

# Foreword

I spent nearly thirty years at the United States Department of Justice, much of it involved in white collar enforcement. As a line prosecutor, United States Attorney, and Deputy Attorney General, I was the recipient of numerous presentations by defense counsel setting forth the results of their internal investigation of alleged corporate malfeasance. Some of those presentations were very effective; others, not so much.

Through that experience, I have come to appreciate that the manner in which an internal investigation is conducted can have a significant impact on the ultimate fate of the company. In short, how the investigation is conducted gives regulators a window into how the company does business and whether the company is truly determined to get to the bottom of the alleged misconduct or is just papering over it in the hope that it will go away.

This is all the more true when we apply an international lens to white collar enforcement. Today, more and more companies, not just the Fortune 500, have some global presence. As corporations branch out operations all over the world, regulators now expect increased sophistication and compliance from these companies—a complex task to navigate and, on the back end, investigate. The practice area of international investigations is born of necessity: companies need legal counsel familiar with their global operations and equipped to advise them in multiple jurisdictions.

This book is meant to guide practitioners in this rapidly evolving area and provide a practical overview of current themes and best practices for investigations in key jurisdictions. Significantly, it will aid counsel representing both foreign and US clients dealing with foreign or US regulators. It covers the main issues present in all investigations—for example: privilege, evidence gathering, interactions with employees and regulators, etc.—with an overlay considering cultural nuances and foreign legal frameworks.

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Although a company generally should not be punished for the actions of its lawyers, sometimes the actions of investigations counsel are inextricably intertwined with the company. If investigations counsel is uncooperative, misleading or obstructionist in dealing with the regulator, that conduct can

consciously or unconsciously be attributed to the client. Moreover, if a matter proceeds to litigation, the manner in which the investigation was conducted can become part of the regulator's narrative before the court or at trial. The importance of the practice is clear: investigations have a resounding impact on a company's fate.

Counsel can use investigations as a shield or a sword. Companies using the investigation as a shield, or risk management tool, will gain knowledge about what is going well and what should be improved. In turn, the company will avoid costly mistakes down the road by enabling it to react swiftly if the investigation indicates that there is a compliance, management, or personnel issue. And, if voluntary disclosure of a compliance issue is warranted, the client can benefit from proactively reporting and addressing the problem. On the other hand, if a regulator has already indicated that there is an issue, the client benefits immensely from a well-oiled investigation that informs advocacy before the government. Critically, during negotiations with the government, the company will be well positioned to seek valuable cooperation credit.

Given the importance of conducting a thorough and defensible investigation, it is crucial to recognize that counsel running *international* investigations must consider additional complexities. Legal frameworks can vary dramatically from country to country and may change certain aspects of the scope, structure, and execution of the investigation. In addition, cultural differences and language barriers might permeate even the most basic building blocks of investigation.

To underscore the significance of local knowledge and expertise in international investigations, this book highlights several key differences between jurisdictions that may impact the investigation, for example:

- *Privilege*: France has no privilege for in-house communications and privilege is also limited in China and Switzerland. Yet, in Brazil, the doctrine of legal privilege is broader than in other jurisdictions and covers documents held in the custody of legal counsel—therefore, witness interviews conducted by lawyers are frequently recorded because these recordings are covered by legal privilege under Brazilian law.
- *Document collection, review, productions*: Given jurisdictional differences, considering local data protection regulations and blocking statutes at the outset of the investigation is critical. Cross-border transmission of data can be delicate, especially in countries like China, or Argentina, where there has been precedent of electronically stored information being ruled out as evidence for failure to comply with data protection laws.

- *Language considerations*: With any international investigation, translation of documents may be necessary, but translation is often subjective. Retaining local counsel is usually helpful and can also benefit the witness interview process—for example, interviews conducted as part of an investigation in Brazil are likely to be more effective if they are conducted in Portuguese. Conversely, interviews conducted through translation tend to obtain less information and miss cultural nuances.
- *Labor and employment laws*: These offer varying protections depending on the jurisdiction and are an important consideration in planning review of employees' materials as well as interviews.

From a more local perspective, DOJ has repeatedly recognized the complexities inherent in international investigations. For example, DOJ acknowledges that a company may still be eligible for cooperation credit even if relevant documents in a foreign location cannot be produced to US authorities because of foreign data privacy, bank secrecy, or other blocking laws.<sup>1</sup>

Moreover, given that compliance issues do not neatly fall into national boundaries, DOJ is increasingly working with its foreign counterparts in assessing corporate liability. This parallel work can benefit companies by helping them avoid situations where they are sanctioned for the same conduct in multiple jurisdictions. However, practitioners should bear in mind that while DOJ aims to coordinate with other regulators on evidence and penalties, DOJ often moves more quickly than its counterparts in other countries and will seldom put its investigation on hold to allow others to catch up.

DOJ's investigation may also set the tone for the other jurisdictions, as it leads the charge in setting policy governing voluntary disclosure programs, cooperation credit, and deal terms. Nevertheless, not all jurisdictions recognize the same resolution tools; for example, as this book points out, deferred prosecution agreements are generally not utilized in some countries (like Switzerland, the United Arab Emirates, and India).

Of current import, the new Administration has recently indicated that international investigations may be of increasing interest, especially as it goes on the offensive to root out global corruption. In June 2021, the White House released a memorandum identifying corruption as a central national security threat and announced that it intends to utilize all available enforcement, financial, foreign policy, and intelligence tools to detect and combat it.<sup>2</sup>

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1. US Dep't of Justice, Justice Manual § 9-28.700.

2. The White House, Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest (Jun. 3, 2021), <https://www.whitehouse.gov>

In addition, DOJ’s Criminal Division recently emphasized that it will be stepping up its proactive investigation of Foreign Corrupt Practices (FCPA) violations. While the FCPA has always been a staple statute generating ample international and cross-border investigations work, DOJ indicated at a June 2021 conference that it is developing “groundbreaking policies” and taking an “entirely new” approach to FCPA enforcement.<sup>3</sup>

Many FCPA investigations have historically originated from company self-reporting, but Acting Assistant Attorney General Nicholas McQuaid announced at the conference that DOJ is now developing FCPA cases “as much, if not more” through proactive investigation methods. Crucially, McQuaid emphasized that DOJ is gathering evidence in corruption cases through law enforcement sources and cooperators, “proactive and innovative” data mining, and partnerships with foreign governments.

Additionally, he warned companies against seeking lower penalties for bribery and foreign corruption violations based on the former Administration’s policy against “piling on.”<sup>4</sup> McQuaid stressed that companies need to make “good faith” efforts to coordinate with Justice Department officials if they want credit for resolving other investigations, especially given the increased collaboration between the agency and foreign governments. These developments signal to companies that proactive international investigations and voluntary disclosures are now more important than ever.

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It can be challenging to build credibility with witnesses and regulators with a home field advantage; it is exponentially more difficult when operating in a foreign jurisdiction. This book aims to make up some of that ground. It will help practitioners proactively identify and address the challenges and complexities involved in international investigations. And, on a practical note, the book helpfully presents this information in a digestible format, with easy to consult summary points for each jurisdiction that practitioners can use as checklists and quick reference guides without having to re-consult the more substantive chapters.

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/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/.

3. Nicholas McQuaid, Acting Assistant Attorney General, Dep’t of Justice, Keynote Address at the Foreign Corrupt Practices Act New York (Jun. 2, 2021).

4. U.S. Official to Firms: Don’t Game DOJ Policy Against Multiple Penalties, Reuters (Jun. 2, 2021), <https://www.reuters.com/business/us-official-firms-dont-game-doj-policy-against-multiple-penalties-2021-06-02/>.

As such, it is an indispensable resource to any attorney who is navigating the increasingly globalized nature of the investigations landscape and dealing with jurisdictional factors that impact how investigations unfold, from initial scoping to negotiations. Understanding the nuances of different countries' legal systems and corresponding pitfalls will help counsel avoid critical missteps.

The bottom line is that companies with well-designed investigations will be positioned for more positive outcomes. Each stage of the investigation will benefit from careful forethought and planning. Now that legal risk can arise from any place in the world, in any time zone, and in any language, clients must feel secure that their chosen legal counsel is ready to meet the challenge. This book will give counsel the tools to do just that.<sup>5</sup>

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5. The author thanks Ana Daily, who was a great help in putting this foreword together.