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# Welcome

CURRENT ISSUES IN

## Internal Corporate Investigations

Steven Wolowitz  
Michael Martinez  
Alex Lakatos  
Mayer Brown LLP

John M. Driscoll  
*Director of Litigation  
& Regulatory Affairs*  
Société Générale/SG Americas



CURRENT ISSUES IN

Internal Corporate Investigations

# Internal Investigations

High Risk Areas:  
Antitrust/Competition



CURRENT ISSUES IN  
Internal Corporate Investigations

# Background



- International antitrust/competition governmental investigations have proliferated in recent years.
- They have grown increasingly significant for companies – both financially and reputationally – as competition law enforcement has been given priority by regulators and enforcement authorities in the U.S., U.K., Continental Europe, and Asia.
- Amnesty programs and similar incentives for cooperation – especially being first in the door – have become a central feature of enforcement programs.
- As a result, internal investigations which enable companies to cooperate, or self-report, have become increasingly important in antitrust/competition cases.

## Background (cont'd)



- Adding to their complexity is the fact that enforcers around the globe coordinate their actions, or at least communicate, as never before.
- And the stakes are higher than ever, as antitrust/competition violations are increasingly subject to criminal sanctions, for both companies and their executives.
- Thus, for companies and institutions doing business across multiple continents, in an antitrust/competition case the need for an effective internal investigation – and for understanding how to deal with the tricky issues that arise in multinational investigations – is more important than ever.

# Key Issues in Multinational Investigation



- Foreign restrictions on the review and transfer of certain information
- Requests by U.S. authorities for foreign-based evidence
- Privilege Issues
- Cooperation with governmental agencies

# Hypothetical



- Your institution, ABC Co., whose home office or headquarters is located in the U.S., sells “Gamma” to clients in the U.S., U.K., Continental Europe and Asia.
- Antitrust and competition regulators and enforcement agencies in the U.S. and those other jurisdictions have announced price-fixing investigations of a number of ABC’s competitors relating to their provision of Gamma to clients around the world.
- Employees of ABC Co. responsible for at least some of the operations pertaining to Gamma work in the U.S., U.K., and countries in Continental Europe and Asia.

## Hypothetical (cont'd)



- Each of the jurisdictions where those employees work has active antitrust/competition regimes; some of the countries, such as the U.S. and U.K., have laws allowing criminal sanctions for price-fixing, while others do not.
- ABC Co. asks you to head an internal investigation to determine whether, and the extent to which, ABC Co. has exposure relating to potential Gamma price-fixing.

# Foreign Restrictions On the Review Of Certain Information



- You want to determine whether ABC Co. was involved in any price-fixing related to Gamma, so of course you want to (a) interview the relevant employees, and (b) review their e-mails, Bloomberg chats, and other electronically-stored information.
- Can you do so?
- Data protection laws have been adopted in many countries and can restrict access during internal investigations. Knowing the local laws in this area is essential.
- In some jurisdictions, data protection laws not only prevent companies from reviewing certain information or correspondence without the employee's consent but, in securing the employee's consent, the company may be required to provide the employee access to the information and give the employee the opportunity to correct any inaccuracies.



## Foreign Restrictions On the Review Of Certain Information (cont'd)



- The labor and employment laws of some foreign jurisdictions are protective of employees, and may allow employees to refuse to submit to questioning by counsel conducting internal investigations.
- However, in most jurisdictions, if the employee wishes to keep his job, he almost has no choice but to submit to the interview.

## Foreign Restrictions On the Review Of Certain Information (cont'd)



- In many cases, a duty to cooperate with the company is specifically set forth in an employment contract or other employee standard of conduct.
- In many jurisdictions, a refusal to cooperate in a company's investigation will constitute a breach of an employee's duty of loyalty to the company and could constitute grounds for termination of employment.
- Nonetheless, bear in mind that with the increase in criminal prosecutions of individuals – and numerous countries, including the U.S., being parties to bilateral and multinational treaties governing extradition – the cost/benefit analysis has changed for employees deciding whether, and the extent to which, they will provide information to assist the company in its investigation.

# Foreign Restrictions on the Transfer of Certain Information



- Can you, in the U.S., review the ESI of all the employees who work in other countries?
- The European Union’s Data Protection Directive is the primary legislation on data protection in Europe.
- That directive gives “personal data” a broad definition, saying that it is data that “relate[s] to an identified person or identifiable natural person” . In essence, personal data is any data that permits the identification of an individual, either directly or indirectly, through means that are “likely reasonably” to be used by any third party.
- The Directive’s provisions (and similar European laws) limit the permissible circumstances in which personal data can be collected and reviewed.

# Foreign Restrictions on the Transfer of Certain Information (cont'd)



- Although the EU Directive does not define “transfer” it is construed broadly to include any transmittal of personal data, whether paper or electronic, whether sent physically or electronically.
- The EU Directive covers both public and private sector employees and, significantly, protects their rights even when electronic data is transferred out of the EU.
- The EU Directive also obligates each European Economic Area (EEA) country to enact data protection laws that are at least as protective of personal privacy as the EU Directive itself.
- Some countries, including Germany, Italy and France, have enacted data protection laws that are significantly stronger than the minimum required by the EU Directive.

## Foreign Restrictions on the Transfer of Certain Information (cont'd)



- Europe takes the position that the Hague Convention on the Taking of Evidence is the exclusive means for cross-border discovery or disclosure of personal data. The Hague Convention permits evidence to be transmitted by “letters of request” – issued by the relevant court, or issued by an appropriate U.S. regulator – to the “Central Authority” of the country where the data is located, which then forwards the letters of request to the local authorities competent to execute the request with the entity housing the data.
- Many countries have also put blocking statutes in place, based on the view that attempts by the United States and other countries to compel their citizens to meet discovery demands is contrary to their sovereignty, customs and national interests.

## Foreign Restrictions on the Transfer of Certain Information (cont'd)



- These blocking statutes impose civil and/or criminal sanctions on those who directly comply with discovery requests without going through the channels set forth in the Hague Convention.
- In the context of an internal investigation, a company that transports data to the United States for review also likely makes the information subject to subpoena in a United States court.
- So, how does one handle the *review* of personal data that is located in one of these countries? How does one handle the *production* of such data to U.S. regulators who have subpoenaed it? Is it possible that U.S. counsel conducting the investigation will not have in its U.S. files a copy set of what is produced to the U.S. regulators?

## Requests by U.S. Authorities For Foreign-Based Evidence



- ABC Co. wants to cooperate with the U.S. governmental investigations, or perhaps even win a race to them in order to get the benefit of the DOJ Antitrust Division's amnesty program.
- Can you produce to the U.S. regulators the materials you accumulate abroad in the course of your investigation?
- Foreign data protection laws, and blocking statutes, must be observed in connection with requested productions to U.S. enforcement authorities.

## Requests by U.S. Authorities For Foreign-Based Evidence (cont'd)



- The United States has entered into various Mutual Legal Assistance Treaties (MLATs) with other countries in order to assist one another in criminal enforcement investigations. Each specific MLAT defines the obligations of the countries to provide assistance and the scope of assistance.
- It is by complying with the specific terms of the MLAT that materials can be transmitted to U.S. regulators and still be in compliance with foreign data protection laws and blocking statutes.



# Privilege Issues



- ABC Co. has experienced in-house litigation and regulatory counsel in its European offices. Can you have them do the employee interviews there?
- It is well-established within the United States that the attorney-client privilege is applicable to a corporation's internal investigation where the usual privilege elements are satisfied.
- However, communications from in-house counsel are treated differently in different countries, which should inform the manner in which in-house counsel assist outside counsel during the performance of an internal investigation involving activities outside the U.S.
- Keep in mind that courts in the U.S. will often apply U.S. privilege law where the subject of the communication relates to, or "touches upon," a U.S. aspect of the investigation.

# Cooperation with Governmental Agencies



- Early on in your internal investigation, ABC Co. receives subpoenas from, and comes under investigation by, regulators in the U.S., U.K., Central Europe and Asia.
- Assuming that ABC Co. does not have antitrust amnesty, and assuming that it generally believes in the benefits of cooperation credit, what are some of the issues that arise in multi-national investigations?

## Cooperation with Governmental Agencies (cont'd)



- Although U.S. regulators tend to allow oral proffers given the risks of U.S.-based treble-damage class actions, be aware that certain non-U.S. regulators may require that the company's responses to their inquiries be in writing.
- Although many U.S. regulators generally do not require companies to waive privilege in order to gain cooperation credit –and some are prohibited in most circumstances from asking for it – be wary of non-U.S. regulators who may ask that you turn over to them what you would consider to be attorney-work product, such as memoranda of witness interviews or forensic analyses performed under counsel's supervision.

# Internal Investigations

High Risk Areas:  
Foreign Corrupt Practices Act



CURRENT ISSUES IN  
Internal Corporate Investigations

# Foreign Corrupt Practices Act Hypothetical Scenarios



- Foreign Corrupt Practices Act
  - U.S. and international enforcement authorities have continued their pursuit of businesses for FCPA and anti-corruption violations.
  - These enforcement actions have resulted in record-breaking fines and settlements, and significant adverse publicity for the businesses involved.
  - Since August 2011, when SEC rules governing Dodd-Frank whistleblower provisions became effective, the SEC has received thousands of reports of fraud or foreign bribery.
  - These potential whistleblowers could receive between 10 and 30 percent of the penalty amount.

# Foreign Corrupt Practices Act Hypothetical Scenarios



- **BACKGROUND FACTS**

- Joint Replacements, Inc. (“Joint Replacements”) is a U.S. company based in New Jersey.
- Joint Replacements manufactures and sells joint replacement devices, including artificial hip and knee replacements.
- Joint Replacements’ devices are sold in markets in Europe and Asia through both subsidiaries and third-party distributors.
- Joint Replacements’ shares are listed on a national U.S. stock exchange.

# Foreign Corrupt Practices Act Hypothetical Scenarios



- Anonymous hotline has produced the following allegations of potential foreign bribery:

## Travel and Entertainment Expenses

1. Joint Replacements paid for 10 Chinese government officials and their significant others to travel to New Jersey to inspect company factories. Joint Replacements paid for their travel, accommodations, and meals. The Chinese officials and their significant others visited the New Jersey factories briefly before visiting tourist destinations, such as Disney World and Las Vegas. Each trip lasted two weeks and cost more than \$50,000 per couple. Joint Replacements recorded some of the trips as “factory inspections” and recorded others as “consulting fees.”

# Foreign Corrupt Practices Act Hypothetical Scenarios



- Assuming the allegations are credible, is there a potential FCPA anti-bribery violation?
- Is there a potential “books and records” violation?
- Is there a potential U.S. tax code violation?
- What investigative steps do you need to take to address the allegations?
- What strategic issues arise in undertaking those investigative steps?



# Foreign Corrupt Practices Act Hypothetical Scenarios



2. Joint Replacements paid all-expense trips for 10 Chinese government officials to inspect New Jersey factories. Joint Replacements paid for business class airfare, which its own employees use for international travel. The Chinese government officials performed an inspection of the New Jersey factories, and a Joint Replacements executive took the government officials to a reasonably priced dinner, a New York Mets game, and a Broadway show.
  - Assuming the allegations are credible, is there a potential FCPA violation?
  - What investigative steps do you need to take to address the allegations?
  - What strategic issues arise in undertaking those investigative steps?

# Foreign Corrupt Practices Act Hypothetical Scenarios



## Facilitating or Expediting Payment

1. Distributor in China pays fee to Chinese government official, legal under written Chinese law, to expedite the inclusion of Joint Replacement's medical devices on the central list of devices available for purchase and use in state-owned hospitals.
  - Assuming the allegations are credible, is there an FCPA anti-bribery violation?
  - What investigative steps do you need to take to address the allegations?
  - What strategic issues arise in undertaking those investigative steps?

# Foreign Corrupt Practices Act Hypothetical Scenarios



2. Distributor in China paid Chinese government official standard fee to schedule inspections related to transit of goods across country.
  - Assuming the allegations are credible, is there an FCPA anti-bribery violation?
  - What investigative steps do you need to take to address the allegations?
  - What strategic issues arise in undertaking those investigative steps?

# Foreign Corrupt Practices Act Hypothetical Scenarios



## Public vs. Private Payments

Joint Replacements paid \$250,000 consulting fee to a French surgeon through the surgeon's private clinic in Paris, France. The surgeon is an industry leader in hip replacement surgery in France and also works in a prestigious state-owned hospital in Paris, where he sits on the committee that makes purchasing decisions regarding medical devices.

- Does the surgeon qualify as a foreign official for purposes of the FCPA?
- Even if the surgeon does not qualify as a foreign official, does Joint Replacements face potential criminal liability for private-to-private bribery? Money-laundering? Books and records violations? Tax offenses?
- What investigative steps do you need to take to address the allegations?
- What strategic issues arise in undertaking those investigative steps?

# Key Issues in FCPA Investigations



- The same issues that arise in international antitrust or OFAC investigations arise in FCPA investigations:
  - Foreign restrictions on the review and transfer of certain information
  - Privilege Issues
  - Deciding whether to self-report to governmental agencies
- New trend is the addition of whistleblower issues.

# Whistleblower Issues – The Goal is Internal Self-Reporting



- Methods for motivating whistleblowers to report claims internally
  - Accessible anonymous hotline for complaints
  - Responsiveness to potential whistleblower complaints
  - Employee-relations versus fraud allegation
  - Issues involving sharing information regarding status of internal investigation with potential whistleblower
  - Determining the resources committed to investigating potential whistleblower's allegation

# Internal Investigations

High Risk Areas:  
OFAC / Sanctions



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# Background



- Prosecutions for violations of US sanctions law continue to result in record fines
  - \$619 million imposed on ING in 2012, now the record fine imposed by OFAC for violations
  - \$340 million imposed by the newly created New York State Department of Financial Services, on Standard Chartered Bank (“SCB”), plus another \$327 million that SCB paid to the US government (primarily OFAC, the DOJ, and the FRB)
  - \$536 million imposed on Credit Suisse in 2009 by the DOJ and the Manhattan District Attorney.



# Background



- Sanctions violations also can be prosecuted in other countries
  - Typically lower risk and lower exposure
- Most serious violations have involved allegations of “stripping”
  - Non-US bank deliberately altered SWIFT messages to avoid sanctions filters and blocking by US banks

# Hypothetical



- First Bank of France (FBF) is a bank based in Paris, France
  - Branches in Jordan, UK, France, Germany
  - State chartered branch in New York
  - USD clearing through New York money center banks
  - Officers often rotate through different jurisdictions
- FBF Jordan is preparing to terminate a long-term Senior Officer, Jordanian national, who currently works in Jordan
  - Senior Officer has received a bad performance review sees “writing on the wall.”
  - No known misfeasance or malfeasance by Senior Officer (yet)

## Hypothetical (cont'd)



- Senior Officer just reported the following to management
  - One of the customers of FBF Jordan, “Jordan Furniture,” is in fact a money transmission business (“Jordan Hawala”)
  - It is common knowledge at FBF Jordan that Jordan Hawala’s customers include individuals that are OFAC-listed and EU listed because of their connection to Hezbollah.
  - In fact, FBF Jordan has instructed Jordan Hawala to avoid mentioning its Hezbollah customers in any transactions, particularly those in USD, which might be blocked through the US financial system
  - Senior Officer was involved with Jordan Hawala business

## Hypothetical (cont'd)



- Senior Officer just reported the following to management, cont'd
  - A securities customer who opened an account while living in Paris has moved back home to Cuba continues to make trades in US securities through the Paris office.
- Officer is threatening to “go public” with this information, but has not been more specific about the threat

# What are the risks to FBF if the allegations are true?



- OFAC

- OFAC will take the view that FBF has violated OFAC regulations by directing and knowingly permitting the stripping of any mention of Jordan Hawala’s OFAC-listed Hezbollah customers from SWIFT messages received by US money center banks.
- Knowingly permitting Cuban permanent resident to trade in US securities non-transparently also will be seen as violation
- OFAC encourages voluntary self-disclosure (“VSD”)
  - OFAC penalties are officially set by formula based on the amount of the violation and the program at issue, but flexible in practice
  - 50% lower in cases of VSD
  - Investigation should include finding facts necessary to decide whether to submit VSD, and what its content will be

# What are the risks to FBF if the allegations are true?



- Federal Reserve Board
  - FBF should notify its regulator at the same time it provides a VSD to OFAC
  - Fed will likely coordinate with OFAC
- NYDFS
  - High risk of independent, aggressive action
  - High risk of fostering negative media coverage
  - Some Mayer Brown clients have chosen to switch to a national bank charter, avoiding NYDFS jurisdiction going forward
    - Typically have been very pleased

# What are the risks to FBF if the allegations are true?



- Prosecutors

- DOJ

- Charge likely would be criminal violations of US sanctions laws
    - Will likely coordinate with federal regulators

- Manhattan DA

- Charge likely would be creating false bank records.
    - Also may coordinate with federal counterparts

# What are the risks to FBF if the allegations are true?



- Private civil litigation

- The Anti-Terrorism Act creates a private cause of action for treble damages for any US person injured by an act of terrorism.
- Suits against banks
  - Founded on allegations that banks knowingly assisted terrorists and/or front charities by processing payments to them
  - Seek millions of dollars for incidents of terrorism that occurred after the transfer
  - Suits against leading banks have survived motions to dismiss and even summary judgment
  - Mayer Brown successfully has won dismissal for lack of proximate causation, but this would be difficult if there is a direct connection between the bank and the terrorist



# Special considerations for internal investigation: Jordanian Bank Secrecy



- Generally prohibits sharing of customer information outside of Jordan
  - Consult with local counsel
  - Conduct document review in Jordan / no removal of documents
  - Consider lawful exceptions
    - Obtain customer consents, but must consider tipping issues
    - Obtain local government consent
    - May be able to use anonymized data in report and VSD
  - Dealing with US federal and state government
    - OFAC may agree to no customer identifying information or work with Jordan
    - NYDFS unlikely to cooperate

# Special considerations for internal investigation: EU Blocking Statute



- May prohibit compliance with certain US sanctions laws, especially Cuba
  - May mean that EU companies cannot prevent Cuban persons from engaging in conduct that would violate US sanctions law
  - Better approach is to try to reconcile both laws, e.g., do not allow transactions that could result in customer funds being blocked in US, not in deference to US law, but in light of customer's own interests or independent business reason.

# Special considerations for internal investigation: Treatment of the whistleblower



- Consider local law
- Consider FBF's whistleblower policy
  - Must not make payment or other quid pro quo for silence on issues raised
- Communications to whistleblower
  - Should communicate that issues are being taken seriously and being investigated
  - May wish to remind whistleblower of legal confidentiality obligations

# Special considerations for internal investigation: Treatment of the whistleblower



- Termination?
  - Cons: Reputational risk, perception of retaliation, may prompt whistleblower to escalate concerns outside of institution
  - Pros: Was originally planned, do not want to be seen as providing continued employment as quid pro quo.
- Influence on internal investigation
  - We recommend against rushing to government before allegations are investigated, even if concerned that whistleblower will raise issue with government
  - May put additional time pressure on investigation, but right result and careful work must remain priority

# Special considerations for internal investigation: Remediation



- Bank should have plan to address, remediate and prevent future wrongdoing before making VSD
  - New written policies and procedures, e.g., additional screening, exiting money transmitter customers
  - Additional training
  - Disciplinary HR actions

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