interview. However, where an entity is seeking to interview an employee who is the subject of the investigation, the entity will need to be conscious of employment laws, which offer a range of protections for employees. In particular, if an entity is seeking to take disciplinary action against the employee, it must afford procedural fairness to 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?

Employees are required to cooperate with their employer's internal investigation. Under Australian common law, employees are required to cooperate and participate in good faith in any lawful and reasonable internal investigation undertaken by their employer. The employment contracts and entity codes of conduct, which are binding on employees, will typically also impose similar obligations.

Employees may not need to comply in circumstances where the questions being asked by their employer are unreasonable or unfair. Employees can also not be compelled to answer questions that would be self-incriminating (given the privilege against self-incrimination). An employer is not entitled to take any adverse action against the employee for a failure to comply with an investigation in these circumstances.

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 either prior to or during an interview. Typically, witnesses are encouraged to bring a support person to the interview (whether or not that person is a legal representative), which is a mandatory requirement where the employee is being interviewed about an allegation of misconduct against them.

Where a witness is the subject of the investigation, it is advisable for an entity to facilitate the provision of legal representation for this witness, to ensure that there is no later allegation of impropriety against the entity.

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

Best practice for a witness interview should be determined on a case-by-case basis. As a general practice, entities conducting witness interviews should:

1. maintain a policy which outlines how the interviews are conducted to ensure consistency (e.g. governing periods of notice before the interview is required, the hours that an interview can take place, the length of an interview, and the frequency of breaks for lengthy meetings);
2. take a record of the interview (ordinarily written);
3. offer the opportunity for the witness to review and where necessary correct any written record of the meeting;
4. have an independent person (whether a support person chosen by the interviewee or a HR representative) attend the interview (particularly where the interview relates to matters of particular significance or concern); and
5. ensure that the witness is provided procedural fairness.

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?

An entity can protect the interests of the company by reasonably questioning the whistleblower during an interview to assess the merits of their complaint. An entity may choose to use outside counsel to conduct this interview.

To uphold the rights of the whistleblower, it is advisable for an entity to provide a whistleblower with the opportunity to retain a legal representative during an interview as well as ensuring adherence to their whistleblower policy. Additionally, at all times, an entity should be aware of the rights of and protections afforded to whistleblowers as outlined in question 1.2.

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

As a matter of best practice, it is recommended that employees are always given the opportunity to review or revise statements they have made. Where the employee is the subject of the investigation and adverse action may be taken against them on the basis of the statement, an employer is required to afford them this opportunity to review their statement.

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

In Australia, there is no requirement for a representative of an enforcement authority to be present during a witness interview, and it would be uncommon for a representative to attend.

As discussed in question 7.3, witnesses are generally encouraged to bring a support person to the interview (whether or not that person is a legal representative). For reasons of procedural fairness, this is mandatory where the employee is being interviewed about an allegation of misconduct against them.

8 Investigation Report

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

The structure of an investigation report should be determined on a case-by-case basis as there should be sufficient flexibility in determining the structure to ensure the report is fit for purpose and adequately discloses all relevant material. As a general rule, the report should be structured in a manner that appropriately reflects the complexity of the issues being addressed and the recipients of reports. Reports should be as detailed as needed and should not be unnecessarily condensed. For more complex or lengthy reports, a short version of the report should also be produced to accompany the full-length report. This provides a summary version where brevity is required.

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Elizabeth Avery
Gilbert + Tobin
L35, Tower Two
International Towers Sydney
200 Barangaroo Avenue
Barangaroo NSW 2000
Australia

Tel: *+61 2 9263 4362*
Email: *eavery@gtlaw.com.au*
URL: *www.gtlaw.com.au*

Elizabeth is a partner in Gilbert + Tobin's competition and regulation group. Her practice includes advising on enforcement litigation and investigations, merger clearances and ongoing strategic and operational advisory work.

Having practised in New York, she brings a breadth and depth of perspectives to her advice, across a broad range of industries. She has a particular focus on multi-jurisdictional and financial services matters, advising a range of participants on transactions, investigations and strategic initiatives. Elizabeth advised on the ACCC Inquiry into Residential Mortgage Pricing, the Productivity Commission's Inquiry into Competition in Financial Services and currently represents K-Line in the first group of criminal cartel prosecutions in Australia.

Elizabeth is currently ranked as the leading competition practitioner in Australia (*Who's Who Legal 2018*) and is held in high regard by clients, who report: "*Her exceptional technical skills are balanced by commercial acumen and a deep understanding of our business...*" (*Chambers Asia-Pacific 2018*).

Richard Harris
Gilbert + Tobin
L35, Tower Two
International Towers Sydney
200 Barangaroo Avenue
Barangaroo NSW 2000
Australia

Tel: *+61 2 9263 4413*
Email: *rharris@gtlaw.com.au*
URL: *www.gtlaw.com.au*

Richard leads Gilbert + Tobin's Disputes + Investigations practice. An experienced, strategic and pragmatic litigator, Richard specialises in significant commercial litigation (including class actions) and investigations. He regularly advises banks, large corporations and their boards on major dispute, regulatory and governance issues. Richard has been involved in a wide range of substantial complex commercial litigation in Australian superior jurisdictions including the High Court. Recently, Richard led the team advising Westpac on the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry as well as the high-profile Australian investigation and enforcement proceeding concerning BBSW (the Australian equivalent of Libor).

Richard is ranked by leading legal directories including *Chambers Asia-Pacific* which recognises him for Dispute Resolution and Financial Services Regulation and states Richard is singled out by clients for "*providing advice that is balanced, considered, strategic and commercial*" and for "*quickly adapting to our needs and the changing environment we operate in*". *The Legal 500* ranks Richard as a Leading Individual for Regulatory Compliance and Investigations.

GILBERT+TOBIN

Regulatory investigations, commissions and enquiries are increasingly a critical and every day part of corporate life in Australia, with many sectors and currently the financial services sector in particular, under intense scrutiny.

Gilbert + Tobin's lawyers have been deeply involved. Our Corporate and Regulatory Investigations group comprises partners and specialist lawyers with strong expertise in litigation, competition, regulatory, corporate and tax to provide coverage of regulatory compliance and investigations from end to end. Our group is known for our unparalleled work in disputes and investigations, competition law enforcement investigations and enquiries and on a range of civil and criminal investigations. We are consistently engaged on the most strategic, complex and challenging, investigations, commissions and litigation, and on industry-changing reforms.

Belgium

Hans Van Bavel

Stibbe

Elisabeth Baeyens

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 ("CBA") allow for the possibilities 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 Act on the protection of natural persons with regard to the processing of personal data of 30 July 2018 ("GDPR Implementation Act"), 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 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 were collected legitimately and the processing of the data in the context of an internal investigation is justified, the data processing could still violate 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 under the GDPR if it processes data in violation of the BDPA or GDPR.

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 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 Data Protection Authority 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.)

1.3 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 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.

3.3 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…).

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 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.

4.2 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 458*bis* of the Criminal Code). If the conditions of Article 458*bis* of the 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 113 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 in-house 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 jurisdictions 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:

- The GDPR and the GDPR Implementation Act. Personal data may only be processed proportionately and transparently and for well-defined purposes and to the extent that there is a clear, legitimate basis for the processing. Different legitimate bases are exhaustively listed in Article 6 GDPR. 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.
- 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 314*bis* 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 to it.
- CBA no. 81, which allows the monitoring of electronic online communication data of employees 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 use of forensic software; email communication including archives; full accounting data set 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 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.

7.8 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 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.

Hans Van Bavel
Stibbe
Central Plaza
Loksumstraat 25 Rue de Loxum
1000 Brussels
Belgium

Tel: +32 2 533 52 63
Mob: +32 475 52 11 57
Email: hans.vanbavel@stibbe.com
URL: www.stibbe.com

With over 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 also 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.

In 2011, Hans passed the professional competence exam organised by the Bar of Supreme Court Lawyers.

Elisabeth Baeyens
Stibbe
Central Plaza
Loksumstraat 25 Rue de Loxum
1000 Brussels
Belgium

Tel: +32 2 533 52 20
Mob: +32 478 80 50 48
Email: elisabeth.baeyens@stibbe.com
URL: www.stibbe.com

Elisabeth graduated in law from the KULeuven in 2004 and has been a graduate in criminological studies since 2005. She has been admitted to the Brussels Bar since 2005 and has been working at the Stibbe office, within the litigation and arbitration department, since 2006.

With 13 years of experience, she specialises in all aspects of corporate criminal law. She has assisted clients in many different sectors before Belgian courts including the Supreme Court, as well as before the European Court of Human Rights and the European Court of Justice. She has also assisted several clients in negotiations with the public prosecutor.

In June 2015, Elisabeth passed the professional competence exam organised by the Bar of Supreme Court Lawyers. She represents clients before this Court herself and teaches in the 'cassation proceedings in criminal cases' training programme organised by the Order of Flemish Bars. She is also a member of the editorial team of *Tijdschrift voor Strafrecht* (Criminal Law Journal) and publishes regularly.

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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.

Brazil

André Gustavo Isola Fonseca

Felsberg Advogados

Marina Lima Ferreira

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 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. On the other hand, the matter is still a novelty in Brazil, having only recently appeared on the legislator's radar, with the issuance of Federal Law no. 13.608/2018, enacted not only to encourage the participation of whistleblowers within investigation procedures, but also to take care of their protection.

1.3 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 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.

3.3 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. According to the Federal Public Prosecutor's International Cooperation Office, until November 2017, officials from 31 countries had sent 139 cooperation requests to Brazilian prosecutors in charge of Lavajato; Brazilian prosecutors, on the other hand, had themselves issued 201 cooperation requests for 41 countries during the same period, involving, therefore, several jurisdictions. 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 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.

4.2 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 4.1 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 judgment 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, as well as by the most recently enacted Law no. 12.965/2018 (the "Brazilian Internet Law"), that disciplines the personal data protection field, grounded on the respect for privacy, the inviolability of intimacy, honour, image and others. 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 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.

7.8 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 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.

André Gustavo Isola Fonseca
Felsberg Advogados
803 Avenue Cidade Jardim
Jardim Paulistano – 01453-001
São Paulo, SP
Brazil

Tel: +55 11 3141 9185
Email: andrefonseca@felsberg.com.br
URL: www.felsberg.com.br/home

André has vast expertise in litigation and consulting in criminal law including a variety of legal issues. In his 25 years of experience in the field of criminal law, André has been working in police investigations, criminal lawsuits, dawn raids and presenting oral arguments before superior courts. He has very sound knowledge of the Brazilian criminal law and its implications for and overlaps with internal laws.

He has led many internal company audits and investigations on corporate fraud. André also has experience acting as a consultant to both national and international companies during the implementation and adjustment of anticorruption compliance programmes, pursuant to Law no. 12.846/13, as well as in assisting companies in local matters related to foreign legislations (FCPA and UKBA), and in preparing their staff to behave or react to the event of an investigation conducted against or in favour of the company and assistance before the police, district attorney's office and judicial sphere.

Marina Lima Ferreira
Felsberg Advogados
803 Avenue Cidade Jardim
Jardim Paulistano – 01453-001
São Paulo, SP
Brazil

Tel: +55 11 3141 4588
Email: marinalima@felsberg.com.br
URL: www.felsberg.com.br/home

Marina has a Law Degree from the University of São Paulo, Brazil, and a Dual Degree in Law from the University of Lyon, France. She is currently working on the completion of her Master's in Criminal Law and Criminology, also at the University of São Paulo. Marina has experience in litigation and advisory services in criminal law, for both national and international clients, and her practice addresses the provision of services to individuals and companies in the resolution of legal issues related to the most diverse fields of law – anti-corruption, money laundering, administrative and regulatory, environmental, labour, antitrust, intellectual property and others. Marina also has know-how and experience in conducting large corporate investigations and in dealing with complex operations. She draws up opinions for specific cases and offers training and preventive guidance for companies, designing strategies for work and crisis management, as well as improving Criminal Compliance systems for clients that seek management committed to ethics and legal rules. Marina is the exclusive White-Collar and Corporate Investigation Representative for the Women's Law Network in Brazil. She speaks Portuguese, English, French, Italian and Spanish.

Canada

Paul Schabas

Blake, Cassels & Graydon LLP

Iris Fischer

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, anti-competitive 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 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.

1.3 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.

Historically, the *CFPOA* offered 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. This changed on September 19, 2018, when new amendments to the *Criminal Code* came into force. The amendments provide for deferred prosecution agreements, referred to in the legislation as "remediation agreements". Under this new regime, a prosecutor and a company facing criminal allegations may enter into a remediation agreement that would stay criminal proceedings pending the fulfilment of certain obligations and conditions. A prosecutor may enter into negotiations for a remediation agreement if, among other factors, it would be in the public interest and appropriate in the circumstances. To determine this, the prosecutor must consider a number of enumerated factors, including the circumstances in which the alleged offence was brought to the attention of authorities. Accordingly, while self-reporting will be considered in a prosecutor's determination of whether to offer a remediation agreement, it is not a guarantee, and a strategic analysis of the costs and benefits of self-reporting will be necessary for each specific circumstance.

In addition, a Quebec bill adopted in February 2018 expanded the investigative jurisdiction and independence of the province's anti-corruption unit and allowed prosecutors to stay or terminate 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 authorities are already aware of a potential breach (see also question 2.1 above). The potential negative outcomes in each circumstance must be weighed against the potential benefits, such as an increased probability of being offered a remediation agreement.

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?

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.

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 authorities from the outset.

3.2 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.

3.3 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 laid charges under the *CFPOA* in December 2016 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 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.

4.2 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, emails 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 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.

7.8 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 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 2.3 above).

Paul Schabas
Blake, Cassels & Graydon LLP
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9
Canada

Tel: +1 416 863 4274
Email: paul.schabas@blakes.com
URL: www.blakes.com

Paul Schabas handles anti-corruption, regulatory, commercial and constitutional/public law cases. He represents clients on complex national and international disputes in trials and arbitrations, and is one of Canada's leading media lawyers. A Fellow of the American College of Trial Lawyers (2007) and International Academy of Trial Lawyers (2015), he has argued close to 100 appeals, many in the Supreme Court of Canada. In June 2016, Paul was elected Treasurer (President) of The Law Society of Upper Canada, which governs the legal profession in Ontario. He is a past Chair of the Law Foundation of Ontario, and a Director of the Canadian Civil Liberties Association, The Osgoode Society and the Canadian Journalism Foundation. Paul is an Adjunct Professor at the University of Toronto Faculty of Law. *Canadian Lawyer* named Paul one of Canada's "25 most influential lawyers" in 2011.

Iris Fischer
Blake, Cassels & Graydon LLP
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9
Canada

Tel: +1 416 863 2408
Email: iris.fischer@blakes.com
URL: www.blakes.com

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.

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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 the certain licences for operation.

1.2 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 complaint. Depending on the nature of a whistleblower complaint, legal and compliance teams 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 briberies and embezzlements committed by government officials or state-owned enterprises employees. 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.

1.3 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 to report. To avoid internal conflicts, outside counsel should determine the investigation 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 a lenient treatment to an entity that self-discloses its non-compliant conduct, but the certainty and the extent of leniency vary 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 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 investigation scope.

3.3 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 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.
2. Gathering resources to conduct the investigation, including leveraging internal resources (in-house counsel, internal audit, finance, etc.) and engaging outside counsel.
3. Identifying custodians and collecting and reviewing documents.
4. Conduct witness interviews with the employees and third parties.
5. Complete and document the investigation's findings.
6. Assess legal implications and determine remediation steps, including potential self-disclosure.

4.2 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 multi-jurisdictional 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 not equivalent to the doctrine of attorney-client privilege or the work product protection. In China, lawyers and their clients can 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 are deleted after the preservation notice is 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 secret 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") are required to store, within the territory of China, personal information and "important data" collected and generated during their operation in China unless certain statutory requirements are met, including having a genuine and legitimate business need to export the data overseas and performing a security assessment of the data transfer pursuant to regulations on cross-border data transfers. As of the date of drafting this chapter, cross-border data transfer regulations have not been officially promulgated, although drafts have been published for comment. 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 an 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 network operators to conduct a security assessment and disclose the self-assessment results to relevant 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 starts 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. 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 advisable to adopt a whistleblower policy that explicitly protects whistleblowers from retaliation and to communicate this policy during the 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 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.

7.8 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 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 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.

Tiana Zhang
Kirkland & Ellis International LLP
11th Floor, HSBC Building, Shanghai IFC
8 Century Avenue, Pudong New District
Shanghai
China

Tel: *+86 21 3857 6305*
Email: *tiana.zhang@kirkland.com*
URL: *www.kirkland.com*

Tiana is a partner in Kirkland's Shanghai office. She has extensive experience representing China-based companies listed in the U.S. on legal and compliance issues, including anti-corruption (including the FCPA), accounting and book-keeping issues, financial fraud, conflict of interest, insider trading, business ethics and other internal control rules. She routinely appears before the SEC and other U.S. government authorities, responds to Chinese regulatory authorities' inquiries and inspections, and conducts internal investigations. Tiana was selected as a recognised practitioner for corporate investigations/anti-corruption in China by *Chambers Asia-Pacific 2015*.

Jodi Wu
Kirkland & Ellis International LLP
11th Floor, HSBC Building, Shanghai IFC
8 Century Avenue, Pudong New District
Shanghai
China

Tel: *+86 21 3857 6337*
Email: *jodi.wu@kirkland.com*
URL: *www.kirkland.com*

Jodi is a partner in Kirkland's Shanghai office. Prior to joining Kirkland, she clerked in the U.S. District Court for the District of Maryland. Jodi originally started in Kirkland's D.C. office and relocated to Shanghai in 2015. She concentrates her practice in the areas of white-collar criminal defence, government enforcement matters and internal investigations, and cross-border litigation issues. Jodi regularly appears before the SEC and DOJ to advocate on behalf of clients. Jodi was featured in the *Global Investigations Review*'s "Women in Investigations 2015" series.

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Denmark

Tormod Tingstad

Martin Sønnersgaard

Kammeradvokaten/Poul Schmith

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 statutory legislation pertaining specifically to internal investigations in Denmark. Internal investigations conducted by outside counsel have generally been conducted in the form of "Attorney Investigations" (*advokatundersøgelser*), as set out in the guidelines adopted by the Association of Danish Law Firms (the "Guidelines"). Prior to the adoption of the Guidelines in 2012, there were no guidance pertaining to internal investigations, but in practice the principles set out in the Guidelines were applied. Generally, a distinction is made between "regular" investigations, conducted by the company's regular legal advisor, and independent investigations, carried out by a law firm with little or no previous ties to the company in question. Until recently, investigations have been based solely on written documentation, as stipulated in the Guidelines, and interviews have been the exception. This practice is, however, rapidly changing, and the use of interviews as well as eDiscovery is becoming the norm.

While there are no express obligations to conduct internal investigations, such obligation may arise in a given situation based on the fiduciary duties of the company's board and management. The main legal questions during an investigation will be in relation to privacy and labour law. There are no formal legal or regulatory benefits for conducting an investigation, but internal investigations have been given weight in favour of the company in subsequent criminal proceedings.

1.2 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?

Because of EU legislation, there is a requirement to maintain a whistleblower hotline within the financial sector in Denmark. Moreover, a number of entities covered by the Anti-Money Laundering Act (*hvidvaskloven*) are required to maintain a whistleblower hotline for suspicious activity concerning money-laundering violations. There is, however, no general statutory or regulatory requirements for maintaining a whistleblower hotline or similar. Moreover, whistleblowers are not given any express protection by way of national law, other than the protection granted by employment law against harassment or unlawful dismissal. In practice, many private as well as public organisations do however maintain a whistleblower service in line with international best practice. Complaints are addressed as is normal practice in other jurisdictions, typically by following a formalised and published policy and procedure.

Under s.115 of the Companies Act (*selskabsloven*), it must be assumed that a company's management, based on the facts in each case, will have a duty to investigate any credible notification that may be submitted through a whistleblower service, or otherwise brought to the attention of the management team.

1.3 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 matter of legal privilege, it is not necessary to determine which individuals within the client organisation is "the client". The whole organisation, typically the company as a legal entity, will be the client as such. However, it is envisaged that a written mandate should be put in place. A key component of the mandate will be reporting lines and other governance issues related to the investigations. In Denmark, the investigation will typically be mandated by the Board of Directors; however, with day-to-day reporting to a senior executive of the client's management, e.g. Head of Legal or Compliance, CEO or CFO.

Anyone within the client's organisation with an interest in the outcome of the investigation should be excluded from the management of, as well as daily involvement with, the investigation. However, this typically leads to difficult determinations, and must ultimately be decided by the client's management itself. Any relevant conflicts of interests should, however, be pointed out in the counsel's reporting 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?

The law enforcement authorities may consider an organisation's willingness to come forward as well as cooperate in disclosing information when deciding on whether to prosecute a matter or not. However, there is no clear precedent in this respect. Moreover, courts do consider self-reporting as well as willingness to disclose information when sentencing in cases relating to financial crime. Other factors that may be considered by law enforcement, as well as the courts, may be, e.g., how systemic the crime was, at what level in the organisation it took place, the length of time of the crime, and to what extent remedial efforts have subsequently been put in place.

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 requirement under Danish law to self-report to enforcement authorities unless there is an express statutory duty to do so (as is, for example, the case in relation to money laundering). The Board of Directors or management of a company may, however, have a duty to take such steps by way of company law; namely, to protect the interests of the company. A number of factors may be relevant for the company to consider, such as the nature and gravity of the matter, the risk of detection and enforcement, and more generally the entity's view on its overriding obligation to report serious crimes to the appropriate authorities. Should an organisation choose to self-report or disclose information to a law enforcement authority, it should retain legal counsel to assist in such 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?

According to the Guidelines for investigations issued by the Association of Danish Law Firms, the investigation should be concluded by way of a written report, setting out, among other things, the mandate, findings, any conclusions and recommendations as well as any reservations made by the investigators. See question 8.1 below. Any written report, whether public or not, carries the risk of additional investigations being instigated by enforcement authorities or others that may come in the possession of the report or gain knowledge of its existence. In this respect, the entity should also be aware of the legislation concerning public access to documents in public files. See question 5.5 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?

An entity that is the subject or target of a government investigation is not required to liaise with local authorities before starting an internal investigation. However, an entity should be careful not to hamper or destroy any evidence that might become the subject of an ongoing government investigation. Moreover, it is advisable that the entity informs the relevant authorities of any concurrent internal investigation, as well as coordinates any investigative efforts with such authority.

3.2 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, an entity has very little or no influence on the scope of a government investigation, and any overt attempt to do so may be viewed negatively by the authorities. The entity may, however, seek a constructive dialogue with the authority in question, and thus effectively have some impact on the scope of the government investigation.

3.3 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?

Danish authorities will work extensively with authorities in other jurisdictions if deemed necessary in the individual case. Should an entity face investigations in multiple jurisdictions, it should be advised to cooperate to provide the requested assistance in Denmark, namely information and evidentiary material, to avoid a possible escalation of legal proceedings outside Denmark.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

An investigation plan will typically include planning, information/data gathering, data processing and review, interviews and subsequent iterations, final assessments, conclusions and reporting. More substantial investigations will most often be assisted by eDiscovery, which will require further planning with respect to the investigation phases.

4.2 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?

In Denmark, internal investigations are generally carried out by

the organisation itself or by external legal counsel. However, other experts, such as accountants, may also carry out investigations.

A company should elicit the assistance of outside counsel in, at least, three situations: (i) when anyone in its top management or in key corporate functions (such as legal, finance or HR) are involved in the alleged misconduct; (ii) when the matter is of a nature or magnitude that the company cannot credibly carry out the investigation within its normal legal and compliance framework; or (iii) the investigation report is intended for publication to a wider audience (e.g. to the public). When deciding whether outside counsel should be elicited, the company should also consider whether legal privilege will be of importance during or after the investigation; see questions 5.1–5.3 below.

A legal counsel investigator will typically retain the services of forensic accountants and an eDiscovery specialist, unless it has such resources available in-house (which very few do). The main criteria for obtaining outside experts, whether counsel, accountants or other experts, should be a proven track record of having carried out an investigation of the nature and magnitude in question, particularly with respect to handling the involved data in accordance with necessary security and privacy requirements.

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 relationship enjoys recognition in Denmark, and generally applies to all material produced during the lawyer's interaction with the client. In relation to work products, there is no distinction between legal advice privilege and litigation privilege. Generally, the duty to provide material will have to be asserted based on the rules pertaining to witnesses in s.804 and ss.169–172 of the Administration of Justice Act (*retsplejeloven*). Privilege should be preserved ensuring that the attorney is in control of the investigative process, including retaining all of the records, data and work products.

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)?

Danish law does not distinguish between information and material from the client himself and material obtained or produced by third parties on his behalf (such as witnesses and experts). The main criterion is that the material is produced in the course of the lawyer's assignment for his client.

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

While the European Court of Justice has ruled that it does not recognise legal privilege for in-house counsel, the question is not completely decided in terms of national law in Denmark. The Danish courts have only ruled that if a Danish attorney (*advokat*) has deposited his/her lawyer's licence while working as an in-house legal advisor, he/she cannot invoke legal privilege. Consequently, an entity cannot be certain that its in-house lawyer will be able to invoke legal privilege.

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

See questions 5.1–5.3 above and question 5.5 below.

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?

As a general rule, under the Danish Act on Public Access to Documents in Public Files (*offentlighedsloven*), the results of internal investigations voluntarily provided to enforcement agencies are subject to access to documents; see s.7(1) of the Act. Such investigations are only considered internal pursuant to the Danish Act on Public Access to Documents in Public Files if they were submitted to the enforcement agency at the agency's request and due to a legal obligation to do so, see s.23(2) of the Act, and they may, in such case, be exempted from access to documents if the investigation concerns the circumstances of a public authority. In certain areas, however, special confidentiality provisions providing extended protection apply. This is the case, in particular, in the financial sector, see s.354(1) of the Danish Financial Business Act (*lov om finansiel virksomhed*), which provides extended protection to confidential information gained by the enforcement agency through its enforcement activities.

If there are no special confidentiality rules, the Danish Act on Public Access to Documents in Public Files in certain situations provides for the opportunity of exempting certain information from the investigation. This applies in particular to data on the private – including financial – situation of individuals, see s.30, para 1 of the Act, as well as data that need to be exempted for essential reasons of prevention, investigation and prosecution of offences or for carrying out public control, see s.33, paras 1 and 2 of the Act. Finally, in situations where non-disclosure is necessary due to the special nature of the circumstances, it may be possible to exempt data in order to protect essential private and public interests; see s.33, para 5 of the Act.

6 Data Collection and Data Privacy Issues

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

In Denmark, no particular general rules on data protection in relation to internal investigations have been laid down. The general rules on data protection as laid down in the General Data Protection Regulation (GDPR) and the Danish Data Protection Act (*databeskyttelsesloven*), which supplements the GDPR in Denmark, are therefore the primary legal basis. These rules are supplemented by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union which lay down rules on, e.g., the protection against self-incrimination, as well as privacy and data protection.

In addition, the Danish Penal Code (*straffeloven*) lays down prohibitive rules on, e.g., secret wiretapping or recording, and opening of private correspondence, including e-mails (secrecy of mail).

Finally, the general labour law in Denmark sets out relevant rules, including employment law principles on, e.g., general control measures in relation to employees, including prior notice, as well as the duty of employees to participate in clarifying matters within the limits imposed by the prohibitive rules on self-incrimination, etc.

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 normally accepted good practice to inform all employees in writing about an internal investigation unless this would defeat the purpose of the investigation.

The individuals whose personal data are being processed in the investigation must be notified of this in accordance with the provisions of Articles 13–14 of the GDPR. In other words, these persons must in general be notified individually about the investigation at the time when the data are collected. The content of the notification must be in accordance with the provisions of Articles 13–14 of the GDPR. According to the Danish Data Protection Act, however, the obligation to notify does not apply if the purpose of the investigation would thereby be defeated. If so, the notification may be postponed until the investigations are completed.

It will often be acceptable to not notify so-called secondary parties (*bipersoner*), i.e. persons who are not the subject of the processing of the personal data but who only appear ancillary to the information on the data subject. This applies in particular if the entity has submitted a general notification to the persons concerned.

Incidentally, it follows from Danish legal practice on data protection and labour law that employees, as a predominant general rule, must receive prior, clear and unambiguous written notice (warning) on general, preventive control measures.

The written notices must be kept on file by the entity in order to document compliance with the legal obligations and the principle of accountability within the GDPR.

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.)?

When documents are in multiple jurisdictions the entity should retain local legal counsel before considering transferring the information to or from Denmark. This also applies when the information is requested by the Danish authorities. This is due to differences in local law, particularly with respect to the transfer of data out of the originating jurisdiction.

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

Generally, the enforcement authorities will seek to collect as much data (documents and records) as possible under pertaining procedural legislation. The rights of enforcement authorities are, broadly speaking, very wide in this respect. The collection will include traditional documents, as well as electronic files of accounts, e-mail servers, databases, etc.

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

While the use of eDiscovery and forensic accounting is still in its infancy in Denmark, larger law firms will collect and analyse documents electronically. Unless the firm maintains such resources in-house (typically, expertise regarding IT, eDiscovery and forensic accounting), the services of a forensic specialist firm will often be retained. Internationally recognised eDiscovery tools are considered the most efficient and are also regularly used by the national enforcement authorities.

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 is no legislation or established practice on the private use of predictive coding techniques in Denmark. Typically, voluminous document collections will be reviewed by the use of recognised eDiscovery tools provided by the law firm itself or a third-party vendor.

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?

Within the private sector, it is deemed to be within the employer's statutory rights to request that current employees make themselves available for interviews by the entity itself or its external advisor carrying out the investigation. See also question 7.2 below on this topic. The investigator must, however, respect the interviewee's right to be protected from self-incrimination, as set out in the European Convention on Human Rights.

The prohibition against self-incrimination basically means that a person suspected of or charged with a criminal offence, or possibly a more severe employment law matter, cannot be forced to contribute to the clarification of the alleged crime, and the person concerned will have the right to remain silent on the matter. The person in question must be informed of the protection against self-incrimination and of his/her right to remain silent. Any form of involvement and/or interviews of employees must therefore not go beyond what is justifiable in terms of this basic principle.

Generally, it is not acceptable to bring about a "confession" with any form of aggressive approach, and the courts have taken a relatively strict approach in this respect. For non-employees, there is no duty to cooperate with a private investigation.

There is no statutory or other obligation to consult with any authorities before initiating witness interviews.

The Guidelines also set out guidance relevant to interviews of employees and other witnesses. For instance, the Guidelines prescribe that an interviewee must be informed of the general framework of the interview in advance, and when necessary the interviewee should also receive relevant documents, etc. before the interview is conducted. Also, the Guidelines prescribe a right for the interviewee to bring an advisor and highlight the right to be

protected from self-incrimination. These Guidelines apply in the private as well as the public sector.

Additional legislation concerning the right to be protected from self-incrimination applies in cases where there is a legal obligation to provide information to the public administration. These rules are set out in the Danish Act on Legal Certainty in the Administration's Use of Forced Intervention and Disclosure Obligations (*tvangsindgrebsloven*).

Even though the right to be protected from self-incrimination is considered to apply as a general principle in Denmark, it can be argued that the protection is wider in cases where the Danish Act on Legal Certainty in the Administration's Use of Forced Intervention and Disclosure Obligations applies. In these cases, the right applies when there is "concrete suspicion", where in comparison, the general principle stemming from the European Convention on Human Rights is generally said to apply only when there is a basis for charging the suspect.

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?

Beyond the administration of justice, employees are under no general statutory duty to give evidence in internal investigations. However, according to Danish employment law principles, employees are subject to a general duty to act loyally and truthfully in all matters relating to their employment. Hence, employees are under a certain duty to inform their employers of any criminal offences and to contribute to internal investigations. Similarly, as a general rule, public-sector employees are obliged to provide relevant information about matters related to their service to their superiors, among others, and the information provided must not be incorrect or misleading. State-employed public servants are, under the Public Servants Act (*tjenestemandsloven*), obliged to appear in official inquiries and to make a statement.

When initiating an internal investigation it is important to pay particular attention to the prohibition against self-incrimination which applies in Danish law as a general legal doctrine. See question 7.1 above. It should be noted that specific rules of disciplinary proceedings are laid down in the Public Servants Act with regard to State-employed public servants.

State-employed public servants are, in practice, rarely interviewed and only in exceptional circumstances; instead, the matter is clarified on a written 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?

No. However, according to the Danish Public Administration Act (*forvaltningsloven*), employees of public authorities are, as a predominant rule, entitled to be accompanied by an advisor if the employee is a party to the case. The public authority must inform the employee of his/her rights before the meeting is conducted.

Additionally, while it is not a legal requirement, it is best practice to offer an interviewee the opportunity to bring an advisor to the meeting, typically legal counsel, a union representative or a trusted colleague. This goes for the public as well as the private sector and is stated in the Guidelines. It is customary for the inquiring entity to cover any costs for such representation.

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

It is best practice for conducting witness interviews to apply a respectful style, encouraging the witness to collaborate as much as possible without the extensive use of direct questioning. Before the interview starts, the interviewee should be informed of the purpose of the interview and why he/she is there. Also, the right not to self-incriminate should be explained to the interviewee. See also question 7.3 above on best practice concerning offering interviewees the chance to bring an advisor.

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

The Danish working environment is generally respectful and cooperative, and any overtly aggressive interviewing may be met with withdrawal and condemnation. It is also seen as a very serious matter to allege misconduct, particularly with respect to financial crime. This may dictate a different interview style than in other jurisdictions.

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

When interviewing a whistleblower, the same considerations as set out above will apply. However, any requirement with respect to maintaining the anonymity of the whistleblower may dictate that interaction with the whistleblower is handled by an outside advisor.

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

Pursuant to the rules of the GDPR in this respect, employees are normally entitled to access and rectify statements, etc. given by them to their employers.

In addition, public authority employees are normally entitled to be consulted and to make a statement pursuant to the Danish Public Administration Act.

Moreover, particular rules are laid down in the Public Servants Act concerning disciplinary proceedings against State-employed public servants. According to the rules, for example, public servants are given the opportunity of providing written submissions, including after the end of the interviews.

Finally, it is general practice that the employee concerned is given the opportunity when the interview is over to review the minutes of the meeting in order to correct any misunderstandings. As soon as possible after the interview, and once the employee has had the opportunity to read the minutes and to provide any comments, the employee will normally be asked to accept and sign the minutes so as to confirm his/her acknowledgment of the minutes.

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

No. It is, however, recommended in the Guidelines that anyone being interviewed should be able to bring an advisor; for example,

his or her own attorney. See also question 7.3 above. Typically, the client will offer to cover the direct cost of such representation.

8 Investigation Report

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

The Guidelines for "Attorney Investigations" recommend that the report should contain the following elements:

- A description of the background for the investigation, including the mandate and any time restrictions, as well as the law firm's previous relationship with the client.
- A description of the material the investigation is based on, as well as any confirmation (or lack thereof) from the client as to the materials' completeness.
- A description of the investigation team, including any third-party consultants of service providers.
- Any qualifications to the report.
- A factual resume of the investigation's findings, as well as any conclusions and recommendations.
- A recommendation as to the publication of the report.

Tormod Tingstad
Kammeradvokaten/Poul Schmith
Vester Farimagsgade 23
1606 Copenhagen V
Denmark

Tel: +45 5095 0885
Email: toti@kammeradvokaten.dk
URL: en.kammeradvokaten.dk

Tormod Tingstad advises businesses on compliance and corporate governance, particularly on issues relating to corruption, money laundering and other types of corporate crime. Tormod is also very experienced in managing large internal investigations of complex and often international issues, including in the financial sector. Tormod primarily assists private businesses.

Martin Sønnersgaard
Kammeradvokaten/Poul Schmith
Vester Farimagsgade 23
1606 Copenhagen V
Denmark

Tel: +45 5077 8423
Email: mso@kammeradvokaten.dk
URL: en.kammeradvokaten.dk

Martin Sønnersgaard advises public authorities and private businesses on data protection law in particular. Martin focuses especially on assisting clients with complying with the rules laid down in the Danish Act on Processing of Personal Data and the General Data Protection Regulation (GDPR) by, for example, making data protection impact assessments (DPIAs), drafting data processing agreements, internal guidelines, carrying out compliance checks, etc.

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England & Wales

Michael Drury

Richard Reichman

BCL Solicitors 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?

Although there are no explicit statutory or regulatory obligations pertaining to commencing internal investigations in England and Wales, it is often in an entity's best interests to conduct an internal investigation when wrongdoing is suspected, whether this be criminal or regulatory. This will enable an entity to identify if any criminal offences or regulatory breaches may have been committed at an early stage and to make informed decisions. An obvious benefit of an internal investigation is that it allows the entity to satisfy itself that it has isolated and dealt with the wrongdoing. Additionally, conducting an internal investigation may help an entity decide whether or not to approach a relevant authority with a view to securing a more favourable outcome than would likely be the case having been approached by the authorities in the first instance.

1.2 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?

Consideration should be given to whether there is likely to be any other evidence capable of supporting the whistleblower's assertions, such as documentary evidence and the extent to which the whistleblower can personally verify the allegation made. An entity should also consider the context and circumstances in which the whistleblower makes their disclosure; for example, even if they are a disgruntled employee, is the disclosure capable of belief? How much time has passed since the events occurred and what is the explanation for any delay? Is the whistleblower raising the matter for their own personal gain or motive?

A statutory framework exists to protect workers if they blow the whistle on their employer; a whistleblower who makes a qualifying disclosure has the right not to be subjected to any detriment by any act or deliberate failure to act by their employer on the ground that the worker has made a protected disclosure.

1.3 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" will often be determined by who has retained the services of outside lawyers and who has control of the internal investigation. The client should be suitably qualified and hold sufficient seniority within the entity to be in a position to provide instruction, direction and make critical tactical decisions about the course and scope of the investigation and any reporting that may occur. The wider the reporting relationship is, the more difficult it is likely to be for the corporate to assert and maintain privilege, and also to preserve confidentiality. Entities are best advised to set up an investigation team comprising a limited number of individuals. For more complex investigations, it is often advisable to set up a management or steering committee as these create very clear reporting lines.

External counsel should make enquiries of the client to satisfy itself that those to whom they are to report are not conflicted – this can be done through, for instance, considering the nature of the allegations to be investigated and who is likely to hold relevant information, and asking those who conceivably have been involved in the matter under investigation to declare any interests. These steps are intended to have the effect of maintaining the credibility of any investigation results with the regulator.

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 an internal investigation is an important factor considered by authorities in determining

whether a prosecution is in the public interest, or whether a Deferred Prosecution Agreement (DPA) or civil settlement (or other alternative to prosecution) is appropriate. However, it provides no guarantee that a prosecution will not follow. Instead, it will form part of a case-by-case analysis looking at a range of factors, including the seriousness of the offence, the harm to victims and any history of similar misconduct 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?

There are a number of scenarios when entities must notify regulators of incidents/misconduct. For example, the General Data Protection Regulation (GDPR) requires that breaches of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of or access to personal data must be reported to the Information Commissioner's Office (ICO) not later than 72 hours after the controller of the data becomes aware of it, unless the breach is unlikely to result in a risk to the rights and freedoms of the individuals concerned. Similarly, the Financial Conduct Authority (FCA) requires its regulated firms to be open and cooperative, and, for example, to notify the regulator of anything about which it would reasonably expect notice. The Health and Safety Executive (HSE) must be notified of reportable safety incidents under the RIDDOR requirements and entities can be required to notify the Environment Agency of pollution incidents, etc.

Generally, details of any wrongdoing discovered during an internal investigation do not automatically need to be disclosed to enforcement authorities. Prior to any self-report, an entity should carefully consider the desirability and potential consequences (e.g. civil and criminal sanctions). Voluntary disclosure before enforcement authorities are involved may be desirable if the entity is considering cooperating with the authorities in an attempt to achieve a more favourable outcome. It is clear from the *Rolls-Royce* case that failure to self-report is not a barrier to a DPA as long as there are counterbalancing factors, notably complete cooperation and disclosure of materials without pre-conditions (including assertions of legal professional privilege) thereafter. If this is a strategy an entity wants to pursue, wrongdoing should be reported to enforcement authorities within a reasonable time of the offending coming to light.

However, when an investigation report is being prepared, there is an incentive to ensure that a detailed investigation has been undertaken before disclosure of the facts. It is an unattractive proposition to provide details of an internal investigation in haste and without a proper understanding of the conduct, not least because the nature of the wrongdoing may not be apparent until the latter stages of an investigation.

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 requirement to provide voluntary disclosure of investigation findings in a specific format, such as in writing, rather than an oral briefing. It is a matter for the entity to decide on the extent and format of any disclosure made. A written report will undoubtedly be viewed more favourably in the context of any enforcement action given it demonstrates cooperation and is likely to contain a more complete examination of the relevant issues and underlying facts with evidential value.

However, there are risks associated with written reports. A report may contain findings or information that are potentially damaging. By disclosing a written report to law enforcement authorities, an entity runs the risk that the information contained in it will be used to open an investigation into the company. Moreover, a written report is open to misinterpretation or misuse, which may be avoided if the results of an internal investigation are presented orally instead.

Ultimately, however, any investigating authorities to whom matters are to be reported will expect materials in writing to be retained and may serve statutory production orders to compel its provision. Any oral report provided will likely be swiftly followed for a request from the enforcement agency for a written report of the same.

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 liaise with law enforcement authorities before starting an internal investigation but there are benefits to such early engagement and it is viewed favourably and encouraged by them. For instance, if an agency is given the opportunity to comment on the proposed scope and purpose of an investigation then the entity can ensure its report is appropriate. Early engagement may also avoid risks associated with tipping off and "trampling on the crime scene". However, an entity should remain cautious about disclosing information about wrongdoing without first having a proper understanding of the nature or extent of the alleged misconduct. To do so may result in an inappropriate or inaccurate self-report which is not in the interests of any party involved.

3.2 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?

Regulators have extensive statutory powers to gather evidence as part of their investigation; for example, to compel entities to answer questions or produce documents.

Engagement with a regulator may help to define or limit the scope of its investigation; guidance can be given regarding the relevance of material and the proportionality of requests for information and documentation.

3.3 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?

The global nature of today's businesses, combined with the increasing availability of extraterritorial statutory powers to obtain evidence and extraterritorial offences, means that jurisdictional issues are becoming more prevalent. Law enforcement authorities in the UK frequently share information with authorities in other jurisdictions through mutual legal assistance agreements or via organisations such as Eurojust, and there are increasing numbers of truly joint investigations by agencies from different states.

Where an entity faces investigation in multiple countries, attention should be given in particular to the rules of privilege that operate in other jurisdictions and the location of evidence or material and any data protection implications, especially for data held within the EU. Entities may consider challenging the extent of a regulator's powers, subject to their intention to cooperate. The recent judgment in *R* (*KBR Inc.) v SFO* confirmed the extraterritorial scope of the SFO's power to compel the production of documents under s.2 of the Criminal Justice Act 1987, in relation to overseas companies with a "*sufficient connection*" to the UK. In addition, the Crime (Overseas Production Orders) Bill is currently making its way through Parliament, which may lead to wider overseas production powers in relation to electronic data. Such statutory powers may reduce the current reliance on mutual legal assistance to obtain evidence from outside the jurisdiction.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

All investigations are different and planning must be approached on a bespoke basis and kept under review. The investigation plan will generally define the subject and scope of the investigation as well as the roles and responsibilities of the investigation team. It may include an outline of what tasks are to be performed, with timelines and rules of engagement (e.g. to preserve confidentiality and privilege).

The investigation plan should ensure that all relevant material is identified, collected and preserved, which will include securing hard copy data and electronic data. How the investigation team will review the data and which individuals should be interviewed will also need to be determined.

4.2 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?

A decision whether to use outside counsel or resources should be made with reference to the nature of the alleged misconduct, the issues to be determined, the kind of expertise required and the relevant experience of the intended resource. In circumstances where government intervention is likely, the independence of outside counsel who can attest to the validity of decisions made or procedures used and do so without being hampered by internal company politics is likely to enhance the credibility of the end result of the investigation.

In the event that non-lawyer experts are used, e.g. forensic accountants, clear rules should be established to ensure that communications back to the client maintain legal privilege as far as possible. This will ensure that, provided the investigation can be properly conducted within the confines of legal professional privilege, the investigation can proceed without the concern that the entity will be required to provide material generated during the investigation to the authorities.

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 falls into two categories: (i) legal advice privilege; and (ii) litigation privilege. Briefly, (i) legal advice privilege attaches to communications between a client and a lawyer in connection with the giving of legal advice; and (ii) litigation privilege attaches to documents created for the dominant purpose of conducting existing or reasonably contemplated adversarial litigation.

The availability of litigation privilege has been scrutinised in a number of cases and, most recently, the Court of Appeal in *SFO v ENRC* overturned a High Court decision which had held that criminal litigation was in prospect at a much later stage than had widely been understood previously. The availability of litigation privilege continues to need to be carefully considered on a fact-specific basis, rather than assuming blanket protection, and may be a factor affecting whether an investigation is desirable and, if so, when and how it is carried out. Evidence should be recorded, for example what litigation was in contemplation and why, to support any subsequent claim.

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)?

As above, litigation privilege may apply to documentation prepared in relation to reasonably contemplated litigation and any communications with third parties would be subject to rules of confidentiality. The use of third parties should be carefully considered and care should be taken to ensure that their work is protected by legal privilege – generally by ensuring instruction is through external counsel appointed to advise on and/or handle the internal investigation – and that measures are in place to guard against inappropriate disclosure.

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

In short, the answer is yes, except in cases relating to European Union law (typically cartels or anti-corruption cases) where in-house lawyers cannot claim legal professional privilege over internal communications with employees. Although in-house counsel are inevitably closer to the business than external counsel, in the context of legal privilege, the "client", i.e. the corporate entity, is the same and legal privilege applies equally to any communications/material generated during the course of an internal investigation. However, claims of privilege will be easier and clearer if external counsel are instructed as, purely as a matter of perception, they are distinct from the business.

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

All legally privileged material created during the course of an investigation should be marked appropriately (e.g. "*Confidential – Subject to Legal Professional Privilege*") and treated to ensure that privilege is maintained (e.g. not inappropriately disclosed beyond the client team internally or externally).

Legally privileged documents uncovered during an investigation, either produced in the course of obtaining legal advice or in the course of separate litigation, should be separately stored and marked (e.g. "*Legally Privileged*").

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 will keep the results of any internal investigation confidential unless there is a requirement to share it with another agency or regulator. The same entity may be under investigation for criminal offences whilst simultaneously being under investigation (by a different entity) for regulatory breaches. The extent to which agencies will share information is dependent on their particular memoranda of agreement but there are statutory gateways permitting such exchanges. Before providing any material, it would be prudent for the corporate to consider the risks of onward disclosure and liaise with the enforcement agency as necessary.

6 Data Collection and Data Privacy Issues

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

Any internal investigation needs to respect the requirements of the GDPR and additional provisions applicable under the Data Protection Act 2018. On that basis, "personal data" (broadly data from which a living individual can be identified) needs to be accorded its proper protection under the law and processed lawfully, taking into account the rights of the data subject (the person whom the data identifies) and the lawful bases of processing under the GDPR whilst ensuring the integrity, security and confidentiality of the data at issue. There are exemptions to certain requirements where legal professional privilege is concerned or where regulatory functions or the prevention and detection of crime is engaged.

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?

Issuing a retention requirement (also known as a "hold notice") for individuals who are (or have been) under confidentiality obligations to the entity undertaking the investigation is generally considered best practice. It is to be anticipated that to the extent that the individual has documents that pertain to the business affairs of the entity they will already be under a legal obligation to hold them subject to the rights of the entity itself. The policies of the entity as to the use and retention of electronic data on media not owned by it for processing data belonging to it (and knowledge about how such policies operated in fact), as well as to the rules concerning the retention of hard copy material, will provide crucial information as to what material might exist. Necessarily, a requirement to preserve materials will require some information to be imparted about the circumstances in which preservation is to take place. That should be sufficient to allow informed retention choices but without disclosing specific details that would give rise to an increased risk of destruction.

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 bank secrecy laws in other jurisdictions remain a key element for consideration, especially as to whether relevant data can be transferred across national borders for the purposes of internal investigations. Well-informed expert (internal or external) counsel qualified in the relevant jurisdiction should be consulted before data is secured and in anticipation of any transfer. Particular care should be taken in relation to data transfers to non-EEA countries where the provisions of Chapter V of the GDPR become relevant. The Privacy Shield principles agreed between the EU and US in 2016 apply where personal data is sent from Europe to the US. Consideration should be given not only to the transfer of data but also to the facts elicited from the data themselves in the form of summaries and reports, etc.

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

Tradition has it that emails provide the most interesting and pertinent evidence. That is no longer true given the increasing variety of social media which are used for communications and which evidence an individual's state of mind and actions taken. It follows that not only should servers holding emails and other electronic data be retained and imaged by experienced professional and independent third parties employed to do so or to oversee the actions of internal staff (who in doing so will meet the necessary standards for preservation of material to evidential standards for the purposes of litigation), but attempts should be made to secure portable electronic devices where storage of relevant data may be on the device itself. Contact with service providers is also important in seeking to retain material held or stored by them that might otherwise not remain in existence because of its ephemeral nature.

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

As above, the employment of an experienced computer forensics team is vital both in demonstrating the integrity and thoroughness of the internal investigation. It is prudent for such a team (perhaps using different team members) to catalogue the material retained and put in place relevant search tools to enable examination of the data (in copy format, preserving a "clean" original version). Liaison with internal and external counsel is crucial and provides an efficient basis for understanding what has happened in the investigation and why the particular steps were taken in it, with a view to being able to explain the scope and integrity of the work undertaken to enforcement authorities that may become engaged.

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 volume of electronic material generated in any business means that the review of this material in hard copy format is no longer feasible. Enforcement authorities and lawyers engaged in internal investigations will always use document review platforms (e.g. "Relativity") to search for and review relevant material. Data obtained, usually by imaging the electronic devices, is uploaded on to the review platform in a searchable format so that keyword searches can be run across the data. This process identifies the relevant material for review.

AI-based processing (e.g. deduplication and "threading" of emails to identify the most inclusive email chains for review) and predictive coding (applying human coding decisions to a larger data set) are becoming more frequently used in order to make reviews of large volumes of data manageable. There is nothing about the use of such methods to prevent the material being used or found to be admissible in subsequent proceedings: admissibility questions are dependent to a large extent on the nature of the documents themselves not the means by which they are discovered.

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?

Although current employees will be expected, by virtue of the terms of their contracts of employment, to comply with internal investigations, former employees or third parties may be more difficult to interview as there is no threat of disciplinary proceedings for failing to cooperate with the entity's internal investigation.

Ordinarily, the authorities do not need to be consulted before initiating witness interviews, save that it may be prudent to do so in cases where the authorities have already been notified that an internal investigation is afoot (for example, where a self-report has been made).

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 cannot be compelled to attend an investigation interview, but failing to attend or cooperate with an investigation without reasonable excuse may mean that they are acting in breach of relevant duties towards their employer. A failure to attend an interview may therefore lead to disciplinary proceedings being brought against that employee.

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, the entity retains the control of the investigation and so it may determine who can or cannot attend internal investigation interviews, i.e. lawyers for the witness can be prevented from attending. If an entity is considering providing legal representation, careful thought must be given to the attendant costs and delays that this may entail; in some circumstances, an entity's Directors & Officers insurance policy may provide for legal fees for certain witnesses, but thought should be given to the overall fairness if only some employees are provided with legal representation by the entity.

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

Interviewers should, where possible, be consistent so as to avoid any difficulties when comparing and contrasting different accounts. A variation of the "Upjohn Warning" should be provided to interviewees at the commencement of an interview, namely: a warning that tells the interviewee that the lawyers involved are advising the entity and not the individual interviewee; a brief explanation of the background of the investigation; a request to be clear when the interviewee is making a statement of fact or is speculating or stating a belief; and to remind the interviewee of the need for confidentiality and not to discuss matters with their colleagues or senior management. A record of the interview should be made in the form of a summary of the key facts rather than a *verbatim* transcript.

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

There may be a culture at an entity of suppressing information or frowning upon whistleblowing. Each interviewee should be encouraged to answer questions to the best of their ability, and questioning should not take the form of a hostile interrogation. Such practices will help an interviewer obtain relevant information where the culture of the entity may otherwise inhibit interviewees. It should be borne in mind that employees may be reluctant to share information or be truthful for reasons independent to the internal investigation, such as concern for job security. Adopting a sensitive approach may reduce the likelihood of this occurring.

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

Provided an entity can demonstrate that it has not discriminated against the whistleblower because of their disclosure (see question 1.2 above), it is unlikely that it can be said to have breached the whistleblower's rights. It is imperative that the investigation team is comprised of individuals who are completely independent from the areas of the business which are the subject of the investigation as this demonstrates that the concerns raised by the whistleblower are being taken seriously and thoroughly investigated. The entity should clarify in any interview with a whistleblower that its lawyers are acting for the entity and not the individual, but also make it clear that the entity is aware of the whistleblower's status and that their disclosure is protected.

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

Any information provided during the course of an internal

investigation, usually through a fact-finding meeting, can be presented to the employee for verification. As stated at question 7.4 above, a record of any meeting should be made in the form of a summary of the key facts rather than a *verbatim* transcript.

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

There is no requirement that the enforcement authorities or a witness' legal representative are present for witness interviews in these circumstances.

Where a self-report has been made or there has otherwise been a level of coordination with any authority, the entity will wish to consider liaising with the authority (and may have been requested to do so following the self-report) regarding the conduct of witness interviews. The investigating authority may well wish to interview individuals before the internal investigation interviews have commenced, in which case the internal interviews may have to be deferred or abandoned.

Companies engaging in cooperative self-reporting, for example with a view to obtaining a DPA, may find themselves under pressure to waive privilege in relation to existing interview notes, or, if there has been early engagement, encouraged to progress any ongoing interviews in a way which ensures that they are not protected by legal privilege.

8 Investigation Report

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

Before producing a written investigation report, consideration may be given to whether the key findings should be presented orally to the client. It may be that an oral report is all that is required and this will avoid creating a report/record over which arguments as to privilege may then arise – in addition, the ability to circulate an oral presentation is limited (although board minutes recording such presentations should make clear where appropriate the parts of any board meeting subject to legal professional privilege).

A written investigation report will usually contain an introduction (describing the background to the investigation), a summary of the relevant regulatory regime or circumstances in which the misconduct arises, details of the investigative steps and findings and a summary of any improvements or remedial action which has been taken.

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Michael Drury
BCL Solicitors LLP
51 Lincoln's Inn Fields
London, WC2A 3LZ
United Kingdom

Tel: +44 207 430 2277
Email: mdrury@bcl.com
URL: www.bcl.com

Michael Drury was formerly Director for Legal Affairs at GCHQ before joining BCL as a partner in 2010. He has specific expertise in national security cases (he is developed vetted) and in cases with high-profile political dimensions. His expertise in foreign relations, his experience advising a corporate client as an in-house lawyer at GCHQ and his background in serious fraud mean that he is particularly well suited to dealing with matters in corporate crime, whether acting for individuals or corporates. Having conducted inquiries both in government and for clients at BCL, he is well placed to lead multi-disciplinary teams and produce investigation strategies. He is ranked in Band 3 in *Chambers 2017 Financial Crime: Individuals.*

Richard Reichman
BCL Solicitors LLP
51 Lincoln's Inn Fields
London, WC2A 3LZ
United Kingdom

Tel: +44 207 430 2277
Email: rreichman@bcl.com
URL: www.bcl.com

Richard Reichman is a partner specialising in corporate crime, financial crime and regulatory investigations. He is recommended by *The Legal 500* for his "*extensive experience*" and being "*extremely thorough and appreciat[ing] the big picture issues".*

He has experience in a broad range of regulatory offences, such as health and safety (generally following major or fatal incidents), environmental, food safety, fire safety and trading, as well as financial offences such as fraud, bribery, insider dealing and money laundering. Richard is involved in cases involving cybercrime (for example, computer-specific offences such as hacking) or a technological dimension. He has acted for victims of cybersecurity breaches and advises regarding data protection issues falling within the scope of the Information Commissioner's Office.

Before joining BCL, Richard trained and qualified into a leading national firm before moving to an international firm, gaining comprehensive experience in complex, high-value and multi-jurisdictional matters.

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Finland

Markus Kokko

Borenius Attorneys Ltd

Vilma Markkola

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 Finland, there is no comprehensive legislation governing internal investigations. However, there are certain regulations that must be followed when conducting an internal investigation. These include employment and data protection laws and certain industry-specific regulations.

Employment legislation contains provisions, e.g., on the equal treatment of employees and grounds and procedure for termination of employment contracts.

Data protection regulations apply to the processing of personal data in connection with internal investigations. The European General Data Protection Regulation (Regulation (EU) 2016/679, "GDPR") imposes provisions on data processors. Entities must comply with the GDPR at all stages of an internal investigation. Entities must ensure that personal data is processed lawfully and fairly and that there is a legal basis for the processing. The national Finnish data protection legislation in employee matters limits processing of employee personal data only to information that is directly necessary for the employment.

In the financial sector, the Financial Supervisory Authority ("FSA") is obligated to maintain a system for receiving reports of any suspected violations of financial market regulations. Credit institutions must also have internal channels for reporting suspected violations of the financial market regulations.

Failure to comply with these obligations may lead to civil or criminal liability. Individuals may be sentenced to a fine or imprisonment in case their actions or negligence constitute a crime. A corporate fine may be imposed on a company in case the crime has been committed within the scope of its operations. Administrative sanctions and damages may also be imposed as a result of violations.

1.2 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?

Whistleblowers' complaints should be reviewed carefully. The necessary measures depend on the circumstances of each specific case. For example, the credibility and graveness of the complaint should be taken into account, as well as the possible risks involved in case the matter is not investigated. In addition, the availability of resources and possibilities for authorities to investigate should be considered.

The consistency of the facts presented in the complaint, the level of detail provided and other similar complaints are factors that can be taken into account when assessing the credibility of a complaint.

In Finland, there is no comprehensive whistleblower protection legislation. The Finnish authorities rely on provisions in, e.g., employment and data protection laws.

1.3 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 assessment is made on a case-by-case basis. Usually, the client is the entity that appoints the outside counsel. In general, the person with whom the outside counsel communicates is a director or a senior employee in the entity, usually the board of directors and/or the CEO. Possible conflicts of interest should be investigated together with the outside counsel before initiating any investigations or reviews. Findings should be reported only to the client in order to preserve confidentiality.

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 general, courts and authorities can take into account the voluntary disclosure of information when considering the penalties. Cooperation with the authorities might be taken into account as a ground for reducing the penalties.

In competition law, the voluntary disclosure of information to the competition authorities in cartel cases may result in reduction of or immunity from fines ("leniency"). In criminal cases, the offender's attempts to prevent or remove the effects of the offence or attempts to further the investigation of the offence can be grounds for reducing the punishment. In addition, the FSA may take the cooperation into account when determining administrative 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?

There are no general requirements on the timing of disclosure, and disclosure is generally not required in relation to past offences. When it comes to ongoing offences, disclosure may be required in certain specific cases, such as in relation to suspicions of insider trading and other offences affecting the stock market.

It should be noted that full leniency in competition law cases is only available to the entity that first reports the competition infringement to the competition authorities and discloses the relevant information.

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 provisions concerning the format of the findings of an internal investigation. The GDPR requires accountability when processing personal data, which means that organisations must be able to demonstrate their compliance with the GDPR. Written reports leave less room for interpretation and can demonstrate that the relevant legislation has been complied with.

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 statutory requirement to liaise with local authorities. Nevertheless, voluntary cooperation with authorities might prevent harmful or unexpected measures by authorities, such as search of premises or seizure of assets. Therefore, it is advisable to consider the benefits of such cooperation.

3.2 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, the authorities will determine the scope of the investigation independently. As stated before, active cooperation with the authorities might have a positive impact on the investigation.

3.3 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?

If necessary, Finnish authorities may coordinate with authorities in other jurisdictions. There are different forms of cooperation based on EU legislation, international conventions and national laws. In case investigations are conducted in several jurisdictions, it is advisable to engage outside counsel in all relevant jurisdictions.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

There are no statutory requirements concerning investigation plans. It is advisable to carefully draft the plan in order to serve the specific purposes of each case. In general, it is advisable to include background information, the scope of the investigation, the individuals involved, the timeline, the research methods, the plan for collecting and processing data and the type of reporting. The objectivity of the investigation and equal treatment of employees should be taken into consideration in the plan.

When planning to establish a general whistleblowing channel within the entity, it may be necessary to negotiate the policy with the employees or their representatives pursuant to the Finnish Act on Co-operation within Undertakings (334/2007, as amended). In addition, some collective bargaining agreements may include more specific obligations.

4.2 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 highly recommended to contact outside counsel who have extensive experience in internal investigations and access to sufficient resources for conducting the investigation.

Outside counsel should be contacted at an early stage, preferably well before initiating the internal investigation in order to ensure best practices are complied with. It should be noted that the documents in the possession of outside counsel are generally protected, whereas the documents in the possession of an in-house counsel do not enjoy legal privilege and may be forced to be released to the authorities or counterparties.

The need for forensic or other special consultants must be assessed on a case-by-case basis.

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?

Internal investigations are generally not protected by attorney-client privilege. To preserve privilege, it is advisable to involve outside counsel.

In principle, documents in the possession of outside counsel are protected. Documents and communication from outside counsel to in-house counsel in the possession of in-house counsel are not automatically protected. Whether such documents and communication are protected depends, e.g., on the timing of when they were provided by outside counsel. For example, documents and communications containing general advice provided prior to any investigation by the authorities have a smaller chance of enjoying protection than documents and communications given by outside counsel during a trial or a criminal investigation. The courts will rule on what is admissible as evidence.

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 does not apply to interactions between the client and a third party. In case there is a third party involved, it is recommended to direct all communication with third parties through outside counsel.

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

No. As stated in question 5.1, legal privilege only applies to documents in the possession of outside counsel.

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

It is advisable to use outside counsel and keep the documents in outside counsel's possession. The documents should also be labelled clearly as being under the scope of 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?

The principle of transparency is applied in Finland. Under the Finnish Act on the Openness of Government Activities (621/1999, as amended), documents disclosed to authorities are in the public domain, unless specifically provided otherwise.

Non-disclosure obligations apply, for example, to documents obtained or prepared for the purposes of ongoing criminal investigations or consideration of charges and documents containing trade secrets. It is important that a request to keep the information confidential is presented to the relevant authority. The relevant authority will then decide if the criteria for confidentiality are met. The parties involved may have a better access to the information, including information that has been ordered confidential.

6 Data Collection and Data Privacy Issues

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

The GDPR applies to the processing of personal data in internal investigations. The government proposal for the new Data Protection Act and related legislation has been introduced to the Parliament on 1 March 2018 and is currently under discussion in the Parliament. The proposed Act will repeal the current Personal Data Act (523/1999, as amended).

Other national legislation relating to data collection and data privacy issues relevant to internal investigations are the Act on the Protection of Privacy in Working Life (759/2004, as amended) and the Act on Electronic Communications Services (917/2014, as amended).

The Data Protection Ombudsman in Finland supervises compliance with data protection legislation, carries out investigations and issues guidelines.

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 or general obligation to prepare and issue a notice. The employer has the right to direct and supervise its employees and consequently the employer can issue a document preservation notice concerning its employees. Recipients of such a notice, and relevant documents or data that should be preserved, vary from case to case.

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 legal systems and regulations vary from one jurisdiction to another, which is why it is recommended that the entity consults advisors in all relevant jurisdictions.

The GDPR applies to all organisations processing the personal data of data subjects residing in the EU, irrespective of where the organisation itself is located.

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

In general, all written material relating to the specific case may be relevant; for example, emails and other written communication, contracts, records, policies and guidelines, tax and audit reports, etc.

The collecting and processing of documents must be completed in accordance with data protection legislation. For example, the employer can only process personal data that is directly necessary for the employment relationship. This is a mandatory legal provision that may not be waived by the employee. Employees' work-related emails can only be viewed if the national provisions are observed. Otherwise, reviewing employees' emails can constitute a criminal offence. Employers are not permitted to review any employees' personal emails. Therefore, careful assessment of possible legal risks should always be carried out before reviewing any emails.

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

The available resources differ greatly depending on the specific details

and nature of the case. Usually, documents are collected at least from company records, relevant employees and available public records.

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 techniques are not prohibited and can be used as an option for limiting the scope of information that will be investigated. However, the information the predictive coding is targeted on should be determined beforehand so that the provisions of data protection legislation are fulfilled.

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 owe a general duty of loyalty towards their employer. Ultimately, the employer has a general right to direct and supervise its employees and can require them to participate in an internal investigation.

Former employees and third parties do not have a general duty of loyalty towards the employer and are not under the employer's supervision. Thus, they are not obliged to participate in the internal investigations, unless an obligation to participate is separately agreed upon.

There is generally 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?

Employees owe a general duty of loyalty towards their employer. The employer also has a general right to direct and supervise its employees and can require them to participate in an internal investigation. A refusal to participate can, in some cases, be deemed misconduct and justify a warning or even dismissal, if the employee has previously received a warning for the same or similar misconduct.

If the interviewee is subject to an ongoing criminal investigation, the right not to incriminate oneself applies in the criminal investigation but not directly in an internal investigation. It is, however, recommended not to require an employee that is under a criminal investigation to be interviewed but instead let the authorities investigate the matter.

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?

Employers are free to handle internal matters independently without involving legal representation. However, should the employer seek to terminate the employee or to cancel the employment contract, the employee has the right to be heard in the matter. Under such circumstances, the employee has the right to have a lawyer present and should be informed of this right.

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

The interviews should be followed through objectively and documented in writing. All the relevant parties should be heard and the order, in which the parties involved are heard, should be considered.

It is recommended to have the outside counsel present during the interviews. In addition, it is advisable to remind the interviewees of non-disclosure of the issues related to the interview.

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

Interviews conducted in a neutral and friendly atmosphere usually lead to interviewees sharing information more openly and may encourage employees to report internally before reporting to authorities. In general, interviewees are more willing to cooperate when the background and objects of the investigation are explained to them.

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

In Finland, there is no specific legislation concerning this issue. In general, the interviews should be conducted in a fair and equitable manner. In order to reach the best possible outcome, the whistleblower should be given an opportunity to make his/her complaints freely and the complaints should be processed in an appropriate manner and documented.

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

The employees have no general right to revise documents drafted in connection with internal investigations, but they do have the right the review their own statements. In order to avoid misunderstandings and ensure the objectivity of internal investigations, it may be beneficial that the records from internal interviews are shown to the employees for their approval by way of, e.g., a signature. There is, however, no obligation to provide the employee with physical copies of notes from an internal interview.

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

The structure of the investigation report depends on the circumstances of each case. In general, it is recommended that the report includes background information, all relevant information gathered during the investigations, description of the process and the main actions taken during the internal investigation, the findings and the conclusions made.

Markus Kokko
Borenius Attorneys Ltd
Eteläesplanadi 2
00130 Helsinki
Finland

Tel: +358 20 713 3482
Email: markus.kokko@borenius.com
URL: www.borenius.com

Markus regularly advises major domestic and international clients on dispute resolution and corporate crime cases.

Markus has in-depth experience of domestic and international corporate and commercial disputes and he has acted as lead counsel in numerous extensive cases. His field of experience encompasses cases related to a wide variety of business sectors, such as the chemicals industry, financial markets, international trade, retail and wholesale and mining. Markus also has an exceptional track record in handling a broad range of litigation and arbitration cases.

Markus frequently advises companies and executives in relation to complex corporate crime cases and criminal investigations regarding, *inter alia*, insider trading, environmental violations, corruption and tax.

Markus' efficient and client-oriented approach has earned him an excellent reputation which has been recognised by rankings in *Chambers Global*, *Chambers Europe*, *The Legal 500* and *Best Lawyers*.

Markus heads the Litigation & Arbitration and Corporate Crime teams at Borenius.

Vilma Markkola
Borenius Attorneys Ltd
Eteläesplanadi 2
00130 Helsinki
Finland

Tel: +358 20 713 3302
Email: vilma.markkola@borenius.com
URL: www.borenius.com

Vilma is specialised in dispute resolution-related matters. In addition to litigation, arbitration and corporate crime-related cases, Vilma also advises clients on employment and insolvency law.

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Borenius Attorneys Ltd is one of the largest leading law firms in Finland. Borenius employs over 100 lawyers at offices based in Helsinki, Tampere, St. Petersburg, and New York and is ranked as a top-tier firm by all leading legal directories.

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France

Christian Dargham

Caroline Saint Olive

Norton Rose Fulbright

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 the "blocking statute" is a criminal offence.

1.2 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.

1.3 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 statutory 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. The French Ministry of Justice issued a circular on 31 January 2017 on Sapin 2, including the CJIP, referring to the impact of self-disclosure and/or cooperation as a mitigating factor on the penalties that will be imposed.

To date, four CJIPs have been entered into in France and none of them seems to have expressly applied the latter circular, although two of the CJIPs took into account the remediation of the wrongful conducts as a mitigating factor.

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 self-reporting 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 some French authorities are not yet fully used to internal investigations, such an attempt may not succeed.

3.2 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.

3.3 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. By way of example, in May 2018, the French National Prosecutor's office concluded a CJIP with a French bank to settle suspicions of past bribery. For the first time since Sapin 2 entered into force, this resolution was coordinated with the US Department of Justice, which also concluded a deferred prosecution agreement with the French bank based on the same facts. This joint negotiated settlement opens a new chapter in international corruption prosecutions, demonstrating that French authorities are now a legitimate prosecutorial authority in the eyes of the US Department of Justice. 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 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.

4.2 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 consultants 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 in the context of the defence of the entity under investigation, French "professional secrecy" should apply. Under this rule, exchanges between an 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"), which entered into force on 25 May 2018. The 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
- the CNIL Decision (Single Authorization AU-004), which 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, presentations, 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 interviews 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 fully 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 whistleblowers' consent.

7.7 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.

7.8 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 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; and a description of the relevant facts and the results of the document reviews and of the interviews. Since the report could be shared with the authorities or accessed by third parties, an option is to set out in a separate document which contains: 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.

Christian Dargham
Norton Rose Fulbright
40 rue de Courcelles
75008 Paris
France

Tel: *+33 1 5659 5292*
Email: *christian.dargham@nortonrosefulbright.com*
URL: *www.nortonrosefulbright.com*

Christian is a business ethics and dispute resolution lawyer.

He has extensive experience in relation to business ethics and investigations (implementation of global compliance policies, day-to-day assistance to compliance officers, audits and assessment of compliance policies, training sessions, integrity due diligence, investigations in areas such as corruption, fraud, and international sanctions).

His activity also encompasses litigation (contractual disputes, product liability and white-collar crime). Christian represents leading industrial groups and international financial institutions.

Christian gives lectures at Sciences-Po Paris and is a member of the editorial committee of the *International Review of Compliance and Business Ethics*.

Caroline Saint Olive
Norton Rose Fulbright
40 rue de Courcelles
75008 Paris
France

Tel: *+33 1 5659 5379*
Email: *caroline.saintolive@nortonrosefulbright.com*
URL: *www.nortonrosefulbright.com*

Caroline specialises in business ethics and anti-corruption matters.

Caroline advises French and international corporations operating in a broad range of sectors with a focus on anti-corruption and international sanctions issues.

Caroline gives lectures at Sciences-Po Paris. She graduated from the Cergy-Pontoise University with a postgraduate degree in Law and Business Ethics. She also graduated from the ESSEC Business School with an Advanced Master in International Business Law and Management.

Caroline trained for six months at Transparency International France in 2016 where she gained experience in anti-corruption matters.

Caroline was admitted to the Paris Bar in 2017 and joined Norton Rose Fulbright in October 2017 after training for six months in their offices.

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Germany

Dr. Thomas Schürrle

Dr. Friedrich Popp

Debevoise & Plimpton 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?

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 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 currently 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. The EU has issued a framework proposal for discussion in April 2018.

1.3 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 determined by the client, and legal counsel usually recommends that the investigation is led by a corporate organ or body that carries the necessary power under the circumstances to support and enable (and to terminate) the investigation. Another factor may be 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?

Generally, there are no sentencing guidelines in criminal cases but the authorities have – within specific 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 has been ameliorated 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 in Germany. 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 self-disclosure 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 company 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 admitted to having committed or 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 in practice often made *verbatim* with slides and more detailed evidence production, but rarely by submitting detailed written reports. The more important factor is that the report is complete and produced 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 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.

3.3 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 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.

4.2 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 in-house 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 communication.

Professional secrecy attaches, in particular, to documents created by and communication with outside counsel, if the documents reside in the custody of 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 in-house 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 European General Data Protection Regulation and the German Federal Data Protection Act govern the collection, use and transfer of personal data relating to individuals in internal investigations sourcing data in Germany.

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 laws, 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 relevant evidence being 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 include a reminder 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 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 chooses to include the interview notes in the personal files of the employee. Best practice suggests avoiding sharing notes with anybody, and to rather invite the employee to prepare his/her own notes.

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

It is common practice to prepare a short investigation summary report at the end of an internal investigation, setting out the findings, remediation and future compliance measures to avoid recurrence. Detailed reports are usually given only in special meetings with the relevant departments, including all relevant evidence used for further internal measures. The structure and content of the investigation report should also 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.

Dr. Thomas Schürrle
Debevoise & Plimpton LLP
Taunustor 1 (TaunusTurm)
60310 Frankfurt am Main
Germany

Tel: +49 69 2097 5000
Email: tschuerrle@debevoise.com
URL: www.debevoise.com

Dr. Thomas Schürrle is admitted to practice both in Germany and the United States and currently serves as the Managing Partner of the Frankfurt office. He works on cross-border transactions, advises on corporate governance matters, including litigation, and he is active in the firm's Cybersecurity & Data Privacy practice.

Originally an administrative and antitrust lawyer, Dr. Schürrle has been active in corporate transactions relating to biotech, IT and high-tech industries and led several international corporate defence cases and related investigations. Dr. Schürrle has significant experience in white-collar crime as well as compliance with regulatory requirements for industrial and banking clients. Over more than two decades, he has assisted European clients in managing cross-border data transfer issues associated with complex multinational litigation and corporate defence cases, in particular relating to the United States.

His publications range from corporate governance and defence practice problems to specific corporate communication issues under data protection constraints. Dr. Schürrle also served as a supervisory board member of several companies.

Chambers Europe has noted Dr. Schürrle as a notable practitioner for Corporate Investigations. He is also listed in the chart, "Top 25 Law Companies for Compliance in Germany" by *WirtschaftsWoche* (2015, 2016 & 2017).

Dr. Friedrich Popp
Debevoise & Plimpton LLP
Taunustor 1 (TaunusTurm)
60310 Frankfurt am Main
Germany

Tel: +49 69 2097 5281
Email: fpopp@debevoise.com
URL: www.debevoise.com

Dr. Friedrich Popp is a senior associate in the Frankfurt office, and a member of the firm's Litigation Department. His practice focuses on arbitration, litigation, internal investigations, corporate law, data protection and anti-money laundering.

In addition, he is experienced in mergers & acquisitions, private equity, banking and capital markets.

Dr. Popp has extensively published articles covering a wide range of topics. He is the co-author of the 2018 chapter on privilege in the *Know How* series published by *Global Investigations Review*.

Dr. Popp is a member of the Bar Associations of Vienna, Frankfurt am Main and New York.

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India

Aditya Vikram Bhat

AZB & Partners

Prerak Ved

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 decision to conduct an investigation may be driven by one or more of a number of statutory or regulatory obligations that a body corporate in India is subject to. While these statutes may not expressly dictate that an "internal investigation" be conducted, compliance with obligations thereunder would often necessitate it.

Examples of such statutes are the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("**POSH Act**"), the provisions relating to internal controls and audits in the Companies Act, 2013 ("**Companies Act**") and the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**LODR**") which applies to companies whose shares are listed on stock exchanges.

An amendment to the Prevention of Corruption Act, 1988 ("**PCA**") has introduced an "adequate procedures" defence to an allegation of bribery against a body corporate. Guidelines with respect to these "adequate procedures" are yet to be notified by the Central Government. It is probable that such guidelines may include an internal vigil mechanism.

As a general statement, an appropriately conducted internal investigation would help ensure compliance with applicable law, remedial action and improve preparation for potential legal action. There may be statute-specific benefits to conducting such an investigation. For example, under the Companies Act, the requirement for a statutory auditor to report incidents of fraud to the Central Government may be mitigated if the fraud is first detected and remedied by the company.

1.2 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?

There is no uniform bright-line test that dictates the level of response to a whistleblower's complaint.

Where no guidance has been provided by the applicable regulation, the relevant function (legal, compliance, investigations, etc.) within the body corporate will need to make a qualitative assessment of the nature of the information provided by the whistleblower before launching a full-fledged investigation.

A costs and benefits analysis between responding to each instance of whistleblowing with a full-fledged investigation on the one hand and selectively acting on complaints could involve the following factors:

(i) the seriousness of the facts alleged in the complaint and the potential consequences of a failure to investigate extensively;

(ii) whether the complaint fits into a situation where complaints are frequent and risks are known to be typical;

(iii) if there is a delay in making the complaint and whether the facts alleged are still relevant; and

(iv) the completeness and accuracy of the disclosures made. Initial procedures such as limited interviews, random testing, and limited electronic searches could be applied before launching a full-fledged investigation.

Applicable law may, in some cases, provide some guidance. For example, the POSH Act does not require a company to act on anonymous complaints, verbal complaints, or complaints made after a prescribed period of time.

The LODR requires a listed entity to devise an effective whistleblower mechanism which enables stakeholders, including individual employees and their representative bodies, to freely communicate any concerns about illegal or unethical practices.

In the case of any complaint relating to financial fraud, the relevant function (legal, compliance, investigations, etc.) may be able to take guidance from standards and practices applicable to internal audits which prescribe the exercise of "reasonable care" and "professional skepticism".

1.3 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?

Identification of the client is an important aspect of an outside counsel's role. This is driven by several factors which may include:

(i) independence requirements imposed by statutes such as the POSH Act and the Companies Act; (ii) the need to preserve legal privilege and secrecy across multiple jurisdictions; (iii) identification of the department or function responsible for the relevant compliance and the implications that it might have for the relevant "client" constituent; and (iv) disclosure and reporting obligations in all relevant jurisdictions.

It is usually appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation. Sometimes an internal investigation may be required not for compliance or governance purposes but in order to assist outside counsel on defence strategy in a prosecution against the company and its executives. The analysis in such an investigation may be different from other situations.

Internal conflicts of interest at both the ends, i.e. the client as well as the outside counsel, need to be checked at the initiation of the engagement and regularly thereafter as facts emerge.

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 some statutes that provide for leniency in the case of voluntary disclosures. Such disclosures should ideally be predicated on an appropriately conducted and robust investigation.

As an example, the Income Tax Act, 1961 and the Goods and Services Tax Act, 2016 provide for the establishment of "settlement commissions" who are empowered to take into account disclosures and cooperation made by a tax assessee and grant immunity from prosecution under those specific statutes.

As another example, the Competition Act, 2002 empowers the Competition Commission of India to impose a lesser penalty in cases where a participant in an anti-competitive cartel has made full and true disclosure regarding a cartel and where such disclosure has been found to be "vital".

Examples of statutes that provide for leniency in return for disclosure and cooperation are, however, sparse under Indian law.

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 bright-line test in this regard. As discussed in question 2.1 above, a factor in considering whether or not to disclose (or when to disclose) is that examples of cooperation credit are sparse under Indian law.

There may be situations where the internal investigation discovers the commission of offences that are mandatorily reportable (such as offences provided for in Section 39 of the Code of Criminal Procedure, 1973).

There may be situations where outside counsel may be able to advise on tactical advantages to reporting to law enforcement authorities, such as fraud committed by renegade employees without the knowledge of management of a company.

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 cannot be a "one size fits all" approach to the mode and format of reporting. Factors that will need to be considered are: (i) the purpose of the investigation; and (ii) the findings of the investigation.

It is always preferable to ensure that a sensitive investigation is conducted by outside counsel enrolled to practise in India or by experts engaged on the instructions of outside counsel enrolled to practise in India. The findings of an investigation should preferably be communicated within the scope of attorney-client privilege.

The risk of a written investigation report being leaked or seized by a law enforcement agency cannot be ruled out.

There have been instances of persons subjected to an internal investigation filing legal proceedings alleging defamation.

If a law enforcement agency is able to access an internal investigation report, it is usually possible to exclude such a report from being adduced in evidence. However, the "fruits of the poisonous tree" doctrine is not strictly applied in India and the law enforcement agency may be able to construct a case on the basis of other evidence to which they were pointed by the 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?

Indian law does not mandate liaising with local authorities before starting an internal investigation. As a general rule, a lawful internal investigation with appropriate precautions should not require liaison. The requirements of a governmental investigation on production of documents, availability of witnesses, etc. will always take precedence over the requirements of the internal investigation.

3.2 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.

3.3 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. Enforcement authorities in India frequently coordinate with authorities in other jurisdictions using formal and informal mechanisms. Formal mechanisms may include Mutual Legal Assistance Treaties, Extradition Treaties, regional cooperation arrangements and Tax Information Exchange Agreements. Informal mechanisms may include cooperation between intelligence and diplomatic services.

When faced with investigations in multiple jurisdictions, it is advisable to: (i) take the possibility of international cooperation as a given; (ii) ensure that the entity in question has strong legal advice and representation in each jurisdiction where it is being investigated; (iii) ensure that due process rights and privilege rights are preserved in each jurisdiction; and (iv) simultaneously assess risks in each jurisdiction before deciding on a strategy rather than to adopt a piecemeal approach.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

A robust investigation plan should clearly identify the scope and the objective of the investigation. It should focus on the specific entity and functions within that entity, it should begin with an identified time period and move out radially if required.

Steps would depend on the object of the investigation.

Typically, steps in an investigation plan should include, in most cases, a thorough review of the entity's corporate records, financial statements and observations drawn pursuant to a statutory audit. It must contemplate a review of the entity's internal policies and practices along with the degree of compliance with such policies. The entity's dealings with relevant third parties should also be analysed.

The investigation plan should contemplate a review of all correspondence previously made by relevant personnel and interviews with such relevant personnel.

A robust mechanism to ensure the preservation and storage of data, confidentiality of interviews and awareness of the legal rights of each stakeholder must also be put in place. While the plan may set out a roadmap for the activities going forward, it should also provide sufficient flexibility to address any unforeseen issues.

4.2 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 a matter of Indian law, it may be important to engage outside counsel at the very outset to preserve privilege over the work product generated during the investigation. The decision to retain forensic consultants would depend on whether the skills and technology required for the investigation are available to the entity in-house or to the external counsel.

Criteria and credentials for outside counsel would include: (i) expertise and past experience on similar mandates and familiarity with the "turf"; (ii) ability to work seamlessly with forensic consultants, statutory auditors, etc.; (iii) ability to seamlessly progress from the internal investigation to litigation roles; and (iv) ability to advise comprehensively on ancillary legal aspects that may arise as a result of the investigation. For example, an anti-corruption investigation may result in the entity requiring advice in relation to its previous tax filings.

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 India, professional communication between a legal adviser and a client is accorded protection under the Indian Evidence Act, 1872, the Advocates Act, 1961 ("**Advocates Act**") and the Bar Council of India Rules ("**BCI Rules**"). The issue regarding the position of an in-house counsel on the question of attorney-client privilege in India is not free from doubt – and has been subject matter of judicial interpretation. Hence, as stated above, as a matter of Indian law, it may be important to engage outside counsel at the very outset to preserve privilege over the work product generated by the investigation. Attorney-client privilege in India is a rule of evidence and is subject to exceptions (for example, communications made in furtherance of an illegal purpose are not covered by attorney-client privilege) – hence, the exact scope and coverage of attorney-privilege would depend on specific facts and circumstances. As an example, while there is no direct judicial precedent on this question, notes of interviews: (i) conducted by legal counsel or in the presence of legal counsel; and (ii) required by legal counsel in order to provide advice or to prepare for litigation may be covered by privilege. Best practice to be followed involves appropriate engagement with the outside counsel at every step of the investigation, right from the time the event which triggers the internal investigation occurs (e.g. receipt of a whistleblower complaint) till operationalising the decisions taken as an outcome of the investigation.

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)?

While there is no direct judicial precedent on this question, as long as the third party (e.g. an accounting firm engaged to perform transaction testing) has been engaged by, and is working on the basis of instructions received from, outside counsel, and submits their work product to the outside counsel (the work product being relevant for the provision of advice or preparation for litigation), their work product may be covered by privilege.

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

As stated above, the issue regarding the position of an in-house counsel on the question of attorney-client privilege in India is not free from doubt – and has been the subject matter of judicial interpretation. The legal position is described in brief below:

Under the Advocates Act, an "advocate" is one who has been entered in the relevant state bar council ("**SBC**") rolls. The BCI Rules stipulate that an advocate must not be a full-time salaried employee of any person, government, firm, corporation or concern. Therefore, an in-house lawyer (i.e. one who receives a salary) cannot practise as an advocate while employed full-time.

There does not appear to be any decision by the Supreme Court of India as to whether communications with an in-house counsel are on the same footing as those with an advocate. The Bombay High Court, in *Municipal Corporation of Greater Bombay v. Vijay Metal Works (Bombay High Court)*, held that privilege should apply to in-house legal advisers. In *Larsen & Toubro Ltd. v. Prime Displays (P) Ltd* the Bombay High Court observed that where in-house counsel would, save for their employment with the concerned litigant, be otherwise qualified to give legal advice, communication between the in-house counsel and the litigant would be privileged. The above was an observation of the Court, and the Court did not make any finding on this issue, due to lack of pleadings on the issue. Further, decisions of the Bombay High Court have only persuasive value before the high courts of other states.

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

In addition to appropriate involvement of outside counsel as detailed above, we advise entities to protect privileged documents by expressly marking them as "Legally Privileged and Confidential – Attorney Client Communication" or with other similar legends, such that privilege is sought to be claimed up-front on the communication being exchanged. Physical and digital security of documents is also important. Privileged documents should be segregated and kept in safe custody with internal counsel to the extent possible. Electronic records should be password protected.

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 do not have a duty under law to keep the results of an internal investigation confidential even if such results were voluntarily provided by the entity. In fact, it is quite likely that such results may be shared between different agencies as part of the inter-agency cooperation arrangements.

6 Data Collection and Data Privacy Issues

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

As per the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data and Information) Rules, 2011, an entity is required to comply with prescribed security practices and procedures relating to "*sensitive personal data or information of a person*" ("**SDPI**") such as bank account or credit card details, health condition, medical records and history and biometric information. Any wrongful gain or loss caused due to negligence in maintaining such procedures may result in the entity being liable to pay compensation.

Some of the obligations cast on the entity are:

(i) to obtain prior consent from persons providing sensitive personal data or information;

(ii) to make any person providing any information aware of the purpose, intended recipients and the agency collecting and retaining such information;

(iii) to keep all information received secure; and

(iv) to not disclose information to third parties without obtaining prior permission of the providers.

Additionally, if the internal investigation is conducted by a group or parent entity (e.g. as a part of a global whistleblowing programme), requiring transfer of the SDPI in question to another entity, this would require some additional safeguards to be maintained.

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?

The Indian Penal Code criminalises the secreting and destruction of any document or electronic record that may be required to be produced as evidence in legal proceedings. As a result, it is a common practice to prepare and issue a preservation notice. All individuals who may have documents or electronic records related to the issues under investigation should receive such a notice. The investigation should be described clearly to avoid ambiguity on what is required to be preserved. At the same time, the description should also avoid sensationalism and prejudgment of issues.

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.)?

Compliance with local laws and established customs of each jurisdiction is of paramount importance, in addition to contractual requirements across the chain where the information is being shared.

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

Internal investigations in India are those conducted by (or on behalf of) the entity itself, and are usually not guided by enforcement agencies. Entities should adopt practical and robust standards on document collection and on each aspect 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?

In addition to work emails, the most efficient resource to collect data in an internal investigation is usually a forensic examination of devices where work-related data is stored. If the entity's policies permit storage of work data on personal device(s) of an employee, such personal device(s) are also examined (subject to receiving consent of the employee in question).

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 best practice to review voluminous document collection in an internal investigation is to prepare and pre-agree to an appropriate and sufficiently detailed list of key words which are likely to throw up the data in respect of which the investigation is being conducted, and then run the key-word search on the data in question (using

appropriate software, if deemed necessary). The emails, documents and data then identified are physically reviewed, with the reviewers separately tagging (or identifying) the emails/documents/data that seem relevant to the matter being investigated, for further review and action.

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?

While there are no specific laws that govern employee interviews, general legal principles to be followed include the following: (i) the person being interviewed is clearly informed of the purpose of the interview, the identity of the interviewers and if there is an outside counsel, the presence of the outside counsel (and a disclosure that such outside counsel represents the entity, and not the employee); (ii) the interview should be conducted respectfully, with no intimidation, and in such manner and setting that the person being interviewed does not feel (and has no reason to feel) under undue pressure; (iii) if the interview is being recorded, the same should be specifically informed to the person being interviewed; and (iv) to the extent practicable, the interview notes should be drawn up in parallel with the interview and signed by the interviewee (in addition to the interviewee confirming that there was no coercion, the information represents the matters discussed during the interview accurately, etc.).

No authorities are required to be consulted before 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?

Employees may be required by contract or internal policy of the employer to cooperate with an internal investigation. In appropriate cases, non-participation may entitle the employer to take disciplinary steps against the employee. However, as a countervailing factor, participation in interviews is necessarily consensual, the employer has no coercive powers, and all individuals have a right against self-incrimination under Indian law.

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 rule in this regard. It may be important to make a judgment call if there is a possibility that the witness may subsequently allege that he/she was coerced or if in the assessment of the entity, there is a danger of self-incrimination.

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

- The consent of the witness to participate in the process should be recorded up-front.
- The witness should be made aware of the identities and roles of the participants.
- The witness should be made aware of her contractual obligations AND her legal rights.
- Women witnesses should be interviewed within regular working hours and in the presence of another woman.
- Notes of the interview should be prepared by outside counsel or at the direction of outside counsel and securely held.
- At the conclusion of the interview the witness should be asked to confirm in writing that the interview did not cause any discomfort to her.

The principles set forth in response to question 7.1 above should be read along with these best practices.

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

An interview is a fact-finding exercise and should be conducted in a transparent manner without being an adversarial or accusatory process. The interviewee should be made aware of his/her contribution to the investigation process. It is helpful if such person is also provided adequate guidance on his/her conduct with investigation authorities in case a prosecution is initiated against the entity or its executives. In case of allegations regarding an interviewee's conduct, he/she must be provided an opportunity to explain himself/herself.

The confidentiality of the discussions in the interview must be emphasised. Interviews with employees should commence with an "Upjohn" warning stating that any attorney-client privilege with an employee belongs solely to the entity and the entity may waive such privilege and disclose the discussions to a governmental agency or third party.

Interviewees (and, in particular, employees of the entity) should also be assured of no adverse repercussions pursuant to any disclosure, except in case of disclosure regarding any misconduct by the interviewee which warrants action under the entity's policies.

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

While dealing with a whistleblower, it is important to ensure the anonymity of the whistleblower and his/her complaint. The entity must safeguard the whistleblower's existing position and ensure no detrimental treatment is accorded. A preferred step would be to confirm the whistleblower's current status and the level of protection accorded to him/her. He/she must also be made aware that the complaint may form part of any submission to an investigating authority and his/her rights (including anonymity and protection) in the event of a prosecution.

Certain companies are required to have a vigil mechanism under the Companies Act, which would need to be complied with. A listed entity will also need to comply with the whistleblower policy adopted by the entity pursuant to the provisions of the LODR.

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

As good practice, the entity should provide an employee with the opportunity to issue any clarification or supplement his/her statement with any additional information which the employee becomes aware of after the interview. However, the extent of any variation from statements previously given must be scrutinised and the veracity

of any additional disclosure must be established to ensure that the investigation process is not jeopardised.

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

As stated in question 7.3 above, there is no general rule in this regard. However, it may be important to make a judgment call if there is a possibility that the witness may subsequently allege that he/she was coerced or if in the assessment of the entity, there is a danger of self-incrimination.

8 Investigation Report

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

As stated in question 2.3 above, there cannot be a "one size fits all" approach to the structure and the contents of reports. An investigation report should clearly outline the scope of the investigation and the steps undertaken in the course of the investigation. Any non-compliance with applicable law should be clearly spelt out along with recommendations for remedial action.

Any existing practices and policies adopted by the entity which address the subject matter of the investigation must be detailed, along with the degree of compliance. Any relevant findings pursuant to a review of corporate records, financial statements and observations pursuant to a statutory audit must be clearly spelt out. To the extent necessary, the extracts from witness' interviews and correspondences may also be stated.

As stated in question 2.3 above, while documenting the findings of an internal investigation the entity must consider the risk associated with a report being leaked or seized by a law enforcement agency or a defamation proceeding by the person accused in the report.

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Aditya Vikram Bhat
AZB & Partners
AZB House, Peninsula Corporate Park
Ganpatrao Kadam Marg, Lower Parel
Mumbai 400013
India

Tel: +91 22 6639 6880
Email: aditya.bhat@azbpartners.com
URL: www.azbpartners.com

Aditya Vikram Bhat is a senior partner in AZB's disputes practice. His practice includes a mix of corporate commercial disputes and white-collar criminal defence. Aditya has represented Indian and foreign clients in courts across India and in arbitrations across jurisdictions. Aditya regularly oversees and has advised on internal investigations conducted by clients, third parties and AZB's team of forensic investigators.

Prerak Ved
AZB & Partners
AZB House, Peninsula Corporate Park
Ganpatrao Kadam Marg, Lower Parel
Mumbai 400013
India

Tel: +91 22 6639 6880
Email: prerak.ved@azbpartners.com
URL: www.azbpartners.com

Prerak Ved is a partner with AZB. His practice comprises a mix of acting for clients on private equity and merger and acquisition transactions, and an advisory practice that focuses on advising clients on legal implications arising from white-collar crimes, corporate governance and general corporate advisory. Prerak has been involved in advising clients on several internal investigations, whether conducted in-house by clients, third parties or through AZB's team of forensic investigators.

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The firm has received wide national and international acclaim within the legal sphere including being 'Ranked No. 1' in RSG's Top 40 Indian Law Firms rankings, 2017.

Chapter 16

Ireland

Joanelle O'Cleirigh

Jillian Conefrey

Arthur Cox

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?

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 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.

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.

1.3 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. At the outset, therefore, outside counsel should determine who the client is. In certain circumstances, it may be appropriate to establish a sub-committee to deal with a particular issue. 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 for under section 19 of the 2011 Act has occurred, the entity should disclose this to An Garda Síochána.

There is no prescribed time limit under 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*: sections 2 and 3 of the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012, which make it an offence to withhold information in respect of certain offences against children or vulnerable persons; and sections 14 and 16 of the Children First Act 2015, which 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 under section 393 of the Companies Act 2014 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?

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 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 in respect of their Terms of Reference, and that may affect the scope. The Inquiry or Commission may also, in certain circumstances, seek submissions from relevant parties 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.

3.3 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.

Mutual legal assistance is frequently invoked by various regulatory authorities to include the police authorities, competition authorities and tax authorities. We expect that this reliance on mutual legal assistance will increase in the years to come. By way of example, the Criminal Justice (Corruption Offences) Act 2018 which came into force on 30 July 2018 provides, *inter alia*, that a person may be tried in Ireland for certain corruption offences committed outside of the State. As such, one can anticipate that mutual legal assistance will play a significant role in the future with regard to information gathering for cross-border corruption investigations.

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.

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 steps should typically be included in an investigation plan?

A typical investigation plan should include:

- the reason(s) for conducting the investigation;
- the aim(s) of the investigation;
- the scope of the investigation;
- details of the investigation team and their roles/responsibilities;
- the information required;
- where this information is likely to be found;
- how it is envisaged that the information will be collated;
- the identities of potentially relevant witnesses (insofar as is possible to do so at the outset);
- consideration as to whether or not witness interviews will be required;
- whether external resources are required (to include consideration as to whether an external person is or should form part of the investigation team);
- consideration as to whether any statutory or regulatory reporting obligations arise; and
- the timeframe to completion of the investigation.

4.2 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 an entity does not have the necessary internal expertise to conduct an investigation.

In obtaining outside counsel, an entity will usually consult its corporate lawyer. The entity should ensure that its lawyer has the relevant expertise to advise on the relevant investigation. If it does not, the entity should be referred to an appropriate investigation lawyer.

Entities should also bear in mind that issues surrounding legal professional privilege ("LPP") may arise with regard to internal investigations and/or where forensic consultants are engaged directly by the entity for the purpose of the internal investigation. It is advisable, therefore, to consult external counsel in relation to privilege concerns in such circumstances.

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 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 LPP. 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 and the caption "confidential and legally privileged" should appear on any documents over which LPP 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, a communication must be confidential as between the client and lawyer. Disclosure of the communication to a third party may amount to a waiver of privilege. However, if a 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.

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 General Data Protection Regulation ("GDPR") entered into force on 25 May 2018, implementing a harmonised data protection regime throughout the EU. The GDPR replaced Directive 95/46/EC and contains a number of provisions which increases the accountability of data controllers and processors including: the 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.

The Data Protection Act 2018 ("2018 Act"), which also came into force on 25 May 2018, transposed the GDPR into Irish law, and since then the key Irish legislation regulating data protection is the 2018 Act and the Data Protection Acts 1988 and 2003. The 2018 Act applies to all complaints made on or after 25 May 2018, but it does not have retrospective effect. When conducting an internal investigation, the 2018 Act provides that an entity must consider the extent of its right to interrogate data relating to individuals or employees pursuant to all applicable data protection and privacy legislation.

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 GDPR and Data Protection Acts 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 subsequently 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. Regulators are also increasingly in favour of predictive coding techniques where significant volumes of data are concerned and it is likely therefore 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 is often 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 witness 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 the 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 witness in advance of the 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 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 a 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.

7.8 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 must have legal representation during an interview. Whether a witness is entitled to legal representation at a 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 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
- findings/recommendations.

The findings of the investigation should be based on evidence and the report should fairly and accurately reflect those findings. It may also be necessary to consider whether the report is privileged and, if so, it should be labelled as such.

Joanelle O'Cleirigh
Arthur Cox
Ten Earlsfort Terrace
Dublin 2
Ireland

Tel: +353 1 920 1000
Email: joanelle.ocleirigh@arthurcox.com
URL: www.arthurcox.com

Joanelle is a Partner in the Litigation and Dispute Resolution Group at Arthur Cox.

Joanelle's principal areas of practice are investigations and inquiries, corporate and commercial litigation, cyber-security and litigation risk, criminal investigations and regulatory and compliance issues. With unrivalled expertise in investigations (statutory and non-statutory) and public law matters, Joanelle advises clients in both the private and public sectors on crisis and incident management, reporting obligations, non-statutory reviews and investigations.

She has been involved in some of Ireland's most significant tribunals, Commissions of Investigations, inquiries and hearings. She has also advised on judicial reviews, High Court and Supreme Court appeals and cases before the European Court of Justice.

Joanelle O'Cleirigh is a "very professional litigator".

(The Legal 500: Europe, Middle East & Africa, 2018.)

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".

(Chambers Europe: Europe's Leading Lawyers for Business, 2017.)

Jillian Conefrey
Arthur Cox
Ten Earlsfort Terrace
Dublin 2
Ireland

Tel: +353 1 920 1000
Email: jillian.conefrey@arthurcox.com
URL: www.arthurcox.com

Jillian is an Associate in the Litigation and Dispute Resolution Group at Arthur Cox with considerable experience in regulatory investigations, enforcement and prosecution.

In her practice, Jillian advises clients in both the public and private sector in relation to fraud and other white-collar crime issues to include: freezing of assets by the Garda Bureau of Fraud Investigation; US Department of Justice and SEC investigations; requests under the Mutual Legal Assistance Treaty (MLAT); search warrants; internet fraud; internal investigations; money laundering investigations; lobbying; anti-bribery; and anti-corruption.

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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Our Corporate Crime Group has extensive experience dealing with law enforcement agencies in Ireland and globally, as well as other investigative and prosecutorial bodies and regulators. Our experience extends to the defence and enforcement of regulatory and criminal breaches and our lawyers act for clients at all stages of regulatory and criminal enforcement processes from investigation to prosecution, including addressing the increasing commercial, regulatory and reputational risks which can arise in this area. In addition, we have significant experience advising on internal investigations, tribunals, Statutory Inquires and Commissions of Investigation.

Further information can be found on our website – www.arthurcox.com.

Netherlands

Niels van der Laan

Jantien Dekkers

De Roos & Pen

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. However, 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. Presenting a plan for an internal investigation may in some cases also prevent enforcement agencies from starting their own – intrusive – investigation and positively impact the handling of the case by the authorities (see questions 2.1 and 2.2).

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 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.

1.3 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 disclose after the facts have been established, disciplinary sanctions have been taken and effective compliance measures have been introduced, as this may prevent enforcement agencies from starting their own intrusive investigation, curtail negative media exposure and positively impact the handling of the case by 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 a criminal 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 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.

3.3 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 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.

4.2 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. This 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 bar.

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 (labour law) liability and high administrative fines by the Dutch Data Protection Authority. From 25 May 2018 onwards, all processors of personal data have to comply with the strict regulations for collecting, processing and transferring employees' personal data under the European General Data Protection Regulation ("GDPR"). Surveillance of employees with hidden cameras without any prior notice is not allowed and is punishable as a criminal 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?

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 key-word searches. To save costs, a first review is often conducted by legal assistants or junior lawyers who mark the documents as 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 employees are generally direct and unnuanced in tone and manner, 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.

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 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.

7.8 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 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. 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).

Niels van der Laan
De Roos & Pen
Keizersgracht 332
1016 EZ Amsterdam
Netherlands

Tel: *+31 6 5510 5540*
Email: *vanderlaan@deroosenpen.nl*
URL: *deroosenpen.nl/en*

Niels van der Laan LL.M. focuses on (corporate) criminal law and acts in high-profile cases and investigations. His clients are publicly traded companies, banks, trust offices, and other businesses in the financial and private sector. He advises on criminal defence and criminal liability and directs internal fraud investigations.

In addition, he is active as a defence lawyer for CEOs, chairpersons, non-executive directors, managers and advisors who are involved in corruption cases, market abuse cases (insider trading, market manipulation), money laundering cases, criminal tax cases and (other) white-collar cases.

Mr. Van der Laan has a great deal of experience with technically complex transnational litigations and maintains good contacts with defence lawyers abroad, especially in the US. He is considered an expert in the field of international criminal law and also litigates before the Dutch Supreme Court.

Jantien Dekkers
De Roos & Pen
Keizersgracht 332
1016 EZ Amsterdam
Netherlands

Tel: *+31 6 4700 9227*
Email: *dekkers@deroosenpen.nl*
URL: *deroosenpen.nl/en*

Jantien Dekkers LL.M. represents individuals and companies in both financial-economic and general criminal cases. Before joining De Roos & Pen, she worked in the Corporate Criminal Law team of Houthoff Buruma, where she advised large corporations on criminal matters and was involved in performing internal investigations. Ms. Dekkers graduated *cum laude* in both criminal and civil law. During her studies she worked as a clerk at the District Court of Maastricht and lectured at the university. Among other subjects, she has specialised in forensic investigations and evidence. In 2013, she published the book '*Forensic familial DNA searching examined: Forensic & human rights safeguards for criminal investigations into genetic family relationships*'. Ms. Dekkers is also an author for the SDU commentaries on criminal law.

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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.

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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

Olabode Adegoke

Bloomfield Law Practice

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 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).

1.3 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 highest-level 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 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.

3.3 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 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.

4.2 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.

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?

Pre-trial investigation rests on common law and is largely uncodified. However, the Criminal Procedure Act and Administration of Criminal Justice Act stipulate 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 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.

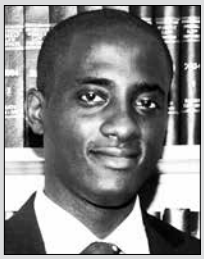
7.8 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

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 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.



Adekunle Obebe
Bloomfield Law Practice
15 Agodogba Avenue
Parkview, Ikoyi, Lagos
Nigeria

Tel: +234 1 454 2130
Email: kunleobebe@bloomfield-law.com
URL: www.bloomfield-law.com

Adekunle is recognised as one of the foremost Nigerian lawyers in immigration, employment and labour matters and is frequently sought after as local counsel for large international companies. He is said to be the "the first port of call" and has a "long standing reputation" in the market (*Who's Who Legal* – Nigeria 2014). Adekunle advises multi-national corporations, Fortune 500 companies, high-net-worth individuals and Nigerian companies on issues relating to regulatory compliance with particular reference to expatriate and Nigerian employee work authorisation in and out of Nigeria and corporate and commercial law.

He is a certified Global Mobility Specialist and a regular speaker at Nigerian and international conferences/seminars on regulatory compliance and emerging corporate immigration issues in Nigeria.

He also was a member of the Executive Leadership Committee (EMEA) of the Worldwide ERC – The Workforce Mobility Association. Since 2009, he has been recognised in *Who's Who Legal* – Nigeria, *inter alia*, as a reliably good lawyer who formulates inventive solutions.

Adekunle is also highly knowledgeable in commercial litigation, corporate investigations and arbitration, and tax. He is the Managing Partner and Chair of the firm's Dispute Resolution, Immigration, and Tax Employment & Labour Practice Groups.

Olabode Adegoke
Bloomfield Law Practice
15 Agodogba Avenue
Parkview, Ikoyi, Lagos
Nigeria

Tel: +234 1 454 2130
Email: bode.adegoke@bloomfield-law.com
URL: www.bloomfield-law.com

As a key member of Bloomfield's Corporate Investigations Practice Group, Olabode has worked extensively in an advisory capacity, on several internal investigations. He also contributed to several publications on corporate investigations.

Prior to joining Bloomfield, Olabode had worked in a reputable multi-service law firm where he represented corporate clients in legal disputes, ADR sessions and extended negotiations over contracts and trade agreements.

Bloomfield LAW PRACTICE

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 general statutory or regulatory requirements that oblige companies to conduct an internal investigation. However, section 2 A-3 of the Norwegian Working Environment Act (the "WEA") requires that all companies with at least five employees develop written procedures regarding internal notifications ("whistle-blowing") concerning censurable conduct in the company. The employer's responsibility to ensure proper investigation of reported concerns is indirectly expressed in section 2 A-3 (5) c of the WEA, which states that the whistle-blower procedure shall also include procedures for the reception, handling and follow-up of the notifications, see also under question 1.2 below.

Also, there are certain other 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, 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.

Third, 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 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 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 whistle-blower in raising the complaint is not considered, unless the complaint can be viewed only to have been made with the purpose of doing harm.

1.3 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.

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, ØKOKRIM exercises 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 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.

3.3 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 the lead in investigating and prosecuting the matter among the authorities in their home jurisdiction.

4 The Investigation Process

4.1 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.

4.2 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 e-mails 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.

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 15 June 2018 No. 38). The law implements the EU General Data Protection Regulation (Regulation (EU) 2016/679). 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 operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

The legislation requires, *inter alia*, that the employer, before accessing and examining an employee's corporate e-mail account or personal workspace and electronic 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 Regulation 2018-07-02-1108 must be observed by the employer, as explained in question 6.1 above.

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 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 4.1 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 whistle-blowers, 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 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.

7.8 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 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.

Elisabeth Roscher
Wikborg Rein
Dronning Mauds gate 11
0250 Oslo
Norway

Tel: +47 22 82 76 65
Email: elr@wr.no
URL: www.wr.no

Elisabeth Roscher is a Specialist Counsel at Wikborg Rein's Oslo office and head of the firm's Corporate Compliance and Investigations practice. Her main areas of practice include:

- Corporate compliance systems and in-depth procedures in the following compliance areas: anti-corruption; anti-money-laundering; anti-trust (competition law); and trade control.
- Private investigations and crisis management for both national and international companies.
- Criminal law, in particular corporate criminal liability.

Before joining Wikborg Rein, Elisabeth was a partner and head of EY Norway's Fraud Investigation, Corporate Compliance and Dispute Services practice. She was previously a senior public prosecutor with the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Norwegian: ØKOKRIM), where she was responsible for investigating and prosecuting large complex economic crime cases. Elisabeth also has broad experience from dispute resolution and litigation, both as a public prosecutor and as a lawyer.

Geir Sviggum
Wikborg Rein
Dronning Mauds gate 11
0250 Oslo
Norway

Tel: +47 22 82 76 76
Email: gsv@wr.no
URL: www.wr.no

Geir Sviggum is a Partner at Wikborg Rein's Oslo office and chairman of the firm's board of directors. He headed the firm's Shanghai office from 2008 to 2013 and was Managing Partner International with overall responsibility for Wikborg Rein's internal practice from 2012 to 2016. Geir's compliance specialty focuses primarily on anti-bribery and crisis management, hereunder criminal law consequences and civil disputes triggered by potential misconduct. His experience spans from a role as public defender in Norwegian courts to crisis management on behalf of listed Norwegian companies following suspected misconduct, preventive advisory work for Norwegian companies and public authorities in their anti-bribery work and lecturing on anti-bribery legislation at universities in several countries.

Geir is the only Norwegian lawyer listed in Global Investigation Review's *Who's Who Legal: Investigations 2017 and 2018* guides. He frequently speaks at universities, conferences and in other fora.

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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

Tomasz Konopka

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.

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 forming 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.

Moreover, according to the new Act on Money Laundering and Terrorism Financing Prevention, which entered into force in July 2018, the obliged entities (such as banks, other financial institutions and even law firms) are obligated to appoint a compliance officer who will be responsible for supervising the appropriate application of the Act. Moreover, these entities have an obligation to introduce internal procedures in the scope of preventing money laundering and financing terrorism. On 17 October 2018, the Ministry of Justice has announced a recent Bill to the Act on Liability of Collective Entities for Acts Prohibited Under Penalty. The amendment focuses, among others, on the introduction of compliance procedures and internal investigations. The Act imposes an obligation to implement compliance procedures in the field of detecting and preventing offences such as corruption.

Work on the draft Act on Transparency in Public Life is in progress in Parliament. The Act provides an obligation to introduce internal anti-corruption procedures. However, the date of the entry into force of the Act and the aforementioned Bill is not known yet.

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 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 whistleblowing issue is beginning to appear in Polish legislation. For instance, pursuant to the new Act on Detecting and Preventing Money Laundering and Terrorism Financing, some institutions like banks or other financial entities are obliged to create an anonymous whistleblowing procedure of reporting irregularities in the scope of money laundering by employees. The provisions concerning whistleblowing issues also appear in Bills that are works of progress in Parliament. For example, the draft Act on Transparency in Public Life contains regulations that grant the status of whistleblowers to people who give reliable information about the possibility of committing a corruption offence. This status provides special protection to the whistleblower, i.e. a work contract cannot be terminated or changed to less favourable terms without the prosecutor's permission. Whistleblowers are also permitted to recover the legal costs of proceedings. Moreover, the planned amendment to the Act on Liability of Collective Entities for Acts Prohibited Under Penalty provides sanctions for causing negative consequences to whistleblowers, which are imposed on a collective entity, e.g. a company.

Regardless of the above, 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 of *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.

1.3 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. In such cases, 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, the perpetrator's attitude is taken into account each time. For example, Art. 15 of the Criminal Code ("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. The same applies in case of corruption in business relations. If a perpetrator, who granted or promised to grant material benefit, notifies the relevant authorities and discloses all of the material facts of the crime prior to their discovery by the authorities, he/she shall not be subject to a penalty under Art. 296a §5 of the CC. Moreover, the aforementioned amendment to the Act on Liability of Collective Entities for Acts Prohibited Under Penalty provides for voluntary submission to criminal liability by a collective entity in certain circumstances, foremost when it notifies the prosecution authorities about the committed crime and discloses significant circumstances of the criminal behaviour.

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 of the proceedings have been carried out and after it has been determined that the established facts of the case contain all of the material information. Otherwise, it is not recommended to disclose to the enforcement authorities information gathered by the company.

Banks are an exception; they are obligated, under banking law, 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.

Pursuant to the new Act on Detecting and Preventing Money Laundering and Terrorism Financing, banks and other financial institutions are obliged to register transactions and convey information on transactions that are suspected to be part of money laundering. If the General Inspector for Financial Information ("GIIF") comes to the conclusion that a given transaction is suspicious, it may demand that the institution withholds the transaction and notifies the prosecutor's office.

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 under the provisions of Polish criminal procedure 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 Art. 1 §1 of the CC, 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 discloses 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 of 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 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).

3.3 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?

Mainly, 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 CCP, as well as those regulated in the Act on Exchange of Information Between the Law Enforcement Authorities of EU Member States) and those following from EU law (e.g. from Art. 82 of the 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 of the 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.

However, it is worth mentioning that now in the European Union the work on establishing the European Public Prosecutor's Office is in progress. The main purpose of this institution is combating against criminal offences affecting the financial interests of the European Union. Poland, as one of a few countries, decided not to be involved in the procedure of creating the European Public Prosecutor's Office. It is estimated that the European Public Prosecutor's Office will begin functioning in the year 2020 or 2021.

4 The Investigation Process

4.1 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.

4.2 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. Strong investigative skills are an important attribute. 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 of the CCP. The interviewing of persons who practise 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 facts cannot be established on the basis of other evidence. However, the Polish CCP permits 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 an, 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 where important private interest could be infringed due to a public hearing (Art. 360 §1 and §2 of the 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 newly introduced Personal Data Protection Act of 10 May 2018. This Act was issued as a result of adjusting Polish law to the provisions of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (the General Data Protection Regulation – "GDPR"), which applies from 25 May 2018. Data protection provisions are also located in the Polish CC.

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 is a large number of issues which must be taken into account in case of placing information in various jurisdictions. These include subject matters in the scope of banking secrecy or the denunciation obligation, especially with regard to foreign branches of credit institutions. Moreover, an entity must consider other statutory secrecies; for instance, arising out of telecommunication law. It is also very important for an entity to obey GDPR provisions. 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 to review documents. In the case of a large number of documents, it is worth using review platforms; for instance, 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 the 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 ("LC") may apply, in particular Art. 94 point 2 of the 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 of the LC, i.e. the confidentiality of information, the disclosure of which could cause damage to the employer. In the absence of application of the provisions of the 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 any 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 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.

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

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.

Tomasz Konopka
Sołtysiński Kawecki & Szlęzak
Jasna 26
00-054 Warsaw
Poland

Tel: *+48 22 608 7067*
Email: *Tomasz.Konopka@skslegal.pl*
URL: *www.skslegal.pl*

Tomasz Konopka joined Sołtysiński Kawecki & Szlęzak in 2002, and has been a partner since January 2013. Tomasz specialises in business crime cases including white-collar crime, investigations, representation of clients related to custom seizures of counterfeit products, cybercrimes, and court litigation. He represents Polish and foreign clients before the courts and law enforcement authorities. He leads the White-Collar Crime Department. Prior to joining Sołtysiński Kawecki & Szlęzak, Tomasz was a lawyer in a number of companies, including those listed on the Warsaw Stock Exchange. He is also a member of the Association of Certified Fraud Examiners (ACFE).

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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.

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Sołtysiński Kawecki & Szlęzak employs top-class specialists who have expert knowledge not only of the law, but also of the practical functioning of business entities.

Portugal

Alexandra Mota Gomes

PLMJ

José Maria Formosinho Sanchez

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 Portugal, there is no specific legislation designed to regulate internal investigations. Therefore, a company is free to decide whether or not to conduct an internal investigation and, by doing so, the company may benefit from a mitigation of its liability.

However, the Law on the Prevention of Money Laundering and Terrorism Financing (Law no. 83/2017 of 18 August, the AML/CTF Law) imposes an obligation on certain entities to detect, and for that purpose, to conduct an internal examination into suspicious operations relating to money laundering and terrorism financing and to report them to the authorities.

When performing these duties, entities are forbidden from informing suspects or third parties about their examinations and must collect and conserve all the relevant documentation for a period of seven years.

If an entity fails to comply with this examination duty, it commits an AML/CTF administrative offence sanctioned with a fine from €5,000 to €5,000,000, depending on the nature of the entity (financial, non-financial or other), and, in some cases, other sanctions such as the closure of the establishment for up to two years.

Please note that this examination duty is not a full internal investigation, but only an internal examination.

1.2 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?

Entities must examine all whistleblowers' complaints to determine whether an internal investigation is necessary and must make a report about that decision.

Specifically, the AML/CTF Law requires companies to: (i) have a specific, independent and anonymous channel to receive whistleblowers' complaints regarding any AML/CTF violations; (ii) ensure the confidentiality of the communications received and the protection of the personal data of the complainant and the suspect; and (iii) refrain from any threats or hostile acts and, in particular, from any unfavourable or discriminatory practices against whistleblowers when their complaints are well-founded.

If the entity fails to comply with these duties, it commits an AML/CTF offence sanctioned as described above.

In some sectors, companies are required to submit a report containing the summary description of the complaints received and their processing to the authorities for the sector in question.

1.3 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 Portugal, there is no specific legislation designed to regulate internal investigations.

However, for the purposes of conducting an internal investigation and reporting findings, the AML/CTF Law requires companies to: (i) prevent conflicts of interest and, where necessary, ensure the separation of functions within the organisation; and, in some cases, (ii) appoint a member of its top management as a Compliance Officer. Among others, the company must assure that this officer: (a) performs their duties independently, permanently, effectively and with the necessary decision-making autonomy, regardless of the nature of their relationship with the company; and (b) is not subject to potential functional conflicts, especially when segregation of their functions does not occur.

Furthermore, the entities subject to the AML/CTF Law must monitor the effectiveness of their policies and procedures through evaluations carried out independently by the internal audit area, by external auditors or by a qualified third party.

If the entity fails to comply with these duties, it commits an AML/CTF offence sanctioned as described above.

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 mentioned above, the entities subject to the AML/CTF Law must report to the authorities any suspicions operations and must report their internal examinations, otherwise they commit an AML/CTF offence.

In other cases, a company is free to decide whether or not to disclose the results of an internal investigation, but by disclosing the results, the company may benefit from a mitigation of its liability.

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?

Generally, a disclosure should be made to the enforcement authorities when the internal investigation leads the company to conclude that a violation has taken place internally.

However, the AML/CTF Law imposes a duty to communicate suspicious operations, which must be immediately reported after a first examination. In these cases, the entity must report to the authorities, among others: (i) the full identification of the parties involved and their activities; (ii) full descriptions of the suspicious operations; and (iii) the analysis carried out by the entity with copies of all the evidence collected, otherwise they commit an AML/CTF 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?

Generally, an entity is free to choose the communication format.

However, the AML/CTF Law requires a written communication made through a specific direct, secure and confidential channel defined by the authorities for the sector in question.

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?

No, there are no provisions that require an entity to liaise with authorities before starting an internal investigation, even when under investigation.

However, when required to do so, the entity should liaise and fully cooperate with the authorities. The AML/CTF Law requires the entity to collaborate and communicate with the authorities, otherwise it commits an AML/CTF offence.

3.2 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?

By sharing information crucial to the investigation, it is possible that the entity's findings and data will indirectly influence the scope of an investigation. Nevertheless, it is impossible for an entity to define or limit the scope directly.

Authorities act independently. As a result, entities cannot set limits or define the terms of a public investigation.

3.3 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?

The Portuguese enforcement authorities customarily coordinate with authorities from other jurisdictions.

In the case of an investigation that covers various jurisdictions, entities must adopt a cautious approach. Hiring lawyers that specialise in this type of matter in each country or with knowledge across the different jurisdictions is highly recommended. Furthermore, it must be borne in mind that all the data shared by the company will be accessed in all the involved jurisdictions.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

An investigation plan must define the scope of the investigation, identify the parties involved, establish preventive measures to ensure the efficiency of the investigation, and provide for the investigators to collect and preserve documents, hold and document interviews, examine and analyse the evidence, and prepare a final written report with the conclusions and the actions to be taken.

4.2 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 hire outside counsel when the company itself is also under investigation, or when the dimension of the investigation or its nature means it cannot be undertaken by the company itself or when the independence and impartiality of the company may be an issue.

In selecting outside counsel, the company must consider experience, knowledge, level of specialisation and reputation.

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?

Outside counsel is subject to professional secrecy covering all the

facts that they become aware of in performing their professional duties in the context of an internal investigation into the legal situation of their client.

The confidentiality duty covers documents and other materials accessed by the lawyer in the investigation that are directly or indirectly linked to the facts subject to secrecy.

This duty can only be derogated from in special and rare cases: upon request and special authorisation from the Bar Association for the purposes of defending their legitimate rights or the legitimate rights of their clients; or in criminal proceedings whenever this is determined by a higher court considering the gravity of the interests at stake.

Regarding the AML/CTF Law, lawyers must communicate any suspicious operations to the Bar Association. However, this duty of communication does not apply when the lawyer became aware of the facts in the context of an evaluation of the legal situation of their client or in the context of advice, representation or a defence regarding the legal proceedings of the client.

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)?

In Portugal, the violation of professional secrecy is considered a crime, and, in several sectors of activity, professional secrecy is specifically regulated.

If third parties are engaged by outside counsel, they will also be subject to the lawyers' duty of secrecy, although their privileges are not as strong as the ones of the lawyers.

In any case, when engaging with third parties, a written secrecy clause must be signed to ensure and protect confidentiality.

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

The legal privileges of outside counsel are only applied to in-house counsel if they are also registered at the Bar Association and if the nature of their work is that of a lawyer and not a simple member of the legal department or some other area.

As directing the internal investigation may not be considered as a lawyer's work, there is a risk the legal privileges of a lawyer will not apply in this case. In any case, the in-house counsel is subject to professional secrecy.

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

In order to protect documents during an internal investigation, the entity must limit access to them by third parties and expressly identify them as confidential.

However, the best measure to protect the documents is to send them to outside counsel appointed to direct the internal 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?

As a general rule, administrative offences and judicial proceedings are not confidential.

Therefore, all the documentation sent to enforcement agencies will be deemed public. However, the authority responsible for the proceedings may determine, upon request and if the interests involved require it, the confidentiality of certain documents and/or information.

6 Data Collection and Data Privacy Issues

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

- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons on the processing of personal data and on the free movement of such data (GDPR).
- Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons on the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data.
- Law no. 83/2017 of 18 August 2017, the AML/CFT Law, which authorises entities to perform the data processing operations needed for the exclusive purpose of the prevention of money laundering and terrorist financing.
- Law no. 41/2004 of 18 August 2004, regarding Data Protection and Privacy in Telecommunications.

Portugal has not yet approved a GDPR implementation law.

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?

As the scope is to collect data necessary to the investigation, entities or individuals that possess relevant data may be notified in order to preserve them.

There is no specific legal requirement for this notification. The main issue is to preserve data and avoid its possible elimination and, for that purpose, a legitimate interest must be at stake.

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.)?

When dealing with documents located in multiple jurisdictions, the entity should hire specialists across the different jurisdictions to take into account the legislation and regulations applied in each jurisdiction.

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

Given that Portugal has no specific legislation to regulate internal investigations, it depends on the specific case. As long as it is relevant to the case, all types of documentation and records must be considered (digital, electronical and written).

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

Currently, electronic documents are the most common and easiest way to collect any kind of information.

The efficient way to collect and analyse those documents and to ensure independence and impartiality is to use an external forensic expert.

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 a common practice of the judicial and enforcement authorities to use predictive coding techniques to review a voluminous document collection.

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?

Witness interviews in the context of an internal investigation are not regulated in Portugal.

Therefore, witnesses can refuse an interview. However, in some cases, actual employees may be subject to disciplinary proceedings if they refuse an interview if that interview is requested by their line manager.

Regarding the lack of regulation on this matter, no entity's consultation is defined or recommended as needed before initiating a witness 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?

In general, employees are required to cooperate with their employer's internal investigation.

That said, if the internal investigation relates to the performance of the duties or the position to which the employee is assigned, they may not decline to participate in a witness interview about the facts that they became aware of in the course of their professional activity.

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 the witnesses, but witnesses should be informed of the possibility of being accompanied by a lawyer.

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

Witness interviews should be directed by a lawyer, who must inform the witness of the context of the investigation, which parties are involved, what is at stake and about the possibility of the witness being accompanied by a lawyer.

Witness interviews must be documented and signed by the witness, the interviewer and anyone else present.

In some cases, interviewers may request the witness to sign a confidentiality agreement about the interview.

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

Portuguese cultural factors are not an issue when conducting interviews.

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 have the possibility of being accompanied by a lawyer.

The interviewer should be as impartial as possible, which is why hiring outside counsel is recommended.

Specifically, the AML/CTF Law requires companies to ensure the confidentiality of the whistleblower and refrain from any threats or hostile and discriminatory action against them.

If the entity fails to comply with these duties, it commits an AML/CTF offence sanctioned as described above.

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

It can be requested but the entities are not obliged to give access to the statements made in internal investigations, which must be classified as confidential in some cases.

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

As internal investigations are not regulated, neither the presence of enforcement authorities nor the legal representative is required. However, if the witness asks to be represented, this request must be accepted.

8 Investigation Report

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

An investigation report should contain: (i) an executive summary with a description of the background, identifying the origin and scope of the investigation, the parties involved and the investigators and/or interviewers; (ii) a description of the preventive measures adopted and the steps taken, such as collecting documentation and holding interviews (reports of which must be annexed); (iii) a description of the analysis carried out with conclusions about the facts; and (iv) recommendations and actions to be taken.

Regarding the AML/CTF Law, in performing the duty of examination, the reports to authorities must contain a description of the suspicious transactions (such as value, dates, location, origin, destination, purpose, nature and means of payment) and the parties involved (such as profile, activities, economic situation and standard operations).

Alexandra Mota Gomes
PLMJ
Av. da Liberdade, 224
Edifício Eurolex
1250-148 Lisboa
Portugal

Tel: +351 918 480 094
Email: alexandra.motagomes@plmj.pt
URL: www.plmj.com

Alexandra Mota Gomes is a partner in PLMJ's criminal law, white-collar defence and compliance practice. She has over 18 years' experience and is one of the most reputable white-collar crime lawyers in Portugal.

Alexandra has extensive experience in dealing with a wide range of criminal cases, both as a defence lawyer and as a representative of the interested parties working in cooperation with the public prosecutor. She has special expertise in the areas of organised crime and economic and white-collar crimes.

Alexandra is also a specialist in compliance and heads PLMJ's compliance practice, with a particular focus on the fight against money laundering and the financing of terrorism, and the prevention of corruption.

Lawyer Monthly: Portuguese White-Collar Crime Lawyer of the Year, 2015–2017.

José Maria Formosinho Sanchez
PLMJ
Av. da Liberdade, 224
Edifício Eurolex
1250-148 Lisboa
Portugal

Tel: +351 917 986 898
Email: jose.mariasanchez@plmj.pt
URL: www.plmj.com

José Maria Formosinho Sanchez is a senior associate in PLMJ's criminal law, white-collar defence and compliance practice with 11 years' experience as a criminal lawyer. Skilled in legal compliance, criminal investigations and criminal litigation, he is highly praised by his peers and clients, who recognise his extraordinary litigation skills and very strong, broad law background.

He is a member of the 'Forum Penal' criminal lawyers association and works with Fair Trials International as a member of the Legal Experts Advisory Panel.

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Finance Monthly: White Collar Crime Law Firm of the Year, 2017.

Worldwide Financial Advisor Awards Magazine: White Collar Crime Law Firm of the Year, 2017.

PLMJ has a multidisciplinary team that specialises in compliance matters.

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These services provided by PLMJ's Compliance Team were classified as Highly Commended by the *Financial Times* for the Innovative Lawyers 2018.

Chapter 22

Serbia

ŠunjkaLaw

Tomislav Šunjka

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 entity should consider, at the minimum, the Constitution (basic human rights protection), Employment Law, Company Law, Data Protection Law, the Criminal Code and the Criminal Procedure Code, the Law on Criminal Liability of Legal Entities, the Law on Contracts and Torts, especially the part on damages, the Code of Professional Ethics of the Serbian Chamber of Commerce, the Law on Protection of Business Secrets, the Civil Code (the part which refers to privilege and exemption from the obligation to testify), the Law on Whistle-blowers, the Law on Free Access to Information of Public Importance, and the Law on Banks (the part which refers to bank secrecy). There could be various legal consequences which could result in: an obligation to compensate material or non-material damages for the entity and the person who was subject to or participated in the investigation as a witness; misdemeanour responsibility and responsibility as a commercial misdemeanour, for the entity and for the responsible person; and criminal responsibility for obstruction of justice. There are direct and indirect legal benefits from conducting an investigation, and all of the enforcement authorities, including the prosecutors and courts, will take a properly conducted internal investigation and cooperation with the authorities as an indirect legal benefit, which may include investigations where there is a legal epilogue of a criminal procedure against the legal entity, as a mitigating circumstance and a reduction, i.e. the mitigation of a criminal sanction. If the legal epilogue is a criminal offence of tax evasion or tax fraud, and the entity itself, after conducting an internal investigation, files the tax application and then pays the tax, the criminal proceedings will not be conducted and, if initiated, will be suspended.

1.2 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 is obliged, in the scope of its authority, to take measures to eliminate identified irregularities in relation to complaints as well as to protect the whistle-blower from harmful actions. The entity is obliged to designate a person authorised to receive complaints and to conduct the procedure in connection with the complaint. The entity is obliged to act on the complaint without delay, and at the latest within 15 days from the date of receipt. Entities which have more than 10 employees are obliged to regulate the procedure of internal whistle-blowing. With regards to the verification of the information from the complaint, the entity will conduct the verification in accordance with the information available to it initially, using the formula of trustfulness of the information, which would be conveyed to a person with average knowledge and experience (identical to the whistle-blower himself). After the initial check, if it is stated that there is a basis or reasonableness for any doubt, the entity will initiate an internal investigation. In working with whistle-blowers, the entity must strictly abide by the Law on Protection of Whistle-blowers, because it is subject to the provisions on compensation for damages to the whistle-blower or misdemeanour liability for the entity as well as the responsible person within the entity.

1.3 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 presents one of the most important starting points in an internal investigation. Outside counsel will determine that the legal entity is the client. Protection and the legal interest of the entity is the primary concern of outside counsels' actions. Who has legal standing in a particular case and which corporate body of the legal entity is conflict-free to sign the power of attorney and mandate letter and to receive the report of the internal investigation and fact-findings with the conclusion and opinion (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, Fraud function, ABMS function, etc.) will be determined by outside counsel in the preliminary moment of engagement, and entered into his mandate letter or agreement on counselling. This determination can be changed if the results of the internal investigation show the involvement of the ordering party in the concrete case. Such a clause in a mandate letter should be inserted in advance. As well as determining who the primary point of contact for the report is, the secondary point of contact should also be determined, in case, during the investigation, it is determined that the

primary point of contact is in any kind of conflict of interest, or even has direct involvement or interest. For example, if in a particular case outside counsel determines that there is involvement or conflict of interest on the side of the in-house attorney and senior executive, the correct contact for the report would be the fraud and AML function, as well as the supervisory board, the shareholder assembly and/or major shareholder; however, if there is involvement or conflict of interest on the side of the major shareholder, outside counsel will report to senior executive management, the supervisory board or the shareholder assembly, on which the major shareholder would not have the right to vote due to conflict of interest. Outside counsel must stay professional and independent, and perform his term of references, task and scope of activities only in the benefit of the entity.

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?

After an internal investigation, if it is determined that there was a criminal offence, the entity will file a criminal charge to the competent prosecutor against the person/persons who were deemed responsible. In an ongoing official investigation, the prosecutor, the court and the police may use the findings gathered in the internal investigation and deem it as legal evidence if it was properly conducted. In the event that a criminal procedure against the legal entity is an epilogue of the said official procedure, the enforcement authorities, including the court and the prosecutor, will take the conducted internal investigation and especially willingness to voluntary disclose the results of an internal investigation as a mitigating factor for the reduction of criminal sanctions, and render a conditional conviction and judicial admonition. If the legal epilogue is a criminal offence, for example tax evasion or tax fraud, and the entity itself, after an internal investigation, files the tax application and then pays the tax, the criminal proceedings will not be conducted and, if initiated, will be suspended.

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, a disclosure should be made to the enforcement authorities immediately if the internal investigation will discover a criminal act while it is still happening, since it could be stopped and/or prevented, or if an immediate threat to people or property exists, which can and has to be prevented. In such a case, the internal investigation engages with the entity it has been in contact with, and advises to immediately inform the enforcement authorities with different demands, such as obtaining a freezing order, stopping the money transaction, employment or construction inspection, 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?

Commonly, the report of the internal investigation is submitted in writing and contains facts finding non-conformities with different laws, statutes and corporate rules, a major violation of different laws, statutes and corporate rules, an explanation of the participants, interests, actions and omitted actions, an explanation and the implications of the decisions made and a proposal of legal procedures and actions, civil claims, criminal claims, etc. However, if such a report is written and the findings of the report are not acted upon or there were attempts to hide it, and yet it is still disclosed, there is a high reputation risk. When a criminal offence is stated in the report and is consequently not reported to the competent authority, it could result in legal consequences such as a criminal procedure against the person or persons who hid it, who failed to report the preparation of the criminal offence, or the offence itself, or who failed to report the perpetrator of a criminal offence. If the report and the findings of an internal investigation are in writing, this is evidence or, at the minimum, a starting point and source of valid information for the competent authority, individuals and stakeholders who may have interests in the process, victims and suspected persons.

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?

This question must be answered from a different perspective. In a civil law system, there is no obligation for the suspect (person or entity), who is the subject of a government investigation, to cooperate with the authorities, or to provide all the evidence to the authorities. In these cases and from that perspective, when defending, the entity will create its own strategy – a defence strategy at first and a parallel internal investigation if the entity wants to separate its own position as an entity from the position of the senior executives or the responsible persons or the company's body.

3.2 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 case of a formal law enforcement investigation of an entity's conduct, the limitation of the scope of a governmental investigation does not exist and the entity cannot define any limit or scope. The scope of an investigation is determined by the Criminal Code or similar statute as a legal basis for the action of the authorities. If during the law enforcement investigation some civil or human personal rights appear and need to be protected, the prosecutor or judge in charge will make a separate decision about that and the investigation will continue.

3.3 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 any cross-border case, whether a criminal investigation or civil investigation or procedure, the local authorities will cooperate and coordinate with the authorities in other jurisdictions. The basis for this cooperation differs and it could be on different levels of authority.

Cooperation can be bilateral or multilateral, for instance between the police authorities, or can be bilateral or multilateral between courts, prosecutors' offices, etc. The manner and kind of cooperation is determined by bilateral or multilateral agreements. Usually, the legal instrument that is used for cooperation is a request or notice for international legal assistance. In tax and customs matters, a direct exchange information relationship also exists. Entities in this kind of situation will make the strategy of cooperation according to their own estimation of their legal position in a particular case and legal situation – from full legal cooperation to a very restrictive defence strategy. If a defence strategy is chosen, the entity should engage defence counsel in each jurisdiction where the investigation will take place. Defence counsel will monitor the procedure. When requesting international legal assistance, the authority, before sending such a notice or request, will have to verify the following conditions: is the particular criminal act described in the request/notice a criminal act in the domestic country; are all requirements by domestic/local law fulfilled; does any political objection to the case exist; and do any local limitations in the disclosure of information exist, etc. Related with this matter, the local authority which is appointed for international cooperation will also look into the same conditions, and only if every condition is met will it give assistance. If something is missing, the local authorities will reply to our authorities and explain to them why they did not give assistance and will, potentially, offer instructions to repeat the request for assistance after fulfilment of the missing condition.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

When an investigation plan is created the following must be considered: which organisational unit and which persons in that organisational unit of the entity will be the subject of the investigation; what is the subject of the investigation; what constitutes the legal framework for the investigation; what is the scope of the investigation; what is the goal of the investigation; who will conduct the investigation and to whom the report will be submitted; the budget of the investigation; the timeframe; the framework for the order of activities such as the reading and control of documents, determining the relevant documents for the forensic process, if necessary, or implementing other forensic processes in relation to the circumstances of the case; like the use of IT; revision of fuel consumption; financial, including tax, implications; whether, in the specific case, all functions of the entity reacted in accordance with their internal obligations such as compliance, AML, etc.; and taking statements from witnesses and ultimately from persons who are possibly the target of an investigation. The final part of the plan is the drafting of the report, with fact-finding, including the discovery of major and minor legal non-conformity and/or violations, observations and opinions reserved for the next steps, initiating legal procedures, if any.

4.2 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?

In a situation where there is a suspicion of conflict of interest or even involvement of in-house counsel in a specific case or when a conflict of interest or even involvement is suspected in a permanent outside law firm that supports the business operations of the entity daily or when the entity simply wants to provide an independent professional investigation, the entity will decide to engage outside legal counsel to lead an internal investigation with a mandate to engage further with outside sources, such as forensic consultants, from a specific field of expertise, where appropriate. In certain situations, one of the reasons for engaging with outside counsel is the existence of a legal privilege, which does not exist when it comes to in-house counsel or outside consultant firms. The criteria for choosing outside counsel should be: the level of expertise in particular types of cases; experience and professionalism; integrity; independency; and work and business ethic.

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 our legal system, there is attorney-client privilege and similar attorney work privilege in every legal procedure including internal investigations. These privileges are recognised by courts, prosecutors and other authorities. Legal privilege is protected by law (including statutory law) and cannot be changed. For example, if in a criminal proceeding a lawyer is called upon as a witness, and if his testimony includes facts on his work as a lawyer, the acting judge will ask his client if he releases the lawyer from keeping secrecy, and if he does, the lawyer will be able to answer the questions of the judge and other participants in the proceedings. We have experience of this. In a criminal white-collar crime case, where we represented a legal entity, there was a legal question of who instructed the outside lawyer to draft the contract which created intentional damage to our client – the legal entity and the victim. The outside lawyer was engaged officially with our client, but it was unclear who really instructed him. Our client – the legal entity – informed the judge in the case in writing about the releasing of privilege and gave full authority to the judge to take a statement from the outside lawyer. We asked questions, too, and he was obliged by law to answer us.

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)?

In relation to interactions between the client and third parties engaged by outside counsel during the investigation (for example, an accounting firm engaged to perform a transaction test or a vendor collection of documents), there is no legal privilege. In this relationship, the contract defines business secrets and confidentiality. The disclosure of a business secret and confidentiality is in itself a particular criminal offence and a basis for compensation for damages. However, a business secret and confidentiality does not exist if its disclosure is required by the state authorities. In that case, the third party will have the status of a witness without any limitation or protection.

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

Legal privileges apply differently whether in-house counsel or outside counsel direct the internal investigation. In our legal system, in-house counsel only has the status of an employee and does not have any

legal privilege. Only outside counsel has the right of legal privilege according to law and Bar rules which regulate the status of lawyers.

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

Entities will protect privileged documents during an internal investigation by giving them to outside counsel for inspection and selection. If outside counsel does not share the documents with anyone, legal privilege is fully secured. If there is a need for part of the documents to be subjected to forensic expertise, outside counsel will carry out the selection of the documents that will be disclosed and will protect them by the laws concerning business secrets. In that case, the third party will have the status of a witness without any limitation or protection.

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 will keep all confidential information as confidential or secret only if it is defined as secret by the Criminal Procedure Code or by basic special laws such as the Data Secrecy Law. In this sense, they do not distinguish the data from the internal investigation and other data that they have obtained, but the criteria for keeping confidentiality are defined only by the aforementioned legal provisions.

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: the Constitution (basic human rights protection); Data Protection Law; the Criminal Code; the Criminal Procedure Code; the Code of Professional Ethics of the Serbian Chamber of Commerce; the Law on Protection of Business Secrets; the Civil Code (the part which refers to privilege and exemption from the obligation to testify); the Law on Whistle-blowers; the Law on Free Access to Information of Public Importance; the Law on Banks (the part which refers to bank secrecy); and Company Law (the part referring to business secrets). The General Data Protection Regulation (GDPR) applies to the processing of personal data of data subjects who are in the European Union by a controller or processor not established in the European Union, where the processing activities are related to the offering of goods or services, irrespective of whether a payment of the data subject is required, or the monitoring of their behaviour as far as their behaviour takes place within the European Union as well as to the processing of personal data by a controller not established in the European Union, but in a place where Member State law applies by virtue of public international law.

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?

Here it is necessary to distinguish whether the document is of a personal nature and represents information about a person protected by law, for example health records, a document which by its nature is property of the entity but is located with a particular individual, or a mutual document for the individual and the entity. Personal information is any information pertaining to a natural person, regardless of the form in which it is expressed, the information carrier it is stored on, on whose behalf the information is stored, the date of the creation of the information, the location where the information is stored, the method of finding the information (directly, through listening, viewing, etc., or indirectly, by inspecting the document in which the information is contained, etc.), or other properties of the information. In accordance with the Civil Law Code, if one party invokes the document and claims that it is in the possession of the other party, the court will invite the party that has the document to file the document and order a deadline for it. Such order will always be directed to the person/persons that has the document in question in his/her possession. A party cannot refuse the filing of a document if he/she invokes the document for proof of his/her allegations, or if the document is considered common with both parties. From the point of view of an internal investigation, a person may refuse to provide the documents that are only his/hers if those documents are only available to him/her.

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.)?

Having in mind that every jurisdiction has its own law and rules that govern the obtaining of documents, all of the above should be considered. In terms of bank secrecy, the Law on Banks usually prescribes which documents and data are considered public and can be provided, and which documents can be provided upon request of an authority. When data privacy is in question, the situation is the same. Data that is considered personal information can usually be provided only upon request of an acting authority, excluding the data that the entity has and is obliged to have by law. In a procedural sense, the manner of obtaining the documents must always be considered in the sense of addressing various foreign authorities, which documents can be considered public data, etc. The GDPR should always be addressed, having in mind its territorial (within the EU) and ex-territorial (outside of EU) applicability and its defining of personal data as any information relating to an identified or identifiable natural person, one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

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

The corporation's statutory documents, which will describe the rights and powers within the entity, labour contracts and management contracts, the rules of procedure and the job classification system, to determine who is responsible for what, who is authorised and the scope of authorisation, contracts and contract documents, signature specimens, cash flow and bank statements, orders and decisions regarding the particular case, the compliance programme, the internal anti-corruption programme, etc.

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

Internal resources of the entity, the collection of documents in electronic forms (.pdf, .jpeg, .mobi, .xlsx, .doc, etc.), if possible, if not, hard copies, the public register, private investigation of third parties and the entity in accordance with the law, and private evidence of witnesses as well as possible targets of the suspect.

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?

Artificial intelligence is in an embryonic stage locally. However, software of consulting houses that are part of the global networks and operating in Serbia are used, as well as predictive coding techniques such as JPEG-LS or DPCM, or similar.

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?

Taking statements before the initiation of official procedures is voluntary. None of the authorities have to be consulted if doing so. If the interviewee accepts, his statement is taken in accordance with the provisions of the Civil Law Code which can be given before the public notary or outside counsel who leads the investigation.

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 no obligation for the employees to cooperate whatsoever. Usually, in the course of an investigation it is suggested to the employees that in the event of cooperation they will have certain legal benefits, whatever the result of the investigation may be, and they will usually cooperate.

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, it is not required to provide legal representation to witnesses prior to interviews. If witnesses want to have legal representation, it is their call and costs.

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

When conducting witness interviews, the best practice includes three steps. The witness is firstly, with his consent, recorded in audio or video when making his statement on the matter. Secondly, the statement is transcribed in written form, which is provided for the witness to read and, if necessary, complete, add or amend. Lastly, such a written statement is certified before the public notary, with the presence of the witness giving the statement, and thus becomes an official document.

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

It must be with respect and appreciation, regardless of the position in a concise internal investigation or future official investigation. The witness has to be protected against insults, threats and any other kind of attack.

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

As stated in the previous question, a whistle-blower has to be treated with respect and appreciation and has to be protected against insults, threats and any other kind of attack. The employer is obliged, within the scope of his authority, to take measures to eliminate the identified irregularities in relation to the information obtained from the whistle-blower and he is obliged, within the scope of his authority, to provide protection from the harmful activity, as well as to take the necessary measures to stop the harmful action and to eliminate the consequences of the harmful activity.

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

If they sign it, and if it is not just the note of the individual who leads the internal investigation, it can definitely be read and altered, completed and explained.

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

No, it does not. Our jurisdiction does not require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations.

8 Investigation Report

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

The investigation report should be structured as below and provide answers, at the minimum, to the following:

1. The date of the report, who conducted the internal investigation, and on what basis (mandate letter or agreement).
2. Who gave the mandate for the investigation and with what scope.
3. Who participated and in what timeline it was conducted.
4. Which activities were undertaken.
5. Fact-findings and non-conformities with current domestic laws.
6. Major and minor violations.
7. Observations.

8. Opinions.
9. Recommendations for next steps and legal proceedings.
10. Depending on the concrete case, the structure of the report or the report in general can be extended or more focused.

    (The following main points should be covered: Executive Summary; Background; Scope of the Report; Looking Back; Key Takeaways; Structure of the Report; Regulation and Practice; Investigation; Purpose and Scope; Overall Conduct of the Portfolio Investigation; Methodology Regarding Customers; Methodology Regarding Employees and Agents (Possible Internal Collusion); Overview of Events; Organisational Overview; Acquisition; Operation; Termination; Investigation; Individual Accountability; Introduction; Overview; Board of Directors; Chairman of the Board of Directors; and Chief Executive Officer.)

Tomislav Šunjka
ŠunjkaLaw
Sremska Street No. 4/1
21000 Novi Sad
Vojvodina
Serbia

Tel: +381 21 47 21 788
Email: tomislav.sunjka@sunjkalawoffice.com
URL: www.sunjkalawoffice.com

Tomislav Šunjka is the founder and principal of the independent law firm ŠunjkaLaw in Serbia. His background is in business and transactional law, and everything connected with transactions, M&A and tax planning law, privatisation law, PPP law, foreign investment law, dispute resolution and complex litigation, and other business laws throughout the world. Because of this background, he understands very well the nature of transactions, bank transfers and financial arrangements and uses that knowledge as a tool in his practice of asset tracking and asset recovery. Tomislav Šunjka is a regional representative for Europe on the IBA's Anti-Corruption Committee, a member of the IBA's Asset Recovery Subcommittee, as well as an exclusive member for Serbia, the Balkan region and ex-Yugoslavian states in ICC FraudNet, a worldwide network of lawyers specialised in asset tracking and recovery. Tomislav is also certified as an auditor by Ethic Intelligence for ISO standards 19600 and 37001, Compliance Management Systems and Anti-Bribery Management Systems.

He has recently published articles in *Getting The Deal Through – Asset Recovery Review*, *The Asset Tracing and Recovery Review*, *Getting The Deal Through – Market Intelligence*, on the latest global trends within anti-corruption legislation and investigations, *Lawyer Monthly*, on fraud and asset tracing in Serbia and fraud litigation, *Diplomacy and Commerce Magazine*, on the UK Bribery Act and anti-corruption, business frauds and asset tracing and recovery, *TalkFraud* of ICC FraudNet ("Global Collaboration Falling Short"), and in many other publications. He regularly attends the IBA's Anti-Corruption Conferences, and C5's and ICC FraudNet's conferences, in the capacity of a speaker, panelist and moderator.

Tomislav Šunjka is fluent in English and Russian.

ŠUNJKA LAW ADVOKATSKA KANCELARIJA ATTORNEYS & COUNSELLORS AT LAW

ŠunjkaLaw provides fast, high-quality responses to legal issues combined with broad experience, integrity and independence, building trustworthy relations with each client, while maintaining a conflict-free environment.

The Firm's practice includes domestic and international business law, transactional law, banking and finance law, M&A and tax planning law, privatisation law, PPPs, corporate law, FDIs, domestic and international insolvency, dispute resolution, complex litigation, etc.

ŠunjkaLaw conducts corporate investigations for its clients: a thorough investigation of a corporation, organisation, or business with a view to finding what (if any) wrongdoing has been committed by employees, management, third parties, etc. Such investigations focus on defining the action, who is responsible for that action, if the client is at risk, and if yes, how to mitigate that risk and prevent damage (material and/or reputational).

The Firm has an exceptional practice and a proven track record in the field of asset tracing and asset recovery, performing thorough investigations in Serbia, other Balkan states and ex-Yugoslavian states, through the competent authorities, and beyond, through an acquired network of legal professionals around the globe, namely ICC Fraudnet.

The Firm participates in a number of projects in relation to anti-corruption and asset tracing and asset recovery matters: the IBA's Judicial Integrity Initiative, which has been undertaken to identify where national laws respond to the conduct identified as corruption by imposing sanctions on those who engage in the conduct; the IBA's Library of Local Anti-Corruption Legislation; the IBA's Anti-Corruption Committee project on negotiated settlements, which has the aim of providing the general public with up-to-date and usable information about processes regarding structured settlements for corruption offences; the IBA's Global Survey on the Role and Standing of Corruption Victims in Criminal Proceedings, which has the goal of promoting awareness, the use and development of civil asset recovery techniques in bribery cases; and the IBA's Submission to the Australian Attorney General's Department on Considerations of a Deferred Prosecution Agreement Scheme, etc.

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 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 as 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.

1.3 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. This is at the law enforcement authorities' discretion. In addition, if the entity is seeking to persuade the Public Prosecutor to consider a Deferred Prosecution Agreement, an important factor that would be taken account would be whether the entity had extended genuine cooperation during the authorities' investigations.

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. It is also common for an internal investigation to be 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. In such cases, 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. If the entity is seeking to persuade the Public Prosecutor to consider a Deferred Prosecution Agreement, an important factor that would be taken into account would be whether the entity had extended genuine cooperation during the authorities' investigations.

3.2 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.

3.3 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 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.

4.2 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. It is helpful to engage outside counsel that have specialist experience in dealing with investigations.

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 previously suggested 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.

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

Yes, they 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 as 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 to witnesses 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 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.

7.8 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 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 4.1 above.

Jason Chan
Allen & Gledhill LLP
One Marina Boulevard #28-00
Singapore 018989
Singapore

Tel: +65 6890 7872
Email: jason.chan@allenandgledhill.com
URL: www.allenandgledhill.com

Jason is the Co-Head of the Firm's White Collar & Investigations Practice. His practice focuses on commercial litigation and international arbitration. As a former prosecutor and judicial officer, Jason advises local and overseas corporations on regulatory and white-collar criminal compliance matters, including market misconduct, corporate fraud and corruption.

Jason is recommended by *The Legal 500 Asia Pacific* for his expertise in dispute resolution, where he is described as "*highly eloquent*" and "*extremely fast in sizing up any complex issues*". He has received numerous awards and commendations for outstanding advocacy.

Jason is a Council Member of the Law Society of Singapore. He also serves as a member of several committees of the Singapore Academy of Law, including the Law Reform Committee. Jason was admitted as an Advocate and Solicitor of the Supreme Court of Singapore in 2008.

South Africa

Marelise van der Westhuizen

Norton Rose Fulbright South Africa Inc

Andrew Keightley-Smith

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, namely the:

- Prevention of Organised Crime Act, 1998 (POCA);
- Protected Disclosures Act, 2000 (PDA);
- Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA);
- Competition Act, 1998 (the Competition Act); and
- Financial Intelligence Centre Act, 2001 (FICA).

There are a variety of consequences that may follow, depending on the specific statutory or regulatory obligation that has been contravened.

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 PRECCA sets out the penalties for committing any of the statutory corruption offences under the Act. 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 the above sanctions, 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.

Section 34(1) of PRECCA imposes a reporting obligation, in terms of which "persons in a position of authority", as defined in section 34(3) of the Act are required to report any of the corruption offences such as theft, fraud, extortion, bribery or uttering a forged document, involving an amount of R100,000 or more. It is important to note that this section imposes only a reporting obligation and there is no duty to investigate. The scheme of section 34 is such that it places the duty to investigate upon the investigating authority with the constitutional mandate to investigate crime in South Africa, namely the South African Police Service. However, it is generally advisable to conduct an internal investigation for purposes of understanding the circumstances of the offence and to prepare for the formal South African Police Service investigation.

1.2 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?

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 addition to investigations arising from allegations of wrongdoing, 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 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.

South African law does however impose, in terms of section 34 of PRECCA, an obligation 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 www.saps.gov.za/dpci/reportingguide.php, 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 the 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 the 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 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, there is no recognised means for an entity to help define or limit the scope of a government investigation. Refer to question 3.1 above.

3.3 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 becoming 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:

1. Set up an investigation team, consisting of internal and external advisers, and a steering committee.
2. Obtain local law advice on issues of data protection, privilege, witness interviewing and employment law.
3. Establish multiple but linked workstreams that feed into the main investigation. Decide whether to split the workstreams by jurisdiction, regulator or issue.
4. Preserve all relevant data. Data may have to be collected, processed and presented in different ways for different regulators in different jurisdictions.
5. 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.
6. 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.
7. Plan engagement with regulators initially and throughout the investigation.
8. Be clear on internal processes for gathering and approving the release of data.
9. Keep the accountable executive and steering committee fully informed throughout the investigation. This equips them to manage internal and external concerns.
10. Ask to see early drafts of information requests or subpoenas for comment before issue.
11. Consider potential remediation outcomes. This will assist in setting out the scope and process of the investigation.

4 The Investigation Process

4.1 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 (legal hold orders, 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-by-case 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.

4.2 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 (e.g. forensic consultants, auditors, local counsel, etc.) 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 cases of *Thint (Pty) Ltd v National Director of Public Prosecutions and others* and *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:

1. The legal practitioner must have acted in his/her professional capacity.
2. The client must have consulted the legal practitioner in confidence. This applies to all communications, whether written or oral.
3. The communication must have been made for the purpose of obtaining or giving legal advice.
4. The advice should not have been sought for an unlawful purpose.

There are two forms of recognised legal privilege in South Africa:

1. 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 are:

- ensuring that internal communications relating to advice obtained from external counsel is kept to a minimum;
- ensuring that investigation findings or advice is not provided to any third parties, which could result in the waiving of legal professional privilege;
- ensuing that written investigation findings are not shared too widely within the client's organisation;
- ensuring that all external counsel are engaged through attorneys; and
- considering and taking into account the legal privilege regulations of those other jurisdictions to which the investigation relates.

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 advisers 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, however many organisations are operating as if they were already in force. The Information Regulator was established in terms of the Act on 1 December 2016 and regulations were published for comment on 8 September 2017 and open for public comment until 7 November 2017.

One of the requirements under POPI is the mandatory notification of data breaches, under which the regulator and identifiable data subjects must be informed where there are reasonable grounds to believe that personal information has been accessed or acquired by an unauthorised person. The regulator may direct that a data breach be publicised if there are reasonable grounds to believe that publicity would protect a data subject who may be affected.

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.
- The legal privilege regulations of those other jurisdictions where documents are located.

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.

Aside from predictive coding, other best practices for reviewing voluminous document collections include:

- email threading;
- deduplication;
- DeNISTing;
- the use data analytics; and
- the application of keywords, date ranges and custom filters to documents.

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 and provide an Upjohn warning to the employee 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?

1. 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. Caution and provide an Upjohn warning to the employee.
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.
8. Remind the interviewee of their duty to provide complete and accurate facts.
9. 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.
13. Restate important questions to ensure that you receive accurate answers.
14. 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 1.2 above.

7.7 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.

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

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 or leaked, 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.

Marelise van der Westhuizen
Norton Rose Fulbright South Africa Inc
15 Alice Lane
Sandton
Johannesburg
South Africa

Tel: *+27 11 685 8863*
Email: *marelise.vanderwesthuizen@nortonrosefulbright.com*
URL: *www.nortonrosefulbright.com*

Marelise is the Chief Executive Officer of Norton Rose Fulbright South Africa Inc. She is a director in the commercial litigation team and was the head of the risk advisory practice in South Africa.

She focuses on regulatory law, investigations, risk advisory, compliance, money laundering and procurement.

Marelise advises the financial sector extensively on various aspects of regulatory law and in particular the implementation of and their continued compliance with the Financial Intelligence Centre Act and the Prevention and Combating of Corrupt Activities Act. She also advises global corporates, parastatals and development finance institutions on their preferential procurement frameworks and related litigious disputes.

Andrew Keightley-Smith
Norton Rose Fulbright South Africa Inc
15 Alice Lane
Sandton
Johannesburg
South Africa

Tel: *+27 11 685 8531*
Email: *andrew.keightley-smith@nortonrosefulbright.com*
URL: *www.nortonrosefulbright.com*

Andrew is an Associate Designate in Norton Rose Fulbright South Africa Inc's corporate and commercial litigation team based in Johannesburg. His focus is on investigations, business ethics and anti-corruption, risk advisory and compliance, and white-collar crime. Andrew has specialised expertise in eDiscovery, digital forensics, investigations and managing large-scale data reviews.

Andrew is also experienced in competition and anti-trust matters and has experience dealing with dawn raid and seizures conducted by South African regulators.

Andrew has acted on behalf of numerous multination companies in relation to cross-jurisdictional internal investigations, involving the UK Serious Fraud Office and the US Department of Justice, into allegations of corruption, corporate espionage, fraud and money laundering.

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 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 accordance with the **General Data Protection Regulation (GDPR/RGPD)** that came into force on May 25, 2018 and the drafting of the new **Organic Law of Data Protection (LOPD)**, pending to coming into force in the next months, whistle-blowers can file complaints anonymously. This possibility was not clear before the elaboration of such Law.

Thus, to assess the credibility of a whistle-blower, the following actions should be taken:

- Identify the whistle-blower's background and whether he/she is reporting for the first time or if he has done it previously. In such case, determine what happened in the former cases.
- Detect vagueness or consistency in the description of the facts.
- Check if other employees have reported connected events.
- Request supporting documentation or evidence to 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 a further investigation is needed or if it does not merit follow-up.

1.3 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 considered 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 during 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:

1. the willingness to cooperate after reporting and the extent of the cooperation;
2. the timing of the disclosure;
3. the nature of the conduct disclosed;
4. the pervasiveness of the conduct within the company;
5. 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.

However, this will be a case-by-case decision, depending on the circumstances.

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 even though 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 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.

3.3 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 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 they are 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.

4.2 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 (**Articles 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.* shed 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 is 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?

The first step is to identify which documents are privileged; then control the use and dissemination of the information and meet the requirements set forth in section 4.

However, protection may not apply when, within the context of criminal proceedings, the Judge instructs that the company be searched.

Please note that Examining Magistrates have 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 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.

The company is entitled to file and bring an appeal claiming the privileged nature of the documents seized.

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:

- **Directive 2016/680** of the European Parliament and of the Council of April 27, 2016 regarding 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. This Directive has been incorporated into Spanish Law with the **GPDR/RGPD** that came into force on May 25, 2018.
- Spanish Data Protection Act (**Organic Law 15/1999, of December 13**, for the Protection of Personal Data). A new **LOPD** has been drafted and its coming into force over the coming months is pending.
- Spanish Data Protection Regulation (**Royal Decree 1720/2007, of December 21**), that approves the Regulation that develops **Organic Law 15/1999, of December 13**, for the Protection of Personal Data.
- **Directive 95/46/EC** of the European Parliament and of the Council of October 24, 1995 on the protection of individuals regarding the processing of personal data 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?

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 in relation 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. That is to say, the data can be legally used as evidence in a future proceeding.

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 considered 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.

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 and now, after the reform of the LOPD that will come into force soon, the whistle-blower can preserve his anonymity. 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.

However, it is not commonly applied in Spain.

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

There are not any 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.

7.8 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 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:

1. 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.
3. Analysis of the investigation process, evidence collected and findings:
   a) Review of the compliance programme.
   b) 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.
5. Recommendations (if necessary).

Mar de Pedraza
De Pedraza Abogados, S.L.P.
Calle Antonio Maura 10, 3º
28014 Madrid
Spain

Tel: *+34 91 532 39 43*
Email: *mar@depedraza.com*
URL: *www.depedraza.com*

Mar de Pedraza is the managing partner of De Pedraza Abogados. Prior to establishing this boutique law firm in 2011, she worked extensively as a white-collar crime lawyer at some of the most prestigious Spanish and multinational law firms. She studied at the Universidad Complutense of Madrid (1996) and the Università degli Studi di Bologna (1995) and has been a member of the Madrid Bar Association since 1997.

Ms. de Pedraza specialises in white-collar crime (such as offences against financial and socio-economic interests, fraud, criminal insolvency, misappropriation, misrepresentation and falsification of documents, corporate offences, bribery, offences against the tax and social security authorities, among others) in corporate compliance and internal investigations.

Mar de Pedraza has been recognised as an expert by various directories and publications. She was the winner of one of *Iberian Lawyer*'s 40 under Forty Awards 2013, and is currently ranked in Band 2 by *Chambers Europe*.

Paula Martínez-Barros
De Pedraza Abogados, S.L.P.
Calle Antonio Maura 10, 3º
28014 Madrid
Spain

Tel: *+34 91 532 39 43*
Email: *paula.mbarros@depedraza.com*
URL: *www.depedraza.com*

Paula Martínez-Barros graduated in law from the Complutense University of Madrid (2008), and has been a member of the Madrid Bar Association since 2009.

Before joining De Pedraza Abogados (October 2015), she worked for several years at the international law firm Baker & McKenzie in the area of white-collar crime and corporate compliance. She holds a Master's degree in Business Administration (MBA) from the University of San Diego (California, 2015), focusing on Corporate Finance and International Business. She completed a semester exchange programme at SDA Bocconi School of Management in Milan. She also completed two "*Compliance Officer*" expert programmes from *Thomson-Aranzadi* (2016).

With business and law studies behind her, Ms. Martínez-Barros is specialised in white-collar crimes, the implementation of corporate compliance programmes of national and multinational companies, as well as conducting internal investigations (nationally and internationally).

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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 and Internal Investigations

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.

Sweden

Sandra Kaznova

Hammarskiöld & Co

Nina Sna Ahmad

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 rules or regulatory obligations relating to internal investigations in Sweden and there are no regulatory benefits. It may be wise to note that, pursuant to Chapter 9, Sections 42–44 of the Swedish Companies Act (SFS 2005:551), auditors have an obligation to notify the authorities if the auditors suspect that the Board of Directors or CEO has committed certain crimes such as fraud, embezzlement or tax crime, or if anyone in the organisation can be suspected of corruption crimes. The EU General Data Protection Regulation ("GDPR") should also be considered since corporate investigations may raise several issues regarding the handling of personal data and violations are sanctioned by high fines. Despite these obstacles, the number of corporate investigations taking place in Sweden is increasing.

1.2 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?

On 1 January 2017, a new Act on Special Protection Against Reprisals for Employees Reporting Serious Misconduct (SFS 2016:749) (the "Whistleblowing Act") came into force in Sweden. The act aims primarily at protecting employees in the private sector from monetary and social reprisals from their employers when disclosing information about serious irregularities, i.e. offences that may be sanctioned by imprisonment or corresponding irregularities. In order to be protected pursuant to the Whistleblowing Act, the employee must first have raised the concern internally without adequate response, or have been in a situation where it was for other reasons motivated to go public. An employer who punishes whistleblowers may be held liable in damages.

Public sector employees have a long-standing right according to the Swedish Freedom of the Press Act (1949:105) to communicate secret information to journalists, the media or news agencies with the purpose of publication, without being punished. It is a crime to try to find out who communicated with the media. There are certain exemptions, for example, relating to state security.

The credibility of a whistleblower's complaint must always be assessed on a case-by-case basis. Some factors to consider are, *inter alia*, the details provided, the position of the employee, if the information has been obtain first-hand or by hearsay, the seriousness of the suspected misconduct, the company's exposure if the allegations are true and the risk related to not conducting an investigation, and if there is any potential motivation for the employee to bring forward such allegation, etc. When setting up a whistleblower system where concerns can be reported anonymously, it is therefore advisable to provide for a mechanism that enables the recipient to get back to the reporter with follow-up questions.

1.3 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 usually the company. Findings are typically reported to the Board of Directors, but depending on the nature and seriousness of the allegation the Board can nominate another corporate body or other trusted persons within the company to be in charge of the investigation. For example, an in-house counsel may, in many cases, be the right person to direct an investigation, but it could also be risk management or internal compliance functions.

For the purpose of maintaining the independence and integrity of the investigation, the officers and/or employees against whom the allegations have been made, or any other person that may have conflicting interests, should always be excluded from taking part in directing the investigation or having access to such material.

There is often a risk for internal conflicts in an investigation. Where external counsel are engaged to conduct the investigations, clear instructions should be given in an engagement letter or similar before the start of the investigation. Instructions should include, for example, the scope of the investigations, who will be in charge of the investigation on behalf of the company, who else should be informed about the investigation, as well as the forms for reporting back findings.

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 leniency mechanism provided for by Swedish law. In general, leniency is not part of the Swedish legal system, competition law being the main exception. In cases where a court is to decide the level of corporate fines for crimes of corruption, the fines may be set lower if the concerned company has acted to prevent the damaging effects of the crime or reported the crime voluntarily. However, in an international comparison, the levels of corporate fines are very low in Sweden. Today, the level of fines range from SEK 5,000 (approx. EUR 500) to SEK 10 million (approx. EUR 1 million).

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 the exemption of suspected money laundering and very serious crimes such as murder or gross assault, companies are not under any legal duty to report findings about possible criminal acts to the Swedish authorities. External counsel are, according to Swedish law, obliged to report suspicions of money laundering to the police, unless of course when acting as defence counsel.

Even where there is no legal obligation to do so, we would typically advise companies to report findings that indicate that crimes may have been committed to the police or prosecution agency, so that it is clear internally that the company acts firmly against any criminality and also in order for the company to maintain public trust.

In addition, companies operating under the supervision of the Swedish Financial Supervisory Authority have a duty to report crimes by leading officers and other major operational or security incidents to that authority. With respect to publicly listed companies, a duty to disclose could be at hand, given that the information is of a nature that could affect the market price of the companies' shares.

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 obligation to report findings of an internal investigation in writing; however, this is normally the case. A written report typically describes the instructions and scope of the investigation, the methods applied, steps taken, issues that have been considered, analysis and often recommendations. A written report also facilitates the follow up of recommendations and reduces the risks for misunderstandings. Prior to presenting the final written report, it may be useful to give an oral presentation for the purpose of presenting and discussing the main findings. Ultimately, it is for the client to decide the method of presenting the findings.

The attorney-client privilege is strong in Sweden and applies to any reports or correspondence exchanged between external legal counsel and its client, including material that has been provided to external legal counsel for the purpose of performing its assignment as legal advisor. There is no such privilege for in-house counsel. This is one of the main reasons why it is advisable to use external legal advisors for corporate investigations.

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 to liaise with local authorities before initiating and conducting an internal investigation. The question of whether it is advisable to liaise with local authorities must be assessed on a case-by-case basis. For companies under the supervision of the Swedish Financial Supervisory Authority, it may, for example, be a strategic advantage to be the first mover and contact the authority before the authority initiates its own action.

3.2 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 Swedish company does not have any legal right to help define or limit the scope of an investigation by enforcement authorities, but it may try to influence the investigation by presenting well-motivated views and acting in a cooperative manner.

3.3 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?

The Swedish authorities cooperate with enforcement authorities in other jurisdictions, e.g. in the EU and the US. An entity facing investigations in multiple jurisdictions should, as soon as possible, set a global strategy and structure for how these processes can be coordinated internally, including sharing of information and communication strategies, so as to ensure that all actions are, as far as possible, aligned.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

Bearing in mind that each corporate investigation is different, the following steps are, in general, included in an investigations plan: determining the scope of the investigation, the methodology and the timing; determining the corporate body leading the investigation and the contact persons; identifying who may have relevant information; and deciding the method of communication externally and internally, the methods to gather information and evidence (collection of written evidence, collection of oral evidence through interviews, etc.), the resources required (such as IT forensic consultants or other experts), and how the reporting of findings should be made during the investigation and the final product.

4.2 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 is no obligation, under Swedish law, to elicit outside counsel for the purpose of conducting internal investigations, but it is often advisable in order to ensure that the investigation is truly independent and objective and enhances its legitimacy. Having external counsel conducting the investigation can also be a way of handling and mitigating internal conflicts. Assigning external legal counsel also has the important benefit of assuring that the work can be protected by the attorney-client privilege. In retaining outside counsel, one should consider the counsel's expertise in the fields that are relevant for the investigation, the counsel's experience and if there is mutual trust. Where an investigation includes the review of large amounts of data or where there is the need to trace lost data, it is typically advisable to retain forensic consultants or similar. In addition, financial expertise may have to be retained in order to review book-keeping documents and evaluate pricing mechanisms and similar transactions that are identified as questionable, etc.

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 is regulated in the Swedish Procedural Code. Provided that a counsel is a member of the Swedish Bar Association, the privilege applies to matters confided to the counsel in their professional legal capacity and covers information provided in any format. The scope of the privilege is, in principle, the same within different areas of law. The privilege can be waived by the client by consent and a few derogations from the privilege have been regulated in Swedish legislation in specific cases, such as when a counsel suspects activity related to money laundering (see question 2.2 above).

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)?

Interactions between a company and a third party are, in general, not afforded legal professional privilege.

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

The attorney-client privilege is only recognised for counsel who are admitted to the Swedish Bar Association (*Sw. Advokat*). Swedish law does not permit in-house counsel admission to the Swedish Bar Association due to the state of dependence to its employer. Consequently, legal professional privilege does not apply to correspondence or internal investigations conducted by in-house counsel.

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

During an internal investigation, documents/reports produced by external counsel and correspondence between the company and external counsel are protected by the attorney-client privilege. This applies both to documents that are in possession of counsel and to documents in the client's possession. Any documents or other correspondence sent to the client during the investigation should be clearly labelled "attorney-client privileged" for the purpose of making it very clear to the authorities that the material is protected. Documents produced by the company internally within the framework of the investigation are not privileged.

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 Swedish Public Access to Information and Secrecy Act (SFS 2009:400), information that an authority keeps is accessible to the public unless there is a particular rule providing secrecy. There is no general right of secrecy that applies to information provided as a result of an internal investigation, but several other secrecy rules may apply. For example, information that is part of a state criminal investigation is typically protected at least during the investigation period. Also, companies may claim secrecy for information provided to the supervisory authorities, such as the Financial Supervisory Authority or the Competition Authority, if it may be assumed that the company would suffer damage in case the information is disclosed. Before submitting sensitive information to the Swedish authorities it is advisable to inquire whether and to what extent there are applicable secrecy rules. When sensitive information is submitted to the Swedish authorities, it should be very clearly stated that the company claims secrecy and on what grounds. The agency will then make its own assessment.

6 Data Collection and Data Privacy Issues

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

The applicable data protection regulation is the GDPR, which entered into force on 25 May 2018. The Data Inspection Board is the public authority in Sweden that is entrusted with monitoring compliance with, among other laws, the GDPR.

According to Article 10 of the GDPR, the processing of data relating to criminal convictions and offences shall be carried out only under the control of an official authority or when the processing is authorised by European Union or Member State law. The Data Inspection Board has been authorised by the Swedish government to issue regulations in which exemptions are made from Article 10.

In relation to corporate investigations, the Data Inspection Board has issued regulations enabling companies to conduct internal investigations and process data regarding suspected criminal offences within a whistleblowing system, without having to apply for special permission from the Board (DIFS 2018:2). However, this exemption from Article 10 is rather limited since it only applies to situations where allegations are made regarding *serious* misconduct by *senior officials* or *key employees*.

Any other processing of data relating to criminal convictions and offences would require that the Data Inspection Board gives its permission to the processing in the specific case.

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 to prepare and issue formal document preservation notices but the company may, of course, instruct its directors and employees to be careful to keep certain 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.)?

The GDPR contains certain rules concerning the transmission of data to (or access to data from) countries outside the EU/EEA. Such transmission is subject to special considerations, e.g. if the European Commission has determined that the country in question has an "adequate level of protection" for personal data, if the transfer is subject to appropriate safeguards (e.g. "binding corporate rules" within a business group or so-called "standard data protection clauses" adopted by the European Commission), or if the data subject has given its express consent to such transfer.

In addition to considerations pertaining to data privacy, local laws must be observed in each jurisdiction.

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

Sweden does not have any tradition of companies cooperating with the authorities in internal investigations, and hence Swedish enforcement agencies have not adopted any recommendations concerning internal investigations.

From the company's perspective, it must be assessed on a case-by-case basis what documents should be collected. Relevant information could typically include contracts, internal auditing, financial reports, internal policies, email correspondence, meeting minutes and notes, back-ups from hard drives, cell phones, information from the whistleblowing system and information from social media, etc.

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

Documents of interest and relevance for the investigation should be collected as soon as possible for the purpose of minimising the risk of the destruction of evidence. The relevant documentation to collect is usually identified by those at the company who are in charge of the investigation together with external counsel. When such a request list has been prepared, the company usually collects the material itself and provides it to external counsel.

IT forensics are often engaged and involved in facilitating the collection, sorting and analysing of data in corporate investigations, where copies of hard drives, email accounts or other data in high volume restored digitally have been identified as important to collect, as well as in the recreation of lost 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?

Predictive coding techniques are permitted in Sweden. The technique is typically used in corporate investigations involving high volumes of data, such as cartel investigations, where key words and key phrases are used to sort and prioritise the data to help identify relevant documents for the investigation to be examined.

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 requirements to consult the authorities before 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?

A general principle in Swedish labour law is the duty of loyalty, a duty which emanates from the contract of employment. This duty obliges the employee to report certain circumstances to the employer. The obligation to report to the employer arises when the employee is aware of circumstances of criminal activity or other serious misconduct at the workplace relevant to the employer.

In addition to the obligation to report, the employer has a right to lead and direct the work carried out at the workplace. As long as the employer is not exceeding this right, the employees are required to conform to the employer's orders and guidelines. This includes cooperating in internal investigations and participating in witness 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?

There is no legal obligation to provide legal representation to a witness prior to interviews.

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

- It is important that the witness is aware of the purpose and aim of the investigation, which persons will have access to the contents of the statement and in what ways the statement might be used. The persons conducting the interview should also make it clear to the witness who they represent.
- Witness interviews are usually documented in writing; sometimes the audio is recorded subject to consent from the witness.

- If the witness will be confronted with accusations of criminal acts or other serious misconduct that may result in serious adverse personal consequences, the witness should be advised to seek assistance and be represented by his/her own counsel.

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

In Sweden, the interviews are non-confrontational and rather informal where the witness is encouraged to answer questions to the best of his/her ability. It is not permitted to record audio or video without prior consent from the witness.

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

The interview should be carried out in a manner no different from any other interview in the investigation. The company should ensure that the whistleblower is made aware of his/her rights under the applicable legislation and execute the interview in a manner which does not implicitly create fear of reprisal for the whistleblower. As set out in question 1.2 above, the Whistleblowing Act prohibits companies from punishing whistleblowers.

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

There is no legal right for employees to review or revise statements they have made in an internal investigation, but they are often permitted to read them and provide comments. In some situations it may be useful to ask the employee to review the notes from his/her interview and approve them by signature, in order to preserve evidence. If an employee wishes to revise a statement, this could, depending on the type of comments, either be done as a revised version of the interview notes or as a separate addendum. To the extent the statements include personal data, the employee may claim a right, pursuant to the GDPR, to be informed about what personal data is being kept.

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

There are no such legal requirements.

8 Investigation Report

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

The general structure and topics in a report would typically include the following: (i) introduction; (ii) background; (iii) scope of the assignment; (iv) method; (v) executive summary; (vi) account for the findings and analysis; and (vii) conclusions and recommendations.

Sandra Kaznova
Hammarskiöld & Co
Norra Bankogränd 2
SE-111 30 Stockholm
Sweden

Tel: +46 70 881 0558
Email: sandra.kaznova@hammarskiold.se
URL: www.hammarskiold.se

Sandra Kaznova is a partner and head of Compliance & Investigations at Hammarskiöld & Co. Ms. Kaznova advises public, private and state-owned companies on all aspects of corporate governance and compliance, with a focus on anti-corruption and corporate governance. She is entrusted with several appointments as external contact person in corporate whistleblowing systems. Ms. Kaznova is an experienced litigator and has conducted several complex corporate investigations about suspected corruption, fraud and other wrongdoings, in Sweden and abroad, including, for example, in Eastern Europe and Asia. Ms. Kaznova is the author of various articles on corporate governance and anti-corruption in Swedish and international publications.

Nina Sna Ahmad
Hammarskiöld & Co
Norra Bankogränd 2
SE-111 30 Stockholm
Sweden

Tel: +46 70 894 1606
Email: nina.snaahmad@hammarskiold.se
URL: www.hammarskiold.se

Nina Sna Ahmad is an associate at Hammarskiöld & Co. Ms. Sna Ahmad advises both Swedish and international clients on a broad range of the firm's practice areas, with a special focus on mergers and acquisitions and compliance and investigations. Ms. Sna Ahmad has assisted in a number of corporate investigations related to competition, cartels, fraud and other misconduct.

HAMMARSKIÖLD & CO

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Hammarskiöld & Co has extensive experience in a broad range of corporate investigations, corporate governance, risk management and compliance issues, including those associated with anti-corruption laws, competition laws, market abuse and other securities laws, as well as laws and regulations targeting specific industries.

The firm was one of the first in Sweden to organise a multi-practice Compliance & Investigations department dedicated to matters concerning the prevention, detection and resolution of potential violations of laws, regulations and company policies. The group has acted in several high-profile investigations, for example the investigation regarding the Swedish Academy and the Swedish Pensions Agency's investigation into suspected fraud and embezzlement issues connected to Falcon Funds Sicav. Hammarskiöld & Co's Compliance & Investigations group is one of the most important practice areas for the firm.

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?

Swiss law does not impose direct obligations on companies to conduct internal investigations. However, duties to cooperate with and provide regulatory authorities with accurate information can indirectly compel them to do so. The Swiss Financial Market Supervisory Authority ("**FINMA**"), for example, frequently orders regulated entities to explain incidents and produce documents relating to matters under its supervision, and the entities are also under an ongoing obligation to immediately and proactively notify material events. The stock exchange, SIX Swiss Exchange, imposes a similar *ad hoc* notification requirement, and financial intermediaries have duties to investigate and report suspicious activity to the Swiss Money Laundering Reporting Offices. Conducting an internal investigation is often the only way to gather information and comply with such duties, and sanctions for non-compliance can be serious. Providing FINMA incorrect information, even if only negligently, is a criminal offence attracting a fine of up to CHF 250,000, while intentional non-compliance bears a maximum sentence of three years' imprisonment. Sanctions against the entity can go as far as the regulatory authority revoking an entity's licence to engage in business, particularly if it fails to remediate the conduct in issue.

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 a proactive and early decision to investigate, entities have the advantage of preserving a degree of control over their investigations, and give themselves time to prepare responses to any government or media enquiries before they arise.

Another incentive to investigate is that the Swiss Criminal Code ("**CC**") imposes corporate criminal liability for failure to take adequate measures to detect or prevent the commission of offences within an organisation. A legal entity may thus be convicted for failing to implement reasonable measures to prevent an exhaustive list of catalogue offences (known as primary corporate criminal liability); or, if the organisation does not have adequate corporate and compliance structures to identify the natural person responsible, it can be made (secondarily) liable for any felony or misdemeanour committed during the ordinary course of its business. The criminal prosecution authorities recently rewarded a company's proactive initiation of an internal investigation, cooperation with the authorities and its implementation of compliance measures by treating these as mitigating factors at sentencing (*cf.* question 2.1 below).

An entity's board of directors and its executive organs also have duties of care under company law, which can require them to set up compliance and control systems to detect, investigate and remediate misconduct. In addition, key employees, such as senior management or compliance officers, may be held criminally liable for failing to take action to prevent criminal conduct within the organisation.

A specific benefit to conducting an internal investigation in competition law is that a statutory leniency programme can grant companies complete or partial immunity from sanction if they report unlawful restraint of competition before others do.

1.2 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 investigate – will depend on the circumstances. Normally, an entity should take immediate measures to preserve relevant evidence, investigate the facts and document the steps in its investigation. If the complaint is 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. From a compliance perspective, it is considered best practice for entities to establish reliable avenues for their employees to report suspected misconduct free from risk of reprisal. Terminating a whistleblower's employment solely because he has made a complaint can constitute unfair dismissal with potential consequences under civil law.

1.3 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, as a result, whether its findings are reliable.

To ensure the reporting relationship is free of internal conflicts, employees or third parties who were involved in the matters under investigation or who are otherwise personally interested in its outcome should not lead or be part of the investigation team. This should apply regardless of whether the person is an in-house attorney, senior executive or major shareholder. Outside counsel should be granted full and free access to the entity's internal records and to its employees, so that it can make recommendations as to the composition of the investigative team.

Outside counsel should then report its findings to specific individuals or a steering committee who have been designated responsibility for the supervision, strategic direction and overall coordination of the investigation. 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. In 2017, 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 rewarded by the authorities reportedly reducing the penalty imposed from CHF 3.5 million to the symbolic sum of CHF 1. As is usually 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. Once the authorities are involved, the company will no longer have autonomy over the investigation and will be forced to react to external pressures and unknowns. The following considerations can influence the timing of a self-disclosure: any disruption that disclosure could cause to the fact-finding process; the desirability of state support in securing evidence, freezing assets or interrogating and apprehending 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 fully cooperate 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 relevant facts would demonstrate the greatest degree of transparency, cooperation and contrition on the part of the company.

Even though reports prepared by external lawyers may be fully or partially privileged from disclosure, the risks associated with written reports are that the findings may nonetheless be used against the company in domestic or foreign legal 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. This risk is less pronounced with oral reporting. A report may also contain information belonging to or affecting the rights of employees and third parties. Any unauthorised disclosure of the report and resulting breach of employee and third-party 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 to do so. Being in contact and maintaining good relations with the authorities can generate goodwill and potential credit at sentencing. The authorities can also be a valuable source of information regarding developments such as planned coercive measures, involvement and collaboration with foreign authorities, etc. In a best-case scenario, an entity may, for example, be able to minimise the disruption caused by a dawn raid by agreeing mutually beneficial terms for producing evidence in advance. If entities investigate in parallel to the authorities, they risk frustrating the government's fact-finding and, at worst, expose themselves to allegations of tampering with or destroying evidence.

3.2 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 that usually have the power to order internal investigations. Regulators will usually define the scope of an investigation but it may be possible to discuss with them and agree on a reasonable scope, the most efficient methodology in reviews and realistic reporting deadlines. While law enforcement entities will usually not involve themselves much or at all in an entity's own internal investigations, we have noticed a trend following the US model for investigations, such that Swiss authorities may also expect to be more involved in purely internal investigations in the future.

3.3 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 multitude of treaties and legal provisions covering the Swiss enforcement authorities' capacity to cooperate with their international counterparts. Particularly in recent times, we have observed an increase in cases involving international cooperation and coordination (e.g. numerous tax evasion matters involving Swiss banks, the FIFA scandal in which officials were arrested in Zurich, or the multi-jurisdiction investigations in the Petrobas/Odebrecht affair, etc.).

Where an entity is investigated by several authorities in multiple jurisdictions, it is almost always 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 vary depending 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 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 address the following: (i) identification of an investigative team; (ii) reporting milestones (including the structure and format for reporting); (iii) interim or immediate measures (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 external counsel and experts; (viii) substantive interviews; (ix) preparation of investigation reports; and (x) communications with the authorities and the media.

4.2 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 engage outside counsel, they should do so early on in an investigation to maximise the procedural protection over the communications and work product generated during the 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. For cross-border investigations, it is also worth noting that Swiss in-house counsel do not enjoy legal professional privilege (*cf.* question 5.3 below). 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 cross-border 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, in principle, 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 involved but, typically, it only applies to lawyers registered to practise law in Switzerland 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 the conduct of internal investigations can potentially qualify as the provision of typical legal services, caution is required in investigations involving statutory anti-money laundering ("**AML**") obligations and general regulatory banking compliance obligations. Recent case-law of the highest Swiss court, the Federal Supreme Court ("**FSC**"), has held that work product created in such investigations will not necessarily enjoy blanket legal professional privilege if the client was under a statutory or regulatory obligation to take the investigative steps in any event. It remains to be seen whether this reasoning is applied beyond AML and banking compliance to investigations involving general controlling and auditing activities.

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 statutory obligations to keep records, such as under AML legislation.

Best practices to maximise the prospects of preserving 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 in-house counsel in civil proceedings is currently under parliamentary deliberation. 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?

As stated above, 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 products should be shared on a confidential basis and with a pre-defined circle of persons, on a "need-to-know" basis only. As a matter of practicality, privileged material should be marked accordingly and stored separately to make it easier to identify.

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, however, they are often 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 disclosure and criminal self-incrimination. FINMA, for example, has at times refused requests by criminal prosecutors to share internal investigation reports that have been provided voluntarily, on the basis that this would discourage cooperation in the long term and thus compromise its ability to supervise. 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. These provisions are currently subject to comprehensive statutory revision. Proposed legislative changes would exclude legal entities from the existing scope of data protection provisions, increase sanctions for non-compliance and introduce a duty to notify data breaches. The revised DPA is not expected to enter into force before 2020.

Provisions of the newly introduced General Data Protection Regulation ("**GDPR**") of the European Union may apply to Swiss companies to the extent that they process personal data in connection with the offering goods or services to data subjects in the EU or monitor their conduct within the EU.

Employment law provisions in the Code of Obligations also impose duties of care on employers, which may restrict the handling of employee data.

Swiss "blocking provisions" intended to protect Swiss sovereignty can also affect the collection and transfer of data from Switzerland. Article 271 CC, for example, prohibits foreign states from, either directly or indirectly, performing any act which falls within the exclusive competence of the Swiss public authorities, including taking evidence in Switzerland. As a result, collecting documentary or oral evidence in Switzerland can require government authorisation.

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 as it ensures compliance with obligations in other jurisdictions. It follows that there are no Swiss formal requirements on how such notices are issued, although data protection rules 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.)?

With each jurisdiction, a separate set of rules on data privacy, employment law, legal professional privilege, confidentiality and, potentially, blocking statutes must be considered. A time-consuming process in cross-border investigations is ensuring that the collection, transfer and use of documents complies with the requirements in each applicable legal system. 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.

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 third-party 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, redaction and production.

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 is to plan carefully and make contemporaneous records of important decisions made during the review process and why they were made. Once data for review is collected on a processing platform, the search criteria should be defined based on the investigation's objectives. The review process should be guided and supervised by qualified lawyers to ensure compliance with the applicable law and to ensure the legal issues in the investigation are addressed.

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?

Swiss employment law does not impose specific rules on how to conduct employee interviews. Pursuant to its general obligations and duties of care, an employer must respect its employees' personal rights. The ground rules for conducting an interview should always be fairness, objectivity and respect for the interviewee. General data protection provisions apply to interviews with third parties such as former employees. Using the evidence from Swiss interviews in foreign proceedings may breach the blocking provision in article 271 CC unless prior government authorisation is obtained. If the authorities are investigating the same matter, they may need to be consulted prior to the interview so as not to frustrate their fact-finding.

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 under a general duty of loyalty to their employer, which requires them to comply with their employer's instructions,

and under a duty to account for all their activities during employment by sharing all the products of their work (such as correspondence, analyses, contracts, etc.). These two obligations are widely recognised as entailing a duty to cooperate with the employer's internal investigations and to participate in witness interviews. In return, the employer must safeguard the employee's personal rights during the investigation, just as it is obliged to do during the ordinary course of employment. If an employee is targeted by an investigation and at risk of criminal prosecution, he arguably has the right to refuse participation or to answer specific questions pursuant to the privilege against self-incrimination. 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 conduct is in issue and he is at risk of criminal prosecution. In such cases, as a matter of good practice, the employee should be allowed the opportunity to seek advice, although 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. 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?

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. Pursuant to its general duty of care to employees, an employer may be obliged to take measures to protect a whistleblower's identity if there are reasonable grounds to fear an adverse reaction against the whistleblower.

7.7 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, minutes should be shown to the interviewee immediately or soon after the interview so as to avoid any misunderstandings or later disputes as to their contents. To reduce the risk of dissemination and protect the integrity and confidentiality of the investigation, the minutes should not necessarily be given to the employee.

7.8 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. There is also no requirement that a witness be legally represented. However, if there is a likelihood that a witness risks criminal sanction and/or incriminating himself during the interview, it is recommended that, as a matter of good practice, the interviewee either be advised that he can refuse to answer questions that would tend to incriminate himself and/or be given the chance to seek legal advice or representation. This is particularly so if the witness is an employee.

8 Investigation Report

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

There are no strict rules on how to structure an investigation report. Investigations pursuant to statutory AML and regulatory banking compliance obligations may benefit from separating the findings of fact from legal assessment in order to maximise the prospects. As a matter of best practice, a report should include the following: (i) an executive summary; (ii) the background to the investigation, its triggers, scope, purpose and the legal issues it addresses; (iii) a description of the document preservation, collection and review processes; (iv) a chronology of relevant facts; (v) the investigative findings from document reviews and interviews; (vi) an overview of the applicable legal and regulatory framework; (vii) legal analysis; (viii) conclusions as to responsibilities and liability; and (ix) recommendations for the 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.

Andreas D. Länzlinger
Bär & Karrer Ltd.
Brandschenkestrasse 90
CH-8027 Zurich
Switzerland

Tel: *+41 58 261 50 00*
Email: *andreas.laenzlinger@baerkarrer.ch*
URL: *www.baerkarrer.ch*

Andreas D. Länzlinger heads Bär & Karrer's Internal Investigations Practice Group and is one of the leading partners of the firm's Litigation/Arbitration Practice Group. He has extensive experience in handling complex banking/financing, commercial, corporate, contract and insurance litigations, both before Swiss courts and in cross-border proceedings. He and his team have conducted many large-scale internal investigations at global enterprises in the financial, pharmaceutical and construction business. He has represented a number of Swiss clients in mass tort litigation cases before US courts. During the last years, he has regularly advised and represented Swiss corporate clients regarding compliance questions and in investigations, including proceedings before US authorities (Department of Justice, SEC and FED), especially in matters under the US Foreign Corrupt Practices Act.

Sarah Mahmud
Bär & Karrer Ltd.
Brandschenkestrasse 90
CH-8027 Zurich
Switzerland

Tel: *+41 58 261 50 00*
Email: *sarah.mahmud@baerkarrer.ch*
URL: *www.baerkarrer.ch*

Sarah Mahmud is a part of the litigation, arbitration, internal investigation and cross-border proceedings teams. Her practice currently focuses on internal investigations and cross-border proceedings. Sarah has also practised in common law jurisdictions and is experienced in common law commercial litigation.

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- 2014 Citywealth International Financial Centre Award.

Taiwan

Michael T. H. Yang

Lee and Li, Attorneys-at-Law

Hsintsu Kao

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?

Article 23 of the Ethical Corporate Management Best Practice Principles for TWSE- and TPEx-Listed Companies states that TWSE- or TPEx-listed Companies should establish whistleblowing mechanisms, which formalise the reporting of misconduct, the investigation procedure, and the production of the findings report. Article 28-2 of the Corporate Governance Best Practice Principles for TWSE- and TPEx-Listed Companies also advises TWSE- or TPEx-listed Companies to establish whistleblowing mechanisms.

In addition, the Financial Supervisory Committee ("FSC") has issued a series of regulations (the "FSC regulations") this year according to which financial holding companies, banking institutions, insurance companies, and service enterprises in securities and futures markets are required to establish whistleblowing mechanisms. Failure to comply with the statutory obligations carries a fine.

1.2 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 law is silent on how an entity should assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary. In practice, we advise our clients that companies should define the criteria for a credible complaint and for launching an internal investigation in their whistleblower policy. A usually applied criterion is that whistleblowers must disclose their identities when reporting a complaint, but if the reported misconduct is specific with supporting evidence given, then the whistleblower may make the complaint anonymously.

According to local labour laws and the FSC regulations, the identity of the whistleblower must be kept confidential, and the entity employing the whistleblower is prohibited from discriminating or retaliating against the whistleblower and is required to properly inform the whistleblower of the conclusion of the investigation.

1.3 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 FSC regulations provide that an entity bound by the laws should designate an independent unit within the entity or outside counsel to conduct an internal investigation to ensure impartiality and independence of the investigation. The "client" of the outside counsel is the entity which retains the counsel for the investigation.

After an outside counsel interviews the accused employee or obtains information about the alleged misconduct by other ways, she should determine and advise the company who is related to the alleged misconduct and should thus be excluded from the reporting and investigation line of the alleged misconduct.

Individuals involved in or connected with a whistleblower's complaint, including the accused employee and interested parties, such as the spouse and close relatives of the accused who work for the entity, should be excluded from the reporting line.

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?

According to the Criminal Code, where the offender voluntarily turns itself/himself/herself in for an offence not yet discovered, the punishment may be reduced. Consequently, if an entity finds it has committed offences punishable by the criminal laws following an internal investigation and voluntarily turns itself in prior to the authorities' discovery of the offences, the court would reduce the punishment against 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?

According to the FSC regulations, the entity subject to the FSC regulations should report to the competent authorities if any violation of laws is discovered following an internal investigation. However, as malicious accusation is punishable under the Criminal Code, the entity is generally advised to make a criminal report only when there is justifiable evidence and reason for the entity to sincerely believe a crime has been committed.

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 findings of an internal investigation can be reported to the competent authorities orally or in writing. To prevent errors or inaccuracy, the entities are generally advised to make a written report which is prepared or reviewed by a competent outside legal 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?

The FSC regulations provide that the entity subject to the FSC regulations should report to the competent authorities if any violation of laws is discovered following an internal investigation. There is no obligation to report before starting an internal investigation. In practice, entities are generally advised to inform the competent authorities when they need government power to assistance them in evidence collection.

3.2 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?

For offences indictable only upon complaint, entities as the complainants could decide the scope of the complained misconduct and thus influence the scope of the government investigation. However, for other kinds of offences, the competent authorities have the authority and discretion and power on the scope and the methods of the investigation. The entity has no legal ground to influence or limit the investigation of the government. They can only communicate and negotiate with the competent authorities on how to proceed with the government investigation through experienced outside legal counsel.

3.3 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?

The Mutual Assistance in Criminal Matters Act ("MACMA") sets forth provisions governing international mutual assistance in criminal matters, including evidence investigation, witness interviews, search and seizure, and confiscation implementation. Foreign countries have to observe the MACMA when submitting requests to Taiwan's Department of Justice.

If an entity is facing investigations in multiple jurisdictions, it is generally advised to manage the investigations efficiently and maintain consistency in the information offered across the jurisdictions. For example, the entity may, by referring to the MACMA, request the competent authorities in multiple jurisdictions to conduct their respective investigations through Taiwan's Department of Justice.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

An investigation plan typically sets out the following:

1. The scope of the investigation.
2. The time frame of the investigation.
3. The process to be taken, including document collection and review, and witness interviews.
4. The analysis of the investigation.

4.2 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?

When the internal investigation involves potential criminal offences, entities are generally advised to consult outside legal counsel specialising in criminal laws and internal investigations at the first opportunity. Entities can rely on the outside legal counsel's knowledge and experience with criminal investigations and effectively respond to the competent authorities.

Depending on the scope of the investigation, entities may seek assistance from forensic consultants and other experts whenever the outside legal counsel deems necessary and appropriate. To preserve the attorney-client privilege, forensic consultants and other experts should be engaged by the outside counsel.

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?

Taiwan recognises the attorney-client privilege, but does not recognise the attorney work product doctrine. To preserve the attorney-client privilege, entities must not discuss the investigation with their outside legal counsel in the presence of unrelated third parties. In addition, forensic consultants and other experts participating in the investigation should be engaged by the outside legal counsel instead of the entities.

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)?

As stated above, communications between the client and third parties engaged by outside legal counsel during the investigation are protected by the attorney-client privilege. Engagement letters with third parties should clearly define the relationship between the outside legal counsel and the third parties.

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

The attorney-client privilege does not apply to in-house counsel. It only applies to outside legal counsel. So if entities seek such protection, outside legal counsel should direct the internal investigation.

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

As stated above, Taiwan does not recognise the attorney work product doctrine. However, to preserve privileges over documents which may be recognised in other jurisdictions, entities are still advised to retain outside legal counsel to direct the internal investigation and produce the 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?

Government authorities are bound to maintain the confidentiality of the investigation as required by the Code of Criminal Procedure and the Criminal Code. Consequently, the authorities should keep the results of an internal inquiry confidential during government investigation proceedings regardless of whether such results were submitted voluntarily by the entities.

6 Data Collection and Data Privacy Issues

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

The Personal Information Protection Act ("PIPA") governs the collection, use, transfer, and processing of personal data relating to individuals subject to internal investigations conducted in Taiwan. According to the PIPA, the use of the personal data gathered from the internal investigation should not go beyond the purpose of the internal investigation. In addition, the method of collecting the personal information should be fair and necessary.

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 specific rule governing the document preservation notice to individuals in Taiwan. However, Taiwan's Criminal Code and Code of Civil Procedure contain stipulations preventing the concealment or destruction of evidence.

Article 165 of the Criminal Code states that a person should bear criminal liability for destroying or concealing criminal evidence. Furthermore, Paragraph 1 of Article 282-1 of the Code of Civil Procedure states that if, in order to obstruct the opposing party's use of evidence, a party intentionally destroys or hides evidence or makes it difficult to use, the court may take as the truth the opposing party's allegation with regard to such evidence or the disputed fact to be proved by such evidence. Thus, if the entity cannot preserve the document, the worse outcome is that the court will find that the entity has hidden or destroyed the evidence intentionally and accept the opposing party's allegation.

In addition to the laws above, for protecting documents and potential evidence, our clients are generally advised to include in the employee work rules and whistleblower policy "document preservation" as an obligation of the employees.

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.)?

If the documents are personal data, international transfer of such data should follow Article 21 of the PIPA. Before transmitting personal data, the entity should consider whether: (1) the data involves major national interest; (2) any national treaty or agreement contains special stipulations; (3) the jurisdiction receiving personal information lacks proper personal data protection regulations; and (4) the international transmission of personal information would be made through an indirect method to circumvent the application of the Act. The competent authorities may restrict international transmission of personal data which falls within the aforementioned scope.

If the transmission of the documents would lead to disclosure of trade secrets, the Trade Secrets Acts may be violated. The entity should also consider whether delivering the documents to another jurisdiction will result in any criminal liability, exposure of national secrets, or national security issues.

The entity is generally advised to consult local counsel in the jurisdiction receiving and using the information on the legal risks before transferring the data internationally.

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

Any documents considered to be relevant to the suspected misconduct should be collected. They can be electronic communications, electronic devices (e.g. company smart phones or laptops), internal audit reports, payment records, internal messages, contracts, invoices, financial statements, and trade records.

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

The most efficient method of collecting documents during an internal investigation depends on the type of the suspected misconduct and the nature of the documents. Since more and more documents are in digital format, computer experts are more and more often required in an internal 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?

There is no e-discovery system or discovery procedure in the litigation procedure in Taiwan. However, no specific rule prohibits the use of predictive coding techniques in Taiwan.

In both civil and criminal procedures, parties could submit a report adopting predictive coding techniques as a piece of documentary evidence. However, if the counterparty denies the authenticity of the report, the submitting party should nevertheless request the court to summon the expert who conducts the predictive coding and drafts the report to testify as a witness in court to create the admissibility of the report.

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 law is silent on witness interviews for corporate internal investigations in Taiwan. Entities are not required to consult the authorities before initiating witness interviews. In practice, entities are generally advised to conduct witness interviews in a pleasant manner while being mindful of potential criminal offences, such as offences of intimidation and defamation, and offences against personal liberty.

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 no statutory requirement for employees to cooperate with their employer's internal investigation. In practice, our clients are generally advised to stipulate the obligation of cooperation in their employee work rules and whistleblower policy.

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 offer legal representation to witnesses prior to interviews for its internal investigation. Counsel should make it clear that they are conducting the interviews on behalf of the entities and prevent any misunderstanding of the witnesses during interviews.

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

Two counsels, instead of one, are recommended to conduct witness interviews. The interview is recommended to be held in an open room instead of a closed room. At the beginning of the interviews, the counsels should clearly inform the witness that they are conducting the interviews on behalf of the entity and they are not the witness's legal counsel and have no positon to give the witness any legal advice. After the interview, the two counsels should draft an investigation report and sign on it to attest its accuracy.

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

Taiwanese people are characteristically indirect in their expression and averse to criticising others behind their backs. Interviewers are thus advised to create a friendly atmosphere for the interviews and to gently encourage the individuals interviewed to provide helpful information by, for example, emphasising the importance of their assistance and their contribution by providing such information.

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

At the beginning of an interview, counsels should clearly inform the whistleblower that they are conducting the interview on behalf of the entities and thus prevent any misunderstanding of the whistleblower during the interview. Counsels should also explain to the whistleblower of the entity's policies and rules concerning the obligations and rights of whistleblowers. Counsels should, however, never give the whistleblower any promises without obtaining the entity's instructions to do so.

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

The laws do not require the entity to produce a written transcript or record of an employee's statement made in the internal investigation. Nor do the laws give employees any right to request to review or revise the written transcript or record produced by their employers. In practice, employees may review their statements to verify the accuracy before the interviews end. However, if such a written transcript or record does exist and the employee subsequently becomes a party in legal proceedings, she, in order to prove facts related to the legal disputes of the proceedings, may petition the court to order the entity to submit the written transcript or record of her statement made during the interview.

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

The law is silent on witness interviews for corporate internal investigations in Taiwan. So there is no statutory requirement that enforcement authorities or the witness' legal representative should be present during witness interviews for internal investigations.

8 Investigation Report

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

In practice, it is common to provide a brief summary report at the end of the internal investigation. However, whether to provide a formal report depends on the type and scope of the issues, the risk of disclosure, and the recipients of the report.

A formal written investigation report should include the background of the issue, methods of collecting the documents and evidence, the findings from the investigation, and conclusions. If necessary, the report should provide suggestions or analysis of the legal risks as well.

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Michael T. H. Yang
Lee and Li, Attorneys-at-Law
7F, 201 Tun Hua N. Road
Taipei 10508
Taiwan

Tel: +886 2 2715 3300, ext. 2230
Email: michaelyang@leeandli.com
URL: www.leeandli.com

Mr. Michael T. H. Yang graduated from the Biology Department of the National Taiwan Normal University, and then obtained his LL.M. and M.B.A. degree from the Law School of Soochow University and the Graduate Institute of Intellectual Property of the National Chengchi University. Mr. Yang then went to the George Washington University, acquired an LL.M. degree, and became a member of the New York State Bar Association.

Mr. Yang used to be a judge for 10 years and is very experienced in civil lawsuits as well as criminal litigation. After joining Lee and Li, Mr. Yang has assisted many clients in the investigation of corporate fraud and represented many clients in the filing of civil as well as criminal complaints against fraudsters. Mr. Yang also represented defendants of white-collar crimes in many well-known criminal cases and acted as the leading litigator in many famous civil lawsuits in Taiwan.

Hsintsu Kao
Lee and Li, Attorneys-at-Law
7F, 201 Tun Hua N. Road
Taipei 10508
Taiwan

Tel: +886 2 2715 3300, ext. 2268
Email: hsintsukao@leeandli.com
URL: www.leeandli.com

Ms. Hsintsu Kao is an associate at Lee and Li. Her practice centres around civil dispute resolution, copyright law, entertainment law, trademark protection, as well as prosecution and defence of white-collar crimes. She also has significant experience assisting clients in establishing whistleblowing mechanisms.

Ms. Kao is relied on by multinational corporations for representation in litigation, arbitration, and negotiation, and has extensive experience and knowledge in trademark protection. She has been successful in the prosecution and defence of white-collar crimes.

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Lee and Li, Attorneys-at-Law, the largest law firm in Taiwan, is known for its expertise in all legal fields and offers a full range of services, covering banking and capital markets, corporate and investment, trademarks and copyright, patents and technology, and litigation and ADR.

Lee and Li has the deepest and widest talent pool, which qualifies it to provide timely counselling. Lee and Li's services are performed by over 100 lawyers admitted in Taiwan, patent agents, patent attorneys, trademark attorneys, more than 100 technology experts, and specialists in other fields. Some of the members are licensed to practise law in multiple jurisdictions.

In the field of corporate investigations, Lee and Li assists many corporate clients in creating their whistleblower policies, acting as their point of contact for reports, and conducting their internal investigation. Lee and Li also acts on behalf of many corporate clients to pursue the criminal and civil liabilities of their employees who committed tortious and criminal offences against their employers. Because Lee and Li understands the needs of our clients, we are able to customise services to optimally serve our clients.

Turkey

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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?

This subject is not regulated under the Turkish Law. Absent any dedicated regulation, companies should make sure to address the attorney-client privilege (no legal privilege applies to in-house counsel), business secrecy, labour laws, influencing potential witnesses, privacy and data protection. Failing to address these issues will expose the entity to heightened risks in case of a raid by the enforcement authorities and potential criminal liability.

1.2 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 by the facts in each case. Under the Turkish Law, there is no provision regarding the statutory protection of whistleblowers or requirement for companies to have whistleblower procedures in place. There are no direct legal implications for dealing with whistleblowers. However, ignoring or mishandling a complaint may lead to a complaint being made to the public authorities, exposing the entity to certain risks. Entities must ensure the whistleblowers' anonymity, as well as the anonymity of the persons identified by the whistleblower in the alert, and the confidentiality of the information disclosed. Furthermore, entities must never act to impede the disclosure of an alert, and shall prevent retaliation against the whistleblower.

1.3 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 highest management of the company shall be regarded as "the client". It is quite probable that 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 during the course of the internal investigation. For this very reason, it is important to exclude any persons who have actual or potential conflict of interest when deciding which persons are authorised to give instructions and receive advice from the outside counsel.

Best practice is to put together an independent task force of relevant functions, limited in size to preserve confidentiality and which includes outside counsel, to anticipate communications with relevant authorities and preserve privilege.

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 Article 20 of the Turkish Criminal Code, no punitive sanctions may be imposed for legal entities. Under the Turkish Law, legal entities cannot have the standing of the Accused or the Defendant in a criminal investigation/proceeding and they cannot be prosecuted. Any legal person according to the Turkish Law can only bear the civil and administrative responsibility. In addition to this, self-disclosure is not a concept stipulated under the national legislation system and therefore the consequences of a voluntary disclosure shall be determined by the judge during the proceedings.

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 not any legal regulation or guideline pertaining to self-disclosure under the 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?

There is no obligation to report the findings during internal

investigations to the governmental authorities since the matter of an internal investigation is not regulated by the Turkish Law. Decisions regarding the reports of such findings could be made by the management of the entity; however, this is rarely practised in Turkey since it can lead to further investigations by the 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 legal requirement to liaise with local authorities before starting an internal investigation.

3.2 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 can only try to limit the scope of an investigation in case the enforcement authorities' actions fall outside the scope of procedural laws and norms. In such cases, the entities may raise objections against the actions of the authorities thereby limiting the scope of a government investigation.

3.3 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?

The number of cross-border internal investigations is on the rise, as entities are becoming more and more global every day. Being a party to many agreements and treaties as well as a member of different organisations, Turkey and its enforcement authorities can cooperate with the authorities of other jurisdictions in a wide scope of matters. If an investigation is commenced by the Turkish authorities and can affect the interests of a state which is also a party of such treaty, the Turkish authorities can provide assistance and exchange information. Therefore, entities should build multi-jurisdictional defence strategies. These strategies may differ for each company structure and mostly depend on the matter and the characteristics of the investigation.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

An investigation plan should include the following steps. Firstly, the company and its consultants should obtain information regarding the investigation; then it should: decide on the instant measures and protective steps that shall be taken; determine, preserve and collect relevant information (data collection, evidence preservation and document review) and analyse them; screen out internal protocols relating to investigations; ensure the coordination of the external service providers; communicate with law enforcement agencies; refer to witness interviews (i.e. employees of the company who know the relevant facts and/or who may have been involved) and take their statements; and, finally, report all evidence and advise for remediation.

4.2 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 depends on the facts of each case. The assistance of outside counsel is crucial where the company does not have in-house lawyers or a limited number of in-house lawyers. This has vital importance in respect of the local regulations, applicable law, local culture and satisfying the 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?

The Turkish Law protects the privacy of interactions between the attorney and the client. According to Article 58 of the Legal Profession Code, the offices of attorneys can only be searched upon a court decision and in the presence of a Public Prosecutor and a lawyer who is a member of the Bar. This regulation specifically aims to protect the confidential information of the client that is held by the attorney.

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?

There are no regulations on this matter under the Turkish Law.

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

As explained in question 5.1, there are regulations protecting the attorney-client privilege. Therefore marking the documents as "attorney-client privileged" or "privileged and confidential attorney work product" is essential for protecting such 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 are no regulations on whether the results should be kept or not if they are voluntarily provided. However, the results would become a part of the investigation file.

6 Data Collection and Data Privacy Issues

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

The Law on the Protection of Personal Data is the law which applies to internal investigations in the Turkish jurisdiction. Also, according to Article 20 of the Turkish Constitution, "everyone has the right to ask for protection of their personal 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?

There is no legal requirement; however, it is common for companies to issue a documentation preservation notice to individuals who may have documents related to the issues under investigation. The authorities will request all relevant evidence relating to the investigation such as hard copy documents and electronic documents. The reasoning of the investigation differs from case to case, but it should be evidently explained.

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.)?

Where the documents are located is important. Local legal assistance should also be sought. These factors must be considered specifically.

In Turkey, there are no statutes in relation to preventing the delivery of information. It should be noted that the reciprocity principle is important.

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 may contain relevant information can be requested. This includes emails, instant messages, audit reports, time records, personal records and any other data relevant to the allegations, provided that the collection of such data complies with the authority granted to the enforcement agencies under the law.

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

The company's servers are the most important resources. The expert services of computer forensic consultants should be sought. Important resources other than the company's servers 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?

There is no restriction on the use of predictive coding techniques in Turkish legislation. The judicial authorities do not use predictive coding techniques, but the enforcement authorities may use them. Keyword searches could also be used to analyse data. Also, special computer software may be used for quicker and better analysis.

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 regulations that apply to interviews of employees, former employees or third parties.

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 no specific obligation for an employee to participate in their employer's internal investigation; however, Article 396 of the Turkish Code of Obligations provides that employees shall act faithfully in protecting the employer's rightful interest. In practice, this provision shall be used to make sure all the employees attend the required 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?

No, there is no such requirement to provide legal representation prior to interviews. No one can be forced to be a witness on any case whatsoever. However, if preferred, witnesses could attend the trial with a legal counsel. This is the preferred course of action, especially for minors.

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

There are no regulations covering witness interviews. Yet, as referred to in Chapter 6, this shall be done in accordance with the laws regarding data protection.

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

There are some unwritten rules which need to be followed when it comes to participating in the proceedings. Assistance should be sought from a native Turkish speaker when conducting interviews.

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 shall agree that the company can share the information if and when requested by the judicial authorities.

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

Despite no legal requirement, it is best practice if employees are given the possibility to revise and withdraw statements that they have made. In such cases, the employees shall also explain the reasons of such revisions in writing.

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

No, there are no special requirements concerning witness interviews for internal investigations.

8 Investigation Report

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

Written investigation reports are common practice in Turkey unless this conflicts with the higher interest for confidentiality or anonymity.

Selcuk Sencer Esenyel
Esenyel|Partners Lawyers & Consultants
iTower, Merkez Mah.
Akar Cad. No.3 K.19 D.135
Bomonti, Sisli
Istanbul
Turkey

Tel: +90 212 397 1991
Email: selcuk@esenyelpartners.com
URL: www.esenyelpartners.com

Selcuk Sencer Esenyel is the founding partner of Esenyel|Partners Lawyers & Consultants and is a qualified lawyer admitted to the Istanbul Bar Association after completing his LL.B. in Turkey and studying for an LL.M. in the United Kingdom. He primarily focuses on maritime, admiralty, dispute resolution, banking and finance and asset finance and securitisation. He has acted for a wide range of clientele, from P&I Clubs to H&M insurers, to international banks, to ship charterers and owners. He is currently in charge of the Shipping, Finance and Litigation team in Esenyel|Partners Lawyers & Consultants.

United Arab Emirates

Morgan, Lewis & Bockius LLP

Rebecca Kelly

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 Securities and Commodities Authority ("**SCA**") and the UAE Central Bank. The UAE Central Bank and the SCA also issue circulars setting out 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 public sector in the UAE has a suite of laws that apply to their employees, and they will also be subject to the application of the UAE Penal Code.

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**") and the Abu Dhabi Global Market (the "**ADGM**"). UAE criminal law applies in the DIFC and the ADGM but the civil and commercial laws of the UAE do not, as the DIFC and the ADGM have their own set of commercial laws based primarily on the laws of England & Wales. This guide does not specifically deal with the jurisdiction or laws of the DIFC, the ADGM or any other free trade zones which may have additional regulations which will apply within those free zone entities.

1.2 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?

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 for the advancement of any criminal complaint, so the collation of appropriate material and existence of witnesses to provide written statements will be important, especially if the investigation gives rise to potential (and reportable) violation of the applicable laws and regulations.

1.3 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 the 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 for managing 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 cooperate 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 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.

3.3 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 steps should typically be included in an investigation plan?

Once notified, the organisation should establish a small and independent internal management team (comprising 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).

4.2 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 recognise 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 believes 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 confidentiality.

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's 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 and legal teams are used at the review stage to accurately identify relevant 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?

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 and or consent by the owner of the material. 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 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 knowingly delivering 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 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.

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

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, and containing any information about remedial steps that must be taken to prevent the issues arising again. As a report is not mandated by the authorities, companies should exercise caution when recording the methodology and outcome of the report and disseminating that information widely.

Rebecca Kelly
Morgan, Lewis & Bockius LLP
Office No. C, 10th Floor
Emirates Towers Offices
PO Box 504903
Sheikh Zayed Road, Dubai
United Arab Emirates

Tel: +971 4312 1800
Email: rebecca.kelly@morganlewis.com
URL: www.morganlewis.com

Representing both the United Arab Emirates (UAE) and international entities regionally and internationally as a litigation and regulatory specialist, Rebecca Kelly counsels clients on arbitration, litigation, corporate and regulatory compliance. Her clients include companies involved in the construction, finance, technology, education, healthcare, and pharmaceutical sectors, and they are based throughout the United States, Europe, Middle East and Asia Pacific. Over the past 14 years working in the Middle East, Rebecca has represented companies involved in global cross-border white-collar crime investigations, including guiding companies through FCPA and UK Bribery Act investigations as well as Middle East regulatory investigations. She is recognised as a leading legal expert in the Middle East.

Admissions / Qualifications:

Solicitor of the High Court of Australia.

Registered Foreign Lawyer with the Law Society of England and Wales.

Solicitor of the Supreme Court of Queensland, Australia.

Registered Advocate, Dubai International Financial Centre Court.

Lawyer, Legal Affairs of Dubai.

Queensland University, Australia, 2003, GDip Legal – Post Graduate Diploma.

Queensland University of Technology, Australia, 2003, Bachelor of Business (Distinction).

Queensland University of Technology, Australia, 2003, Bachelor of Laws (Hons).

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Chapter 31

USA


Jeffrey A. Brown


Roger A. Burlingame

Dechert 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?

Generally speaking, under U.S. law, there are very few statutory or regulatory obligations to conduct an investigation and the question of whether and when to investigate is typically left to the discretion of an entity's leadership. However, despite the absence of affirmative obligation, there are significant incentives under law for an entity to investigate any allegation or suspicion of misconduct. As a general rule, businesses that identify, investigate, and self-report misconduct prior to a government investigation may receive leniency in any subsequent enforcement action. Further, where a government investigation has started without a self-report, there can be similar benefits for businesses that conduct an internal investigation alongside and in coordination with U.S. authorities.

In certain limited circumstances, public companies and other highly regulated entities may be subject to statutory and regulatory obligations to conduct internal investigations, depending on the nature of the alleged or suspected misconduct.

For example, corporate officers of companies that are registered with the Securities and Exchange Commission (SEC) periodically certify that financial reports accurately reflect the registrant's financial condition. Accurate certification may require an entity to investigate any allegation of misconduct occurring during the reporting period that could materially affect the entity's financial condition. Similarly, member-entities of self-regulatory organisations (SROs) may be subject to SRO rules that require them to conduct investigations in certain circumstances. For example, the Financial Industry Regulatory Authority (FINRA) requires member firms to promptly investigate suspicions of insider trading.

In the broad range of circumstances where investigation is not obligatory but rather is discretionary in nature, regulators and prosecutors, including the SEC, Department of Justice (DOJ), Commodity Futures Trading Commission (CFTC), and Office of Foreign Assets Control (OFAC) grant leniency or cooperation credit to entities that investigate and self-report violations, or conduct an investigation alongside and in concert with the authorities.

1.2 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 appropriate response to a whistleblower complaint requires some degree of investigation, irrespective of any perceived lack of credibility. Companies that fail to investigate a whistleblower complaint because they choose to disbelieve the whistleblower take significant and unnecessary risk. Of course, the degree of investigation may depend in part on an assessment of the whistleblower's credibility, including an assessment of the whistleblower's role in the organisation, his or her direct knowledge of the events in question, and the existence or non-existence of corroborating information.

A company's response to a whistleblower complaint may impact whether U.S. authorities will choose to bring an enforcement action. For example, the SEC's Whistleblower Program, established under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), specifically encourages whistleblowers to report misconduct internally prior to approaching the SEC. This gives companies the chance to investigate. If the SEC, or any other U.S. regulator or prosecutor, believes a company given such a chance has not adequately investigated the complaint, it can increase the chance of enforcement action.

Whistleblowers employed by publicly traded companies are afforded significant protections under the Dodd-Frank Act and the Securities Exchange Act, among other regulations. Protection under the Dodd-Frank Act's anti-retaliation provision, however, is available only to whistleblowers who report the alleged misconduct directly to the SEC. Consequently, whistleblowers may be inclined to report to the SEC shortly after reporting internally, and companies should consider this factor in determining whether promptly to proceed with an internal investigation. Additionally, public companies may face civil or criminal liability for discriminating or retaliating against whistleblowers who provide information to supervisors or government officials.

1.3 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?

Attention to this question at the outset of any investigation is essential. The client should be explicitly defined at the start of outside counsel's engagement, and set out unambiguously in writing. Ultimately, questions regarding the identity and scope of the client are determined by the party seeking representation, and not by counsel. In the case of an internal investigation, the client can be the company itself, but is often the board of directors, or a sub-group of the board, such as the audit committee, whose mandate often includes the conduct of internal investigations. Where the company is the client, the company will often request that outside counsel represent both the entity and those employees of the entity whose interests are not divergent, which is appropriate and not objectionable. If there is even slight potential for corporate and individual interests to diverge, this issue should be identified early during the course of any investigation and the affected individuals should be advised to retain their own counsel, or counsel should be arranged for them. Often, similarly situated individuals needing representation separate from the entity can be represented jointly by "pool counsel".

Individuals whose conduct is, or may be, implicated in the investigation should not participate in the direction of the investigation and should not participate in 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?

Self-reporting is a significant factor in the calculation of what, if any, penalty to impose for misconduct. Regulators and civil and criminal enforcement authorities typically consider an entity's timely and voluntary disclosure in determining whether to bring a criminal or civil enforcement action against the entity. If a proceeding is ultimately brought, voluntary disclosure may be a significant factor in a regulator's decision to seek a reduced penalty.

For example, in evaluating the appropriate sanction, the DOJ, SEC, and CFTC consider an entity's self-disclosure and subsequent cooperation, which can include document production and assistance with employee interviews, as one of a number of relevant factors, including the nature and seriousness of the offence, the entity's history of misconduct (if any), the existence and effectiveness of the entity's compliance efforts, and the actions the company has taken in response to the misconduct.

Many regulators and prosecutors, including the DOJ, SEC, and CFTC, have recently adopted policies explicitly stating that in order to receive cooperation credit, an entity must identify all employees involved in or responsible for the misconduct and provide all facts relating to the 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?

If and when an entity becomes reasonably certain of misconduct constituting civil or criminal wrongdoing, it should consider self-reporting to capture the significant benefits of early cooperation credit and voluntary disclosure. However, while an investigation need not be completed prior to self-reporting, the entity and outside counsel (if any) should thoroughly understand the scope of the alleged conduct and the identity of the individuals involved to avoid incomplete or inaccurate disclosure that may diminish prospects for cooperation credit and unnecessarily increase regulators' scrutiny.

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?

Investigative findings need not be reported in writing. Oral presentations best preserve applicable privileges and permit interim reporting prior to reaching final conclusions, avoiding memorialising inconsistencies that can ultimately be resolved prior to the investigation's conclusion. However, when an investigation in a matter that has attracted attention and public scrutiny is complete and the findings are secure, a publicly available written report may be desirable for reputational or other reasons.

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 generally required to seek permission or otherwise confer with regulators before investigating. However, in certain limited circumstances where the entity is in a cooperative posture, regulators may make requests to the entity about contacting certain individuals in order to preserve the sanctity of the regulator's parallel investigation.

Although liaising with authorities is generally not required, it is often advisable, for the reasons described elsewhere in this chapter. An entity under investigation may benefit from disclosing the existence and preliminary findings of its internal investigation to the investigating authority not only because of eventual cooperation credit but also to help confine the contours of the outside investigation.

3.2 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?

Where regulators act within the lawful scope of their authority, a

corporate entity has little ability, aside from cooperation and self-disclosure, to control the scope of a government investigation, which is ultimately a matter of the government's discretion. However, where an entity cooperates with the investigation, discloses its own investigation, and shares its findings with the government, such cooperation and disclosure may serve to focus the government's investigation and limit its scope. Where an entity is not in a cooperative posture with the government, and a regulator exceeds its authority, the entity may have recourse to the judicial system to oppose investigative measures and requests that are intrusive and burdensome, but such recourse is typically limited.

3.3 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?

Cross-jurisdictional coordination between U.S. authorities and law-enforcement and regulatory agencies outside the U.S. is commonplace. Entities subject to investigation should assume as a matter of course that information presented to one authority will be shared with other authorities. When that happens, it is essential that the information presented to multiple authorities be consistent. Such consistency is best achieved through coordination with regulators, which has the additional benefit of easing the burden of responding to multiple and different requests for information from various authorities. Entities under investigation should seek to liaise with regulators early in the investigative process, harmonise where possible the scope of the investigations, and identify opportunities to eliminate duplicative work and the risk of inconsistency. For example, counsel may choose to create document depositories with rights of access for multiple regulators, or invite multiple authorities to witness interviews.

Furthermore, whenever an entity is subject to investigation by multiple authorities, the entity should at the early stage explore whether a coordinated or global resolution of the investigations is possible.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

An investigation plan should set forth clearly the scope of the investigation, in terms of geography, relevant business units, and the pertinent time period. Necessary steps include document preservation, collection, and review, which begins with the identification of relevant document custodians, and, if the review is electronic, relevant document search terms. A plan for further fact development typically includes witness interviews and in many cases expert analysis. The plan should also include an understanding of how and when investigative findings will be shared with the client. When cooperating with investigating authorities, it is often advisable to share the scope of the investigative plan with the authorities to ensure it meets with their satisfaction and cooperation credit is being secured.

4.2 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?

For any matter involving activity beyond a routine response to an information request, the hiring of outside counsel is commonplace. Even where in-house legal departments are experienced with investigations involving suspected civil or criminal violations and are comfortable interfacing with government authorities, the hiring of outside counsel can serve to demonstrate that the entity is taking the issue seriously and responding sincerely. Regulators and prosecutors tend to scrutinise closely investigations in which the entity is, in effect, investigating itself.

Whether to retain additional outside consultants, including data forensics experts or subject-matter consultants, should be discussed closely with outside counsel. Any such experts should be retained by outside counsel to ensure that communications made by the experts pursuant to the investigation remain privileged.

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?

U.S. law does not provide for a general investigative privilege. As a result, clients and counsel need to take affirmative steps within the conduct of an investigation to establish and abide by the necessary conditions to ensure that all applicable privileges are preserved. The privileges recognised in U.S. law include the attorney-client privilege, the "common interest" or "joint defence" privileges, and the attorney work-product doctrine.

The attorney-client privilege protects communications between client and counsel wherein legal advice is sought or provided. The common interest and joint defence privileges provide for the protection of legal 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 thereof. It is important to note that these privileges protect communications, not facts. By virtue of being communicated to counsel, facts themselves do not become subject to privilege.

The attorney work-product doctrine protects materials – documents, memoranda, and analyses – prepared by attorneys in anticipation of litigation. Depending on the nature of the work product, it may be afforded a different degree of protection from discovery. "Ordinary" work product, which consists of gathered materials and facts is accorded less protection than "opinion" work product, which contains the thoughts and analysis of counsel.

Applicable privileges can be waived, both explicitly and by the conduct of the holders of the privilege. To preserve privileges, privileged materials should be clearly marked and should be kept confidential.

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 experts hired by counsel are protected by the attorney-client privilege and attorney work-product doctrine, provided that such communications and materials are made in furtherance of providing legal advice to the client.

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

U.S. privilege law applies equally to in-house and outside counsel. However, privileges asserted for communications with and materials prepared by in-house counsel may be challenged, particularly if in-house attorneys also provide business advice or other non-legal advice to employees. In such circumstances, it is important for in-house counsel to separate legal and business communications. Accordingly, including outside counsel on any investigation-related communications may provide a stronger shield against disclosure.

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

Proper identification and handling of privileged documents is critical to preserving applicable protections. Privileged documents created during the course of the investigation should be clearly marked with the applicable privilege on each page of the document. Privileged communications that pre-date the investigation should be identified and clearly marked during the document review phase of the investigation, and set aside so as to avoid inadvertent disclosure to regulators or other third parties. Additionally, entities and their counsel should be mindful that at least one U.S. court recently has ruled that a client may waive the work product protection for materials prepared by counsel, such as interview notes and memoranda, by providing oral summaries of interviews to government authorities like the SEC.

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?

Some materials provided to U.S. enforcement agencies are protected from general disclosure by law, such as materials provided pursuant to a U.S. federal grand jury subpoena. But investigating authorities are typically not under a legal obligation to keep confidential information voluntarily provided by an entity about the results of an internal investigation. Entities making disclosure of materials typically seek to limit further disclosure of such materials, including through requests for confidential treatment under the Freedom of Information Act (FOIA). However, as stated elsewhere in this chapter, entities should assume that law-enforcement agencies will share information with other domestic or foreign authorities. Further, where the investigating authority is under no obligation to keep the information confidential, or the agency determines it may disclose the information consistent with its objectives – for example, detailing facts supporting an agreement that includes a penalty imposed upon the entity under investigation – the information may become public. Nonetheless, where the entity is in a cooperative posture, counsel can work with the investigating authorities to limit the scope of information disclosed.

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 U.S. does not have a specific data-protection or data-privacy regime applicable to internal investigations. Certain DOJ policies and procedures provide for the redaction or non-disclosure of sensitive personal information like social security numbers and other identifying data, but such protections are not mandated by statute.

While the U.S. does not have an equivalent to the European Union's General Data Protection Regulation, entities producing information in the course of investigations should pay close attention to the data-protection or data-privacy law of the states in which they do business. Notably, California recently passed the California Consumer Privacy Act of 2018 (CCPA), which will go into effect on January 1, 2020 and requires companies to make disclosures to consumers regarding the collection, use, and sharing of personal information. While the CCPA does not restrict an entity's ability to comply with a government investigation, it may nonetheless alter data collection and retention policies for certain consumer-facing companies, and entities should make themselves aware of the manner in which data-privacy statutes and the ability to comply with information requests from regulators may conflict.

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?

While it is not a legal requirement to preserve data unless an investigation or litigation commences or is reasonably foreseeable, entities should maintain and periodically update a written document retention policy that is accessible to all employees that clearly and thoroughly delineates under ordinary circumstances what data should be retained by the entity, for how long, and when and under what circumstances data may be deleted or destroyed. Compliance with document retention policies, including deletion policies, can be a useful safeguard against suspicions or allegations that data has been selectively deleted for nefarious purposes.

Once a litigation or investigation is foreseeable and a duty to preserve does arise, failure to preserve data can have consequences ranging from potential criminal liability for obstruction of justice to evidentiary inferences of consciousness of guilt that can significantly alter civil and criminal proceedings regarding the matters under investigation. As such, entities should issue a document preservation notice, which suspends the operation of the ordinary course document retention policy, not only when notice is given of a potential government investigation, but also whenever an internal investigation is initiated. The notice should be sent to employees, as well as third parties, who are likely to possess relevant documents and data. It should state the existence of the investigation, briefly describe the relevant subject matter 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. Entities should also send the notice to their IT departments to prevent ordinary course document destruction or overwriting of electronic media from continuing. To record compliance with the notice, the notice should provide some form of acknowledgment, often a signature affirming receipt and compliance, by each employee receiving a copy.

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 overriding consideration in the investigative context is often

the entity's desire to preserve the perception of compliance and cooperation with the investigating authority's requests. The delays and difficulties that can arise from complying with the overlapping, and sometimes conflicting, data-privacy regimes of foreign jurisdictions can threaten the perception that an entity is providing information in a forthcoming manner. Multi-jurisdictional entities should have thoroughly developed standing protocols for navigating investigative requests that implicate competing disclosure and privacy regimes, should be attentive early in the investigative process to the complexities and delays that may arise, and should be aware of measures, including informed consent of employees, that can alleviate such delays. Engaging local counsel experienced in complying with non-U.S. data-protection regimes may be necessary to this process.

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

Which types of documents must be collected will depend on the particular facts and the matters under investigation. An entity should collect broadly and consider at the outset of collection which types of documents may have relevance to the potential issues and underlying activity. Typical examples include physical and electronic documents and communications, recorded audio communications, trade records, payment and transaction ledgers, and relevant policies and procedures. Particular attention should be given to whether in the context of the investigation and given its specific focus, employees' mobile devices should be collected and imaged.

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

Where large volumes of data and documents need to be collected and reviewed, an entity will often hire a third-party data vendor to identify and secure the relevant materials. Outside counsel may begin its investigative process by conducting interviews in collaboration with the vendor to better understand what categories of documents and data may exist, where they are kept, and which employees are most likely to have responsive materials.

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 scope of document review and production is increasingly the product of a negotiation between the entity and the investigating authority. Typically, the entity, in collaboration with outside counsel and any outside data collection and review vendors, identifies a population of employees ("custodians"), a date range, and a set of search terms to apply to the documents possessed by that set of custodians, and seeks the approval of the investigating authority to conduct its collection according to the proposed scope. The resulting documents will be reviewed by counsel for responsiveness and any applicable privileges prior to production.

Some entities use predictive coding and other forms of technology-assisted review (TAR) *in lieu* of search terms and first-level document review. An increasing number of courts have been accepting the use of predictive coding in civil cases, and it may be particularly useful for financial institutions or other entities with large volumes of data. However, TAR has not yet been widely used to identify materials responsive to government requests and investigations.

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, except in the limited circumstance discussed elsewhere in this chapter in which as part of a cooperative investigation an authority requests that an entity shall not interview or contact an individual until the authority has had the opportunity to interview that person.

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 often required to cooperate with internal investigations as a condition of their continued employment, and declining to participate may result in 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 requirement to provide separate legal representation to employees prior to interviews, though certain key employees may negotiate indemnification for legal fees in their employment agreements and may hire counsel if they feel their interests diverge from those of the entity or if they may face criminal charges. Even absent such contractual provisions, entities will often provide separate counsel for employees and pay counsel's fees.

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

Witness interviews should be conducted in a manner and location that affords privacy to the witness and avoids speculation among other employees and resulting disruption to the entity's business activities. This often means interviews are conducted at the offices of outside counsel or at a separate location.

Interviews should be memorialised in writing by counsel and attended by a sufficient number of counsel so that in the unlikely event an attendee were needed to testify about what was said in the interview, a member of the legal team could do so without disqualifying the law firm or otherwise disrupting the representation. The conditions of the interview should be clearly described to, and understood by, the witness, including whether the attorney-client privilege applies to statements made therein and whether counsel represents the entity, the witness, or both. In the U.S., in an employee interview where counsel represents the entity but not the witness, the interview typically begins with a formal instruction known as an "*Upjohn* warning", which clarifies that that in-house or outside counsel represents the entity and not the witness, and that it will be within the entity's discretion, and not the witness's, whether to share the content of the interview with government authorities.

The written memorandum of the interview should not be a *verbatim* recitation of what was said, but rather should reflect the mental impressions of the attorneys present, so that, as set forth elsewhere in this chapter, the work product doctrine will protect the memorandum from compelled disclosure. In addition to a description of the witness's responses, the memorandum should reflect who was present at the interview, the approximate length of the interview, and whether the *Upjohn* warning was given.

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

Though the U.S. is likely not unique in this regard, employees may generally be wary of interviews and reluctant to interface with counsel, particularly with unfamiliar outside counsel. As a result, employee interviews are often designed to be as accommodating as possible to the witness. Such interviews are conducted in an informal, non-confrontational fashion to ease the employee's concerns and to ensure the most thorough information gathering possible.

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

As described elsewhere in this chapter, whistleblowers are afforded certain protections under U.S. law, and companies may face civil or criminal liability for discriminating or retaliating against whistleblowers who raise concerns about company misconduct to outside authorities. However, there is nothing particular about the interview context that requires modification for the interview of a whistleblower. All employees are due respect and consideration in the investigative process, and whistleblowers are no different. Nonetheless, a routine measure that may protect the interests of both the whistleblower and the entity is the provision of separate counsel to the whistleblower at the entity's cost, which signals to both the authorities and the whistleblower that the matter is being treated seriously and that whistleblower's individual rights are being respected.

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

Often, counsel representing employees will ask what statements their client made to the entity prior to the involvement of the employee's counsel. Such requests are routinely accommodated, in one form or another, but with due attention paid to avoiding any waiver of applicable privileges or protections. However, such requests are granted as a matter of discretion, not entitlement. If a witness wishes to clarify or supplement a prior statement, such requests are typically viewed as beneficial to the truth-finding process, and are permitted, absent circumstances indicating a motive to fabricate.

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

Government authorities are not required to be, and are typically not, present at employee interviews during internal investigations.

If an employee is represented by separate counsel, in connection with the investigation, counsel will generally attend all interviews of the employee. Indeed, ethical rules in many jurisdictions forbid a lawyer from contacting an individual he knows to be represented by counsel outside the presence of said counsel, though this protection can be knowingly waived.

8 Investigation Report

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

The structure of any investigative report may vary according to the particular facts and circumstances of the matters under investigation and the ultimate audience and purpose of the report. To the extent that the written report is for internal use for the client, it is likely to be less formal, less structured, and less elaborate than a report intended for public access. Any report, whether public or private, should contain factual findings, legal conclusions, and recommendations for remediation, if findings of deficiency were made.

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Jeffrey A. Brown
Dechert LLP
Three Bryant Park
1095 Avenue of the Americas
New York
NY 10036-6797
USA

Tel: +1 212 698 3511
Email: jeffrey.brown@dechert.com
URL: www.dechert.com

Jeffrey A. Brown focuses his practice on white-collar defence, securities litigation, Securities Exchange Commission enforcement actions, and related commercial litigation. His experience includes conducting internal investigations across multiple industries and across international boundaries, representing companies and individuals in connection with investigations by the Department of Justice, the Securities Exchange Commission, and state and local prosecutors. Mr. Brown's practice also includes representing individuals investigated for "spoofing" and other market manipulation in markets for various commodities.

Mr. Brown previously worked for almost 10 years at the United States Attorney's Office for the Southern District of New York, where he served as Co-Chief of the General Crimes Unit and before that as Acting Deputy Chief of the Narcotics Unit. As an Assistant U.S. Attorney, Mr. Brown investigated and prosecuted crimes in the Terrorism, International Narcotics Trafficking, Narcotics, Violent Crimes and General Crimes Units. Many of Mr. Brown's representations at Dechert involve investigations brought by his former Office.

Roger A. Burlingame
Dechert LLP
160 Queen Victoria Street
London
EC4V 4QQ
United Kingdom

Tel: +44 20 7184 7333
Email: roger.burlingame@dechert.com
URL: www.dechert.com

Roger A. Burlingame focuses his practice on white-collar criminal defence, internal investigations, regulatory enforcement matters and related civil litigation. A former high-ranking prosecutor for the U.S. Department of Justice and seasoned trial lawyer, Mr. Burlingame defends individual and corporate clients in the EMEA region from cross-border U.S. government investigations and related civil litigation. He routinely serves as lead defence counsel in high-profile investigations relating to fraud, collusion, manipulation and abuse in the financial markets, FCPA violations, money laundering, asset forfeiture and tax evasion.

Mr. Burlingame also represents companies and individuals facing U.S. sanctions violations, import/export controls, as well as issues involving the International Emergency Economic Powers Act and the Committee on Foreign Investment in the United States.

Consistently recognised as a leading lawyer by EMEA-based clients facing U.S. government criminal and regulatory investigations, Mr. Burlingame is described by *Chambers & Partners UK* as "the go-to guy for any case with a US angle" and by *The Legal 500 UK* as "the go-to guy for European targets of high-profile US-facing investigations".

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glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com