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Internal Investigation Procedures: International Considerations for Maintaining an Effective Compliance Program

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Introduction

Companies today operate in an environment of ever-increasing U.S. and foreign laws, regulations and enforcement. Failure to adhere to such laws and regulations may subject these companies and their employees, officers and directors to substantial fines, penalties and consequences, including imprisonment. Accordingly, companies are strongly encouraged, and in certain industries required, to develop compliance programs that will enable them to detect, deter and prevent violations of law and misconduct.

An effective compliance program consists of various elements, including: (1) ethical culture and governance; (2) risk assessments and due diligence; (3) policies and procedures; (4) training and communication; (5) reporting and investigations; and (6) monitoring and auditing.¹ U.S. regulators have determined that a one-size-fits-all compliance program or a mere “paper program” is ineffective and insufficient.² Therefore, it is important to ensure that each of the elements of a compliance program is properly tailored and implemented to the company’s particular business and regularly updated to address changes in the organization’s governance, operations and applicable regulations.

Conducting effective internal investigations is critical to any compliance program. The adoption of an appropriate internal investigations policy, procedures or protocol (collectively, investigation procedures) enables a company adequately to ensure that a uniform standard



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or guideline is established upon which the company’s management, employees, counsel and consultants can rely and be held accountable for conducting such investigations. It also provides the board of directors, regulators and other stakeholders with certain assurances and an objective measure that investigations are being conducted in compliance with applicable laws and the company’s internal policies.

In the context of international investigations, various complex and conflicting issues arise due to the occurrence of activities, alleged misconduct and investigations overseas where different laws may apply. Indeed, a number of foreign laws differ from U.S. law in a variety of ways that affect the way international investigations may be conducted, including the treatment of attorney-client and work product privilege, data privacy protections and the existence of “blocking statutes.”³

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Consequently, it is very important for companies with foreign operations or business to be mindful of foreign laws when adopting investigation procedures and to provide appropriate flexibility for international investigations.

Investigation Procedures

In order for a company to investigate adequately

violations of law or wrongdoing within its organization or business, it should adopt effective investigation procedures. Such procedures should reference: (1) the governing body within the company that has oversight and authority over the overall investigation process and procedures; (2) the applicable reporting mechanisms; (3) the process for assessing the allegations that are to be investigated; (4) the method for identifying and selecting an investigation team; (5) policies for gathering and analyzing evidence, including documents, legal holds and privacy; (6) procedures for witness interviews; and (7) protocols

for final investigation reports and recommendations. From the reporting and assessment of an allegation to the drafting of a final report, investigation procedures, particularly when applicable to international investigations, need to be accurate, flexible and practical.

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held on 2 October 2016. Only 40% of the electorate voted, and a majority of voters rejected the agreement. The main reservations of the opposition group were with regard to the articles that would allow amnesty and clemency to former guerrillas and to the articles that would guarantee political participation for FARC, as well as grants to help form a FARC political party. Despite the voters' rejection of the agreement, both Colombia's government and FARC publicly reiterated their intentions to maintain the peace between them. Notably, President Santos was awarded the 2016 Nobel Peace Prize in recognition of his efforts in the peace process.

The New Agreement

In November 2016, Colombia's House of Representatives and Senate ratified a new peace agreement signed by the government and FARC, which included some of the opposition group's proposals for the original document.

The ratified peace agreement was renegotiated between the parties after the referendum held in October 2016. Apparently, the new peace agreement will not be submitted to another referendum since it has been approved by the Congress.

The results of October's referendum and criticisms of the opposition group show that Colombia continues to live with political uncertainty. This uncertainty could lead to a return of the war that ravaged Colombia for decades.

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Governance

As with the overall compliance program, the investigations element of the program should be overseen by a compliance committee. While compliance committees vary depending on the nature of a company's business and industry, members generally consist of senior management representatives from departments that are actively involved in the compliance function, including legal, compliance, human resources, internal audit and information technology. The committee may also include one or more representatives from sales, marketing and/or an operational function. The compliance committee should be responsible for approving and adopting the investigation procedures and designating the appropriate investigation team to conduct the actual investigations for particular cases. The compliance committee should receive investigation reports and recommendations from the investigation team and then determine which investigations, trends and related data are communicated to the company's board of directors and/or its audit committee so there is accountability at the highest governance level of the organization, thereby strengthening the company's "tone at the top."

Reporting; Anti-Retaliation Policy

In an effective compliance program, employees, agents and third parties should have several mechanisms for reporting a potential violation of law, compliance issue or related concern, including contacting a supervisor, human resources, compliance and/or an anonymous and confidential helpline. A successful reporting system requires that the reporting person feels comfortable communicating potential issues using the available reporting mechanism. The key is to make sure employees or other reporting persons do not fear retaliation or retribution for coming forward. If employees fear retaliation or a breach in confidentiality, they will be reluctant to report problems and issues, which can expose the company to future compliance risk. A company can reduce the risk and lack of communication by implementing an anti-retaliation policy, ensuring its compliance with any applicable anti-retaliation laws that prohibit retaliation and outlining the procedure for reporting retaliation. This policy can be incorporated into the employee handbook, code of business conduct and/or adopted as a standalone policy. If a company operates in a foreign country, all policies, communication and

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training should be in a language understood by the employees to whom they are directed.

Allegation Assessment

Once an allegation has been reported to the company, it must determine whether to conduct an internal investigation. An investigation should focus on determining whether a violation or misconduct has in fact occurred as well as on identifying potential areas of risk for the company. Generally, an investigation should be conducted in response to the following issues:

- Credible allegations of wrongdoing committed by the company or any of its employees, officers, directors, agents or third parties (collectively, representatives)
- Government investigations or enforcement actions
- Violations of applicable regulations or laws
- Violations of internal company policy
- Lawsuits against the company or one of its representatives
- Reports of criminal conduct

Depending on the nature of the allegation reported, the investigation procedures should outline whether a specific individual/function, department or the compliance committee should assess the allegation and determine whether to conduct an investigation.

Investigation Team

Once a decision to investigate an allegation has been made, the appropriate investigation team should be assembled. The investigation procedures should provide sufficient flexibility to ensure that the investigation team consists of one or more representatives from different departments with appropriate subject matter expertise. For example, if an allegation concerns harassment, discrimination, retaliation or workplace violence, the investigation team should generally involve a member of the human resources department. Similarly, if an allegation concerns fraud or books and records violations, the investigation team should include a member of the internal audit department.

The investigation procedures should also provide that the persons assigned to conduct an investigation must

be objective and free from bias or any conflict of interest in the outcome of the matter being investigated. Indeed, such persons may need to sign a certification reflecting the absence of any such conflict prior to conducting the investigation. In addition to internal members of the investigation team, the investigation procedures should authorize the company to retain outside counsel and/or consultants when highly specialized expertise or skills, avoidance of internal conflicts and/or additional resources are required for an investigation, particularly in the international context.

The investigation procedures should also reflect that persons who are regularly engaged in internal investigations on behalf of the company receive periodic training on the investigation procedures and related investigations skills.

Gathering Evidence

As a company's investigation team proceeds with an internal investigation, particularly in the international context, it should identify the key documents, data and other information that must be preserved, gathered and analyzed, as well as the relevant data privacy and attorney-client privilege implications.

Legal Holds - Companies must preserve relevant information when an investigation or a lawsuit is initiated or reasonably anticipated. This duty arises from the common law duty to prevent spoliation of evidence and from several statutes and regulations, including the Sarbanes-Oxley Act of 2002⁴ and the Dodd-Frank Act.⁵ The duty to preserve electronic and paper records can be triggered by various circumstances, including when:

- A company receives a complaint or is put on notice of a lawsuit against it;
- A company receives a subpoena for information as a third party to an existing lawsuit;
- A formal order of investigation from a government or regulatory body is issued; and
- A company becomes aware or should reasonably become aware of a potential legal claim against it.

To comply with its preservation duty, a company should issue a legal hold, which is a written instruction directing

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employees, agents and relevant parties within an organization to preserve and refrain from destroying any potentially relevant records and information, both in paper and electronic format. Failure to issue and maintain a legal hold can result in serious consequences, including court sanctions subjecting companies to: (1) monetary penalties; (2) adverse inference instructions to a jury relating to the information lost or destroyed; (3) the preclusion of evidence to support a company's claim or defense; and (4) a default judgment. Because of the serious nature of preserving documents, it is important for the investigation procedures to include a cross-reference to the company's legal hold procedure and/or contact so the investigation team is adequately informed about the legal hold process whenever an internal investigation arises.

Data Privacy and Blocking Statutes - Many countries have adopted strict data privacy laws that place considerable restrictions on the retrieval, use and transfer of documents and data containing personal information. For example, countries including Argentina, Canada, Costa Rica, the European Economic Area, Hong Kong, Israel, Japan, Korea, Mexico, the Philippines, South Africa, Switzerland and Uruguay have adopted a compilation of data protection laws that prohibit exporting employee data without first building certain data export channels.⁶

Further, in a number of countries, blocking statutes have been enacted to restrict or prevent the production of documents or evidence that will be used in a proceeding outside of the country in which such statutes were adopted. In some circumstances, the restrictions imposed by these laws may be overcome by requesting production under a treaty⁷ or an international agreement.⁸

Accordingly, it is important for investigation teams to understand and observe these restrictions at the beginning of an international investigation before they retrieve and transfer any protected data from foreign countries to the United States. Further, the investigation procedures should highlight these important restrictions

and cross-reference the company's applicable data privacy policy and contact because a violation of data protection laws can itself trigger a violation of law and serious consequences.

Preserving Evidence - Any document or information that pertains to an issue under investigation may have the potential to become evidence in a future administrative proceeding or lawsuit. Therefore, the investigation procedures should address important points concerning the preservation and handling of such documents and information, including:

- Documents and information should never be modified, deleted or destroyed, even if it could hurt the company's position.
- All original documents and information should remain in their original physical or electronic folders unless instructed otherwise by legal counsel.
- Any document or information pertaining to an ongoing investigation should be provided only in consultation with legal counsel.
- Copies of all documents in an investigation should be maintained even if the original exists.
- All documents, physical evidence, as well as any notes made in reviewing them should be properly secured.

Attorney-Client Privilege - Other important considerations that should be reflected in the investigation procedures and in each internal investigation conducted by a company are the attorney-client privilege and work product protections. To preserve a claim of privilege over the company's investigative process in assessing critical facts, it is common practice in the United States for investigations to be managed through legal counsel. A company's attorney-client and work product privileges protect counsel's strategies and mental impressions, as well as facts gathered in anticipation of litigation.⁹ In certain foreign jurisdictions, however, the attorney-client privilege is often narrower than in the United States, or nonexistent.¹⁰ For example, European Union member states recognize a rudimentary in-house counsel privilege, but there is no European-wide doctrine that confers a privilege on in-house counsel.¹¹

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Before engaging in an international investigation, the investigation team should determine whether the foreign jurisdictions in which they are conducting such investigation recognize attorney-client privilege or work product protections similar to those in the United States.¹² Further, incorporating this important determination into the investigation procedures will help guide the investigation team in establishing the appropriate tone, process and documentation of the investigation. It may also drive a company's decision to retain outside counsel to lead an investigation.

Interviewing Witnesses

One of the more challenging and time-consuming aspects of an internal investigation is conducting witness interviews. As part of the investigation procedures, companies should address the importance for the investigation team to develop a list of employees or pertinent witnesses to be interviewed as well as a standard script, including model questions, for witness interviews. The investigation procedures may also include a standard form letter to be sent to employees regarding interviews for the suspected misconduct.

For international investigations, it is important to note that some countries' laws, treaties and/or international agreements may require the presence of an employee's counsel in some cases and may prohibit the investigation tactics used in the United States. Accordingly, the investigation procedures should caution the investigation team to consult with legal counsel regarding the foregoing prior to engaging in international investigations to ensure compliance with such laws.

At the outset of the interview, the investigator should explain to the witness the reason for the interview and the role of the investigator. The witness should be advised that the company expects all employees to cooperate and that no one will be penalized for telling the truth. Interviews should be properly and promptly documented, including the specific dates, times, places and full names of the witnesses and other persons present at the interviews. The investigation procedures should address the importance of all investigations being

conducted confidentially, and all memos, notes and other documents pertaining to the investigation should be marked "Confidential."

Final Report and Recommendations

After gathering all of the relevant evidence, the investigation team should prepare a final report to present to management, the board of directors and/or the compliance or other governing committee in accordance with the investigation procedures. The report should summarize the investigation and findings. The investigation procedures should provide the flexibility for such report to be delivered in writing or orally, depending on the nature of the case and considerations of attorney-client privilege. The report should provide a basis on which management or the appropriate committee can decide whether a violation of the law or of company policy has taken place and what actions, if any, need to be taken. As part of the investigation procedures, a company should consider creating a standard form for recording the findings of an internal investigation. This is especially helpful when the company is investigating common issues or violations that may arise again in the future. Generally, the final report should include:

- Summary of the issues
- Applicable law or policy
- Relevant facts to the investigation
- Investigative strategy used
- Scope of the investigation
- Analysis of documentation, evidence and witness interviews
- Findings of the investigation
- Any recommendations and corrective action

Disciplinary and Corrective Action; Disclosure

Following issuance of the final report, management should decide which employees, if any, should be disciplined for any proven allegations. Such discipline may include demotion, suspension or termination. In addition, management, the board or the appropriate committee should decide what corrective actions will be

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taken. An allegation that is substantiated should result in a corrective action plan, which may include new or revised company policies, stronger internal controls, specific compliance training, etc. If at the conclusion of the investigation the company determines that a violation of local, state or federal law or regulation has occurred, it must consider whether it is required to disclose or wishes to disclose voluntarily such violation to the appropriate governmental authority and/or in a public filing, as required. Voluntary disclosure may provide certain benefits, including cooperation credit and other incentives, as in the case of the U.S. Department of Justice's Foreign Corrupt Practices Act Pilot Program.¹³ Nevertheless, the decision surrounding disclosure is fact-specific and requires considerable thought, analysis and legal counsel. Accordingly, the disclosure aspects of any misconduct uncovered during the course of an internal investigation are generally deemed to be beyond the scope of the investigation procedures.

Conclusion

Conducting effective internal investigations is critical to maintaining an effective compliance program. Adopting investigation procedures establishes consistency, legality and accountability for an important and complex internal process. Companies operating internationally need to ensure that their investigation procedures are flexible enough to address conflicts between foreign and U.S. laws and regulations, including privacy laws, blocking statutes and privilege restrictions. Although establishing and maintaining effective investigative procedures require time, commitment and resources, doing so will: (1) reduce the risk of violating the law during investigations; (2) provide important guidance for internal investigators; and (3) strengthen the integrity of the investigation process and results.

Note: The investigation procedures described in this article are not exhaustive, and a company, especially one operating in foreign jurisdictions, should consult legal counsel with expertise in the applicable jurisdiction and subject matter.



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Endnotes

1 Organizational Guidelines, UNITED STATES SENTENCING COMMISSION, <http://www.ussc.gov/guidelines/organizational-guidelines>.

2 CRIMINAL DIVISION AND ENFORCEMENT DIVISION, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT.

3 See Blank Rome LLP, 4 KEY ISSUES WHEN CONDUCTING CROSS-BORDER INVESTIGATIONS | BLANK ROME LLP, <https://www.blankrome.com/index.cfm?contentID=37&itemID=3472> (December 2014).

4 Pub. L. No. 107-204, 116 Stat. 745.

5 DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2010).

6 See E. Herrington & T. McCann, *Privilege Pitfalls: Companies Must Be Careful to Preserve Right During Internal Probes*, CORPORATE COUNSEL (July 2014 at pg. 35).

7 See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

8 See Blank Rome LLP, 4 KEY ISSUES WHEN CONDUCTING CROSS-BORDER INVESTIGATIONS | BLANK ROME LLP, <https://www.blankrome.com/index.cfm?contentID=37&itemID=3472> (December 2014).

9 See *Hickman v. Taylor*; Fed. R. Civ. P. 26 et seq.

10 Akzo-Nobel, ECJ case-550/07P (14/9/10).

11 *Id.*

12 See E. Herrington & T. McCann, *Privilege Pitfalls: Companies Must Be Careful to Preserve Right During Internal Probes*, CORPORATE COUNSEL (July 2014 at pg. 35).

13 Criminal Division Launches New FCPA Pilot Program, OPA | DEPARTMENT OF JUSTICE, <https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program>.

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