

# Planning and Conducting Internal and Cross-Border Investigations

November 2021

## Why Conduct Internal Investigations?

- **Find the facts** so that management (or the Board) can make an informed decision on how to respond.
- **Identify and stop** any illegal conduct or violations of policies/procedures.
- **Establish and assess** any allegations of wrongdoing to consider remediation and to prepare for litigation.
- **Promote** a culture of transparency and compliance throughout the company.
- **Determine** any appropriate employee discipline and necessary improvements to the controls.
- **Prepare** for any response or potential disclosure to enforcement or regulatory authorities and to public relations issues.

# Conducting Internal Investigations

## Determine Who Should Conduct an Investigation

- **In-house** v. **outside** counsel
- Consider the **seriousness of the violation and risk**
  - Allegations of policy violations v. conduct implicating civil/criminal liability
  - Allegations of line workers v. senior management
- Consider if **independence** is necessary
- Consider need for **subject-matter expertise**
- Consider who best **preserves privileges**

## Adopting a Protocol and Engaging Standby Outside Counsel

- A **protocol** helps determine whether/when an investigation should be referred to outside counsel
  - Benefits to having a standardized process
- **Standby outside counsel** helps the company mobilize quickly when a need for such counsel arises
  - Subject-matter expertise
  - Familiar with the company's business and operations

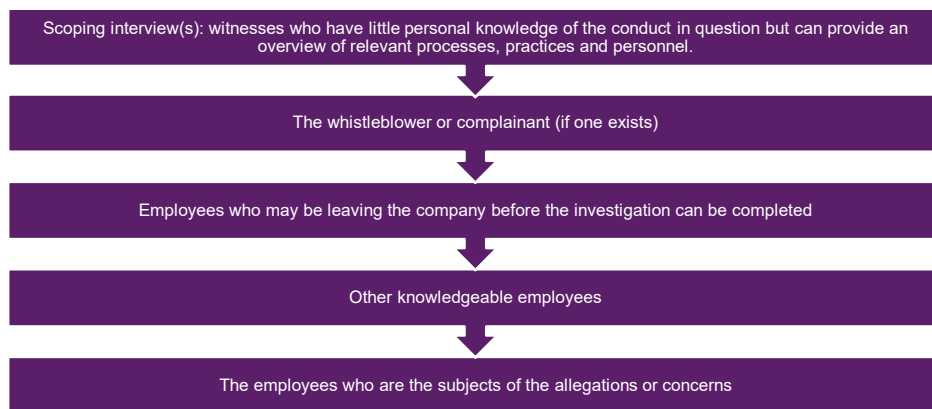
## Develop a Investigation Plan

- Draft a **written plan** for conducting the investigation that:
  - Includes the **purpose and scope** of an investigation
    - Scope should account the nature/seriousness of the allegation
    - Watch out for scope-creep
  - Identifies **key issues**
  - Determines which **records to review** and **individuals to interview**
  - Lays out the **schedule** for concluding investigation
- **Revisit** in the course of the investigation as facts are discovered

## Planning the Investigation

- What **policies apply**?
- What **documents and processes** are **relevant**?
- **Who** at the company is knowledgeable about the allegations or would know about the subject matter at issue, and should be interviewed?
- In what **order** should the witnesses be interviewed?
- **Who should be involved** in the evaluation of the evidence?
- What is the appropriate **remedial action**?
- How to **memorialize** the investigation?

## Order of Interviews



## Interviewing an Employee

- **Before each interview, prepare an outline and assemble relevant documents you intend to show the interviewee.**
- Two people should be present in addition to the employee.
  - *One to take notes, one to do the questioning.*
- Give *Upjohn* warning at start of interview, and record it in your notes--
  - *Counsel has been retained by the company to conduct an investigation;*
  - *Counsel does not represent the witness;*
  - *the information obtained during the interview is privileged and the company should keep the interview confidential; and*
  - *The decision whether to waive the privilege belongs to the company.*
- Employee should be told the purpose of the interview
- Expectation of cooperation

## Interviews: You May Not Lie or Mislead

- In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person....” KS Rule 4.1(a); D.C. Rule of Professional Conduct 4.1(a); California Rule of professional Conduct 4.1(a)
- Conduct involving dishonesty, fraud, deceit or misrepresentation is prohibited. N.Y. Rule of Professional Conduct 8.4(c).

## Tips for Report

Use a neutral tone

Omit extraneous  
information

Omit  
conversations and  
communications  
with counsel

## Challenges in Cross-Border Investigations

## Global risk often turns on local issues

- Undertake thoughtful consideration of local issues (law, customs, language, privacy) . . .
  - Ensure data governed by local law is gathered, processed and reviewed in a compliant manner; failure can have significant consequences
  - Review materials using knowledge of native language and customs
  - Same with witness interviews
  - Local laws may offer defenses; evaluate these with local resources

## Local laws and customs

- Cross-border investigations almost always implicate either **local laws or customs**
- **Language and culture** are at the heart of an effective investigation
  - It is essential to understand, for example, cultural context, local “slang,” and common business practices
- **Local law** understanding is essential - not just for risk, but it can set up defenses
  - E.g., Labor laws outside the U.S. can be anathema to U.S. lawyers

## Data privacy

- Company data is often **scattered across jurisdictions** (devices, storage, servers)
- Many jurisdictions have their **own rules** on privacy and labor laws
- **Data privacy:** “Personal data” often implicated. Know what Data Subject Impact Assessment is.
- **Data localization laws:** Require local storage of personal data

## Common challenges

- **Practical:**
  - Data collection, processing and review (maybe by in-country or “flown-in” third-party vendors)
  - “Convenience translations,” translations completed by non-native speakers, and “dirty translations” using an app *must be used with great caution.*
- **Legal:**
  - Disregard of local privilege rules at your own risk.



## Always: protecting and preserving privilege

- *Mangouras v. Squire Patton Boggs*, 980 F.3d 88 (2d Cir. 2020).
- “Privilege” is not “privilege” everywhere
  - Consider extent of privilege under applicable legal systems
    - *The Director of the Serious Fraud Office v. Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB)

## Today and going forward: ephemeral messaging

- Ephemeral and personal messaging apps
  - **Texts**: Common business tool in the U.S.
  - **WhatsApp**: Common business tool outside the U.S.
- Widespread global, business usage of non-email messaging apps pose significant compliance challenges for U.S. companies operating abroad and non-U.S. companies operating here

## Challenges with ephemeral / personal messages

- Use of messaging applications create potential issues with record preservation
- DOJ FCPA Corporate Enforcement Policy and DOJ practice

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## Consider policy re. ephemeral/personal message

- Companies should consider **adopting written policy** on the use of ephemeral and end-to-end encryption communications
- **Differing approaches** to policy
- Consider also potential challenges with **collection** of messages

## Piling on

- Local investigations and cross-border cooperation can spring up rapidly and without notice.
- Consider risk of **follow-on / “where’s mine” prosecutions**
- DOJ and SEC have often **credited amounts** paid as part of monetary settlements with foreign enforcement authorities

## Self-disclosure in a global setting

- A company's decision to disclose or not should involve a thorough analysis of the advantages and disadvantages
- A decision to disclose to the US is a decision to disclose to the world
- Neither the DOJ nor the SEC provide for "credit" for a voluntary disclosure in a foreign jurisdiction, though they have occasionally agreed to divide penalties with other jurisdictions

## Thank you

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