The International Comparative Legal Guide to:

Corporate Investigations 2018

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A practical cross-border insight into corporate investigations

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Introduction

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As the new U.S. administration settled in this year, the U.S. Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"), among other U.S. enforcement authorities, have continued to show a commitment to prosecute and regulate business crimes and related regulatory issues, as evidenced by a number of significant, well-publicised prosecutions and settlements.

Yet, uncertainty remains within the investigations defence bar regarding the future of white-collar enforcement under Attorney General Sessions. For example, commentators and practitioners have questioned whether the DOJ will: (i) continue to prioritise the prosecution of white-collar crimes – in terms of funding and focus – over other Department priorities, including drug offences, violent crime and immigration; (ii) articulate new policies to improve coordination and avoid "piling on" with duplicative financial sanctions by regulators in multi-jurisdictional enforcement proceedings; and (iii) amend the 2015 "Yates Memorandum", which issued guidance to DOJ criminal and civil prosecutors about the importance of individual accountability in civil and criminal investigations.

While we do not have a crystal ball regarding DOJ priorities and funding for the next three years, it seems evident that the DOJ (and SEC) will continue working to provide increased certainty to corporate defendants with respect to enforcement processes. This was aptly demonstrated by the recently announced Foreign Corrupt Practices Act ("FCPA") Corporate Enforcement Policy, which makes the 2016 FCPA Pilot Program a permanent DOJ policy. Under this Policy, if an entity voluntarily self-discloses an FCPA violation, cooperates fully, and appropriately remediates the issues, it can avoid prosecution unless aggravating circumstances exist or the offender is a criminal recidivist. If prosecution is warranted, the DOJ may still recommend a 50 percent reduction off the low end of the fine range for entities that self-reported the misconduct and a 25 percent reduction for entities that did not self-report but fully cooperated and timely and appropriately remediated per the Policy's standards.

The DOJ's decision to provide clarity regarding FCPA enforcement is welcome news for practitioners and corporates, as the DOJ continues to drive a large percentage of significant international anti-corruption investigations. It is also important because the U.S. approach to the investigation, prosecution and resolution of business crimes has often served to inspire changes in the legal regimes of other countries. For example, the U.K.'s use of Deferred Prosecution Agreements ("DPAs") has moved it closer to the U.S. approach. Indeed, in 2017, the Serious Fraud Office ("SFO") used DPAs to resolve two of the most significant enforcement actions on its docket in recent memory: against Rolls-Royce on bribery-related offences; and against Tesco on allegations of false accounting. The Rolls-Royce resolution, which resulted in a landmark penalty of £671 million, also involved U.S. and Brazilian authorities.

Other jurisdictions are also starting to introduce and use DPAs in an effort to encourage self-reporting by companies. In 2016, France passed "Sapin II", which, among other things, requires the management of companies with more than 500 employees and revenues exceeding €100 million to implement anti-corruption compliance programmes, and offers a French equivalent of a U.S.-style DPA for corruption, money laundering of tax evasion proceeds and related offences. Recently, French prosecutors relied on this new regime when entering into France's first-ever DPA with HSBC, which agreed to pay €300 million for money laundering and tax evasion offences. Australia is also actively considering whether to introduce DPAs.

Although a number of jurisdictions have now provided guidance on the benefits of cooperation and self-reporting, both corporates and individuals should expect enforcement authorities globally to continue to be aggressive when cases so merit. The DOJ's decision-making around the Yates memo and concerns related to "piling on" will not change this fact of life for parties caught in the crosshairs of a U.S. regulatory investigation, although such guidance, assuming it is forthcoming, may help further clarify best practice in the area of cross-border investigations.

Outside of the U.S., international regulators are also continuing to press ahead with their enforcement priorities. For example, in 2017, the U.K. Financial Conduct Authority ("FCA"), for its part, issued its largest-ever anti-money laundering penalty against Deutsche Bank for failing to implement adequate anti-money laundering controls, know-your-customer procedures and automated systems for detecting suspicious trades. In addition to the £163 million FCA fine, the New York Department of Financial Services imposed a fine of $425 million for engaging in a purported money laundering scheme by using "mirror trades" to move money out of Russia. The World Cup and Lava Jato investigations also continue to produce global headlines, prosecutions and settlements.

A number of noteworthy individual prosecutions were also announced in 2017. For example, in November 2017 the DOJ announced that three former Rolls-Royce employees and an individual who worked for a consulting firm instructed by a former Rolls-Royce customer had pleaded guilty and that a fifth individual, who worked as an intermediary for Rolls-Royce, had been indicted in connection with bribery and corruption offences. That same month, two former executives of the Dutch company SBM Offshore NV pleaded guilty to conspiracy to violate the FCPA.

Another important topic that has received attention in multiple jurisdictions this year revolves around the applicability of privilege protection over attorney-client communications or attorney work product. Even in jurisdictions where privilege protection is recognised, practitioners need to be aware that there may be significant legal and practical differences that may impact internal investigations and interactions with enforcement authorities. In the U.K., for example, a May 2017 High Court judgment (that is currently being appealed) would significantly limit the circumstances in which a company conducting an internal investigation prior to initiation of formal criminal proceedings could successfully claim litigation privilege over work product generated during the investigation. In another decision, the English High Court further restricted the scope of privilege by refusing to grant protection to notes of interviews of current or former employees. The Swiss Federal Supreme Court adopted a similar stance in investigations relating to the Swiss Anti-Money Laundering Act. These judgments could dramatically impact the practice of internal investigations in the U.K. and Switzerland, particularly those that are undertaken to address whistleblower allegations or compliance concerns absent a formal inquiry from an external regulator, and further complicate multi-agency, multi-jurisdictional investigations.

These developments, and others, are discussed in Global Legal Group's *The International Comparative Legal Guide to: Corporate Investigations 2018*, where leading practitioners have shared their insights on practices, developments, and trends in internal investigations in 20 countries, including with respect to the following areas:

- duties, benefits, and other factors to consider in deciding whether to launch an internal investigation;
- the process and potential effects of voluntary disclosure to civil and criminal enforcement authorities;
- strategies for cooperating with law enforcement authorities in multi-jurisdictional investigations; and
- the structuring, planning, execution, and internal reporting of investigations.

In this guide, we and our fellow contributors aim to provide readers with an introduction to the key aspects of corporate internal investigations globally in today's enforcement landscape. This guide also helps to highlight and focus on new or increased risks and challenges that corporates may face with respect to enforcement and regulation, which are unlikely to abate given the increased whistleblower activity and aggressive multi-jurisdictional government investigations of recent years.

We hope that this 2018 edition of *The International Comparative Legal Guide to: Corporate Investigations* will provide a valuable introduction to the key considerations steering internal investigations today and provide you with a helpful resource to help you confront significant questions relating to the scope, nature and timing of internal investigations. We would like to thank Global Legal Group for giving us and our fellow contributors the opportunity to share our insights.

Acknowledgment

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