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Published by Financier Worldwide Ltd

SPECIAL REPORT ARTICLE February 2023

International executives facing a US internal investigation: what to consider

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Headlines about recent international corporate scandals involving the likes of Lafarge, Glencore, FIFA and Volkswagen are clear reminders that US authorities are ever-more willing to work with their foreign counterparts to investigate alleged misconduct overseas. As a result, corporations and their US counsel often find themselves conducting investigations beyond US borders. It is thus increasingly likely that international executives will experience a US-style corporate investigation at some point. This article suggests some issues to consider when that occurs.

Why would a US corporate investigation take place overseas?

A US interest may arise from conduct engaged in by the employees of a US company or its subsidiaries, from a foreign company's transactions with a US company, or, in some cases, even from US dollar transactions that pass-through correspondent bank accounts, such as payments that could be part of a foreign bribery scheme. The US Department of Justice (DOJ) has a very expansive view of US jurisdiction. Conduct abroad by non-US persons can become the focus of a US investigation even if the conduct is not illegal or prosecuted under local law, often to the surprise of the individuals involved.

When a non-US corporation becomes aware of a potential US legal violation, it is not uncommon for the company to have its internal audit function, or an outside law firm or investigations consultant, conduct an internal investigation. Given the draconian financial penalties under US law for corporate misconduct, as well as the benefits of corporate cooperation, there are many incentives for companies to cooperate with the DOJ to uncover wrongdoing. A company will frequently engage US-trained lawyers to conduct an internal investigation

and advise on strategy to minimise harm to the company.

The first public sign of an investigation may be a notice to employees to preserve documents

It is a standard practice of American investigators to freeze the evidentiary status quo by directing employees to suspend the deletion of communications and documents related to the investigation, even SMS texts and WhatsApp messages. An employee might have an instinct to 'clean the files' of potentially damaging materials upon learning of an investigation. Given sophisticated forensic technology, an effort to delete could come to light later. Document destruction, even if accidental, is often viewed as a red flag by investigators, and could be a criminal offence.

Upon learning of an investigation, an employee might also have an instinct to talk to colleagues about the conduct under scrutiny. Such conversations are likely not privileged, and employees may eventually be asked, by either internal investigators or government authorities, whether they spoke with colleagues about the investigation and what was said.

Considerations for an executive asked to give an internal interview

Internal investigators often seek to interview company employees, including executives. The company tries to determine what happened and may use the facts it learns to make employment decisions. The company may ultimately share the information it learns from interviews with law enforcement, and may not inform the interviewees if that happens, much less ask permission. This leads to several considerations for any executive who is asked to provide an interview.

Is submitting to an interview required? The answer likely involves company policy and local employment law. At-will employment is the general rule in the US, and companies have tremendous latitude to require US-employee compliance with internal interviews, even upon pain of disciplinary consequences including termination. In other countries, there may be tension between employee privacy laws and the employee's duty of loyalty to his or her employer. It is a question counsel is best suited to answer on a case-by-case basis.

Is submitting to an interview advantageous? This is a strategic question. The internal interview may be an opportunity for an individual to tell their side of the story. A critical factor in the decision is how close an individual is to conduct under investigation. If an employee perceives a risk that honestly answering questions could lead to them being viewed as culpable for improper conduct, that employee might consider not submitting to an interview, regardless of the employment consequences. The decision whether to speak or not will have long-term effects in any event and is worthy of serious thought.

Should the interviewee have a legal representative at the interview? An executive who does not bring their own lawyer can assume they do not have counsel at an internal interview. A senior executive may mistakenly believe that owing to their rank, a company lawyer who interviews them is protecting their legal interest. However, when a company conducts an internal investigation, the purpose is generally to benefit the company, not any particular employee.

Following the 1981 US Supreme Court decision in *Upjohn Co. v. United States,* it is now standard for US investigating counsel to provide a warning to corporate employees at the start of an interview that company counsel is not their personal counsel. The so-called 'Upjohn warning' essentially alerts the employee that the internal interview is covered by the company's privilege, and the company may decide to share the employee's information outside the company regardless of the employee's wishes.

In some cases, an employee may be entitled to company coverage of reasonable legal fees for independent counsel, depending on company by-laws, insurance coverage and local employment or corporations law. The fact that the corporation covers legal fees does not mean the employee's counsel is beholden to the company. In fact, US ethics rules specifically prohibit it.

Independent legal advice offers an employee several potential advantages. The employee's lawyer has a duty to act in the employee's interest alone and can provide an objective view of an individual's potential exposure, a key factor in deciding how to respond to an interview request. Under US privilege rules, a lawyer can gather facts and talk to other defence lawyers and company counsel in confidence in a way that a client cannot. Independent counsel can also help a witness prepare for the interview and take notes, so the witness has a record of what was said. In a complex cross-border matter, counsel can advise on what could happen in the future.

Disadvantages to an employee may include the cost of counsel if the employer does not cover legal fees for the representation. In addition, there may be concern that it appears adversarial to the company to request counsel at an internal interview.

There may be some benefits to the company, however. A lawyer can help a witness prepare for an interview by attempting to refresh recollection in advance. That can lead to a more efficient information-gathering process for the company. Having independent personal counsel may also help dispel any implication that a witness is being coerced or controlled by their employer, and thus support the bona fides of a corporate investigation. This could benefit an employer if a prosecutor later suspects that an employee was unduly influenced by an employer to answer questions in a certain way.

In the interview, the witness is generally asked questions and shown documents about the issue under investigation. One can assume that the interviewer will ultimately draft a memorandum of the answers provided. Because any statement made by a witness in an interview is likely to be memorialised, no workplace investigation interview is ever truly informal, even if it is short, conducted by an internal lawyer at the company, and the interviewee is unrepresented.

Should a witness sign an interview memo? An interview memo is generally not a word-for-word transcript. It is often prepared by

junior lawyers based on their notes. It is not common US practice to ask a witness to review and sign an interview memo. In part, this is because the corporation may wish to claim later that the memo is covered by its attorney-client privilege. A US defence lawyer may also prefer that their client not sign an interview memo, because by signing it, the witness may appear to endorse every word in it. In other countries, the practice may be different. Depending on the course of an investigation, an individual may end up being interviewed by multiple authorities and it may be preferable not to be bound by a written statement drafted by someone else, even if it purports to capture the substance of the witness's words.

Under US law, it is a crime to lie to a federal government investigator, even if the witness lies only to protect themselves and does not falsely inculpate others. The risk of a false statements charge exists not only if a witness lies directly to a prosecutor; it extends to lying to a lawyer for the company conducting an internal interview. While the law is not settled, it is prudent to avoid the risk by giving only truthful answers, if one speaks at all.

What happens after the internal investigation?

An internal investigation involving US issues may conclude with investigators reporting findings to management and the board, possibly leading to disciplinary employment actions at the company. It may also result in findings being reported to the government. In that event, it could be the prelude to a criminal or regulatory investigation by US authorities, either alone or in parallel with local authorities. For that reason, it is prudent for executives to proceed with great caution when navigating an internal investigation. ■

This article first appeared in the February 2023 issue of Financier Worldwide magazine. Permission to use this reprint has been granted by the publisher.