

## FCPA Internal Investigations: Latest Developments

Preserving the Evidence, Assessing Voluntary Disclosure and Other Key Elements

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WEDNESDAY, MARCH 20, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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John E. Davis, Partner, **Miller & Chevalier Chartered**, Washington, D.C.

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# Strategies for Conducting Investigations of Suspected FCPA Violations

**March 20, 2013**

Kimberly A. Parker, WilmerHale  
John E. Davis, Miller & Chevalier

Strafford Publications Webinar

# To Investigate or Not To Investigate

- ✓ Receiving and documenting an allegation or complaint
  - ✓ Determining the credibility of an allegation
  - ✓ Determining whether an investigation is needed
  - ✓ Dealing with whistleblowers
    - ✓ Often foreign nationals in FCPA inquiries
    - ✓ Impact of Dodd-Frank whistleblower provisions
- ✓ Documenting the handling of an initial allegation (especially if you do not investigate)
  - ✓ Standard investigation protocol as part of compliance program
  - ✓ Staged inquiries

# Stopping Questionable Conduct

- ✓ Based on initial assessment, protocol for stopping questionable conduct if needed
  - ✓ Communications with relevant business units and exercise of accounting controls
  - ✓ Transaction-specific prophylactics
  - ✓ Considering “fast-track” review if more information needed to determine nature of conduct or if transaction timing matters
- ✓ Risk of later charges of management/company participation or acquiescence

# Preserving the Evidence

- ✓ Preserving documents/evidence
  - ✓ Scope of preservation
    - ✓ Custodian identification
    - ✓ Physical and electronic evidence
  - ✓ Preservation norms may differ in different markets
  - ✓ Documentation of preservation efforts
  - ✓ Risks of sending document hold notices without taking immediate physical preservation steps
  - ✓ Preservation steps can become a focus of enforcement agency attention

# Planning the Investigation

- ✓ Choosing the investigation team and resources
  - ✓ Local investigators, HQ investigators, or a mixture?
  - ✓ In-house or external investigators?
    - ✓ EU restrictions on privilege for in-house counsel
  - ✓ Accountants or auditors (internal or external)?
  - ✓ Other specialists (e.g., IT)?
  - ✓ E-discovery vendors – considerations in emerging markets
- ✓ Establishing and maintaining U.S. privileges
- ✓ Developing an “organic” work plan
- ✓ Strategies for increasing efficiency/reducing costs in international investigations

# Determining the Investigation Scope

- ✓ How far do you have to go beyond the initial transaction?
  - ✓ Looking laterally and vertically – taking a concentric circles approach
  - ✓ Focusing on regions/key employees/similar business model
  - ✓ Considering jurisdictional and statute of limitations issues regarding both antibribery and accounting provisions)
  - ✓ Balancing what is necessary vs. what is achievable
  - ✓ What does DOJ/SEC expect?
    - ✓ FCPA Guide: “efficient, reliable, and properly funded process” + “documenting” company response
    - ✓ Standard question: “How can you assure us that the conduct/issue is limited to Country X or transaction Y?”

## Application of Multiple Jurisdictions' Laws

- ✓ Attention is required to the anti-corruption laws of:
  - ✓ United States/UK: FCPA and UKBA have particularly broad jurisdiction
  - ✓ Countries where customers, agents, or projects are located
  - ✓ Any other countries where company has operations, especially OECD countries
- ✓ Laws in many countries now have broad jurisdictional reach and may differ in important respects, e.g.,

Criminal Intent		
U.S. FCPA	French Anti-Corruption Law	U.K. Bribery Act
<i>"Knowledge" or "firm belief"</i>	<i>Intent</i>	<i>Strict corporate liability for acts of third parties, unless existing procedures are "adequate"</i>

# Collecting Evidence

- ✓ Collecting and Handling Documents/Evidence
  - ✓ Paper
  - ✓ Electronic
  - ✓ Hidden sources (PDAs, mobile phones, back up drives, voice mails, non-work email accounts)
  - ✓ Moving documents/data across jurisdictions
  - ✓ Review team access
  
- ✓ Data privacy and personal information
  - ✓ Not just an EU issue
  - ✓ Practicalities of obtaining consents

# Conducting Interviews

## ✓ Conducting Interviews

- ✓ Addressing language issues/use of translators
- ✓ Communicating purpose
- ✓ Local cultural issues
- ✓ Conflicts of interest
  - ✓ Do Upjohn warnings have meaning abroad? Do employees understand them? – resonance of “Upjohn warnings” in emerging markets?
  - ✓ Interviewee requests for legal advice or representation
  - ✓ What to say if disclosure to government is likely?
- ✓ Seeking confidentiality
- ✓ Memorializing interviews
- ✓ Requests for “amnesty” – Siemens approach?
- ✓ Can private investigators be considered government agents?

# Dealing with Special Considerations

- ✓ Employment law issues
  - ✓ Limits on compelled cooperation in some jurisdictions
- ✓ Confidential business information
- ✓ Departing employees and post-employment cooperation
- ✓ State secrets
  - ✓ China
  - ✓ Former Soviet countries

# Concluding the Investigation

- ✓ Communicating with management
- ✓ Communicating with Audit Committee and outside Auditors
- ✓ Written report or not?
  - ✓ Initial consideration at start of investigation
  - ✓ Level of detail
  - ✓ Roadmaps for investigators or civil suits?

# Determining Corrective Action

- ✓ Employee discipline
  - ✓ Employment law issues in emerging markets
- ✓ Correcting books and records
- ✓ Upgrading compliance program and controls
  - ✓ New internal controls?
  - ✓ Training?
  - ✓ Enhancing policies and procedures?
  - ✓ Enhanced audit and monitoring plan?

# Disclosure Considerations

- ✓ Considering disclosing to:
  - ✓ Regulators/law enforcement – local, US, other?
    - ✓ Effects of increased mutual legal assistance
  - ✓ Shareholders
  - ✓ Other stakeholders
- ✓ Relevant factors include:
  - ✓ Whether there is a government investigation related to the industry, market, or type of transaction
  - ✓ Whether there are potential litigants
  - ✓ Whether there might be whistleblowers (especially under Dodd-Frank)
  - ✓ What weight to give to law enforcement statements regarding the benefits of voluntary disclosure

# Questions

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