The International Comparative Legal Guide to:

Corporate Investigations 2018

2nd Edition

A practical cross-border insight into corporate investigations

Published by Global Legal Group with contributions from:

Allen & Gledhill LLP
André Fonseca & Marina Lima Associates, OAB/SP
Arthur Cox
Baker Tilly Belgium
Bär & Karrer Ltd.
Blake, Cassels & Graydon LLP
Bloomfield Law Practice
Clayton Utz
De Pedraza Abogados, S.L.P.
De Roos & Pen
Debevoise & Plimpton LLP
Dechert LLP
Duff & Phelps LLC
ELIG, Attorneys-at-Law
Eversheds Sutherland
Kirkland & Ellis International LLP
Krogerus Attorneys Ltd
Morgan, Lewis & Bockius LLP
Norton Rose Fulbright
Pinsent Masons LLP
Rahman Ravelli
Skadden, Arps, Slate, Meagher & Flom LLP
Sołtysiński Kawecki & Szlęzak
Stibbe
Wikborg Rein
Zavadetskyi Advocates Bureau

glg
global legal group

global legal group

Contributing Editors
Keith D. Krakaur & Ryan Junck, Skadden, Arps, Slate, Meagher & Flom LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Editor
Sam Friend

Senior Editors
Suzie Levy
Caroline Collingwood

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George
Print Group
January 2018

ISBN 978-1-911367-89-5
ISSN 2398-5623

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

USA

Keith D. Krakaur

Skadden, Arps, Slate, Meagher & Flom LLP

Jocelyn E. Strauber

1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Publicly traded companies, financial services institutions, and other entities may, under certain circumstances, be subject to statutory and regulatory obligations to conduct internal investigations, depending on the nature of the alleged or suspected misconduct.

For example, the Sarbanes-Oxley Act of 2002 (SOX) requires corporate officers of US issuers, foreign private issuers, and other publicly traded entities that are registered with the Securities and Exchange Commission (SEC) to certify that each periodic financial report filed with the SEC fairly presents, in all material respects, the issuer's financial condition and results of operations. In connection with such certifications, an entity may need to investigate allegations or suspicions of misconduct that could materially affect its financial condition. SOX further requires that publicly traded companies establish audit committees responsible for developing procedures for investigating complaints of financial fraud involving auditing, accounting, or internal controls issues. Such procedures may call for internal investigations under certain circumstances.

Broker-dealers, and certain other regulated entities that are required to register for membership in self-regulatory organisations (SROs), may be subject to SRO rules that require members to investigate suspicions or allegations concerning certain types of misconduct. For example, the Financial Industry Regulatory Authority (FINRA), which, together with the SEC, regulates brokerage and exchange activities, requires member firms to promptly investigate any trades that may violate insider-trading provisions of the Securities Exchange Act of 1934 or related SEC or FINRA rules and regulations.

Certain agencies and authorities, including the SEC, Department of Justice (DOJ), and Commodity Futures Trading Commission (CFTC), grant leniency or cooperation credit to entities that self-report violations. As a general rule, businesses that identify, investigate, and self-report misconduct prior to a government investigation will receive more significant cooperation credit.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Entities should consider factors such as the scope and significance of the potential misconduct, including whether it could give rise to civil or criminal liability, whether the employees involved are still employed, whether the conduct could be ongoing, whether it could impact the entity's publicly filed financial statements, and the likelihood that the potential misconduct will come to the attention of criminal or civil authorities or regulators (for instance, if the conduct has a nexus to pending investigations or actions).

1.3 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Companies should assess whistleblower complaints on a fact-specific, case-by-case basis, including with respect to the nature of the allegations, the whistleblower's knowledge, the existence of corroborating information (including prior similar complaints), and the potential consequences of the allegations.

A company's response to a whistleblower complaint may impact whether the SEC chooses to bring an enforcement action against the company, pursuant to the SEC's Whistleblower Program, established under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), which encourages whistleblowers to report misconduct internally prior to approaching the SEC.

Whistleblowers employed by publicly traded companies are afforded significant protections under the Dodd-Frank Act and SOX. Public companies may face civil or criminal liability for discriminating or retaliating against whistleblowers who provide information to supervisors or government officials.

1.4 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

The client should be defined at the start of outside counsel's engagement and set out unambiguously in the engagement letter,

based on discussions with the individual or entity representative seeking representation. Outside counsel may represent corporate officers and other employees in addition to the corporate entity, but only if those individuals' interests do not diverge from the entity's interests. Where corporate and individual interests diverge, the affected individuals should be advised to retain their own counsel, or the entity may arrange separate counsel for them. Often, employees with similar roles and common interests, but whose interests may diverge from those of the entity, can be represented jointly by "pool counsel".

Individuals whose conduct is or may become the focus of the investigation should not be permitted to conduct or influence the direction of the investigation and should be excluded from the investigation's reporting structure while the investigation is in progress.

2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Regulators and civil and criminal enforcement authorities typically take an entity's timely and voluntary disclosure into account in determining whether to criminally charge or bring a civil enforcement action against the entity. Voluntary disclosure may result in a more favourable resolution or reduced penalty, particularly if the entity self-discloses prior to being informed of any government investigation.

For example, the DOJ, SEC, and CFTC generally consider an entity's prompt and full self-disclosure of misconduct and willingness to cooperate alongside other factors, including the quality of the cooperation, the nature and seriousness of the offence, the extent of wrongdoing within the entity and in the ranks of corporate management, the entity's history of similar misconduct (if any), the effectiveness of the entity's pre-existing compliance programme, the manner in which the entity detected the misconduct, and remedial steps taken.

Generally, in order to receive cooperation credit from the DOJ, an entity must identify all individuals involved in or responsible for the misconduct and provide all facts relating to the misconduct. Similarly, the CFTC views full cooperation as including disclosure of the identities of any individual wrongdoers.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

In light of the benefits of cooperation credit and voluntary disclosure, an entity should consider approaching the relevant authorities once it has developed information indicative of a violation of civil or criminal law. An entity can report well-founded suspicions before any conclusions have been drawn, though premature self-reporting may subject an entity to government scrutiny that may later prove unnecessary if the investigation does not ultimately establish misconduct.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

Oral disclosures and communications are generally preferable because they are more protective of attorney-client privilege and work product and present less risk of prematurely solidifying findings or conclusions that may change as further information is developed. Such disclosures may be accompanied by a sampling of key documents or transaction-related information, as appropriate. That said, under certain circumstances, an entity may have an interest in publicly disclosing its findings, in which case a written report may be preferable. US regulators and authorities typically do not require entities to report the findings of internal investigations in writing, though they may ask an entity to produce a copy of its written report if such a report has been prepared.

3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

Entities are not required to confer with government authorities when initiating internal investigations, though banking institutions may apprise their prudential regulators of internal investigations as part of ordinary-course dialogue concerning bank supervision and examination.

If an entity is aware that it is the subject of a related government investigation, it may benefit from promptly disclosing the scope and status of its internal investigation to the relevant authorities, as this may position the entity to influence or limit the scope of the government's investigation and increase the entity's cooperation credit.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

The DOJ, SEC, CFTC, and other authorities generally do not expect to be involved in internal investigations. To the contrary, authorities often rely on entities to disclose potential issues or misconduct – in line with the guidelines and criteria for voluntary disclosure and cooperation credit outlined above – before taking investigative steps or other actions of their own. However, in the event that the entity is actively cooperating with a government investigation, the investigating authority may request regular updates as to the status of the entity's internal investigation and may request that the entity take or refrain from taking actions in that internal investigation.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

A corporate entity's ability to guide the scope of a government investigation is typically most robust when the entity informs law

enforcement agencies that it is undertaking a thorough internal investigation and fully cooperates with and voluntarily discloses its findings to the relevant authorities. Of course, absent judicial intervention, an entity cannot control the scope of a government investigation, and ultimately the extent and nature of the investigation is within the government's discretion. To the extent an entity is not cooperating, it may seek judicial intervention to limit requests from civil or criminal enforcement agencies on grounds including undue burden and protection of the attorney-client privilege, but its options will be far more limited than when it is in a cooperative posture.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Cooperation between US authorities and law enforcement and regulatory agencies outside the US has become increasingly common over the past decade.

If multiple authorities across jurisdictions are conducting separate investigations concerning the same or overlapping activity, the corporate entity should ensure that any information the authorities receive is consistent. The entity also should identify opportunities to eliminate duplicative work, reduce the burden on relevant employees, and harmonise investigative efforts to address the different authorities' needs and interests more efficiently. For example, counsel might coordinate employee testimony with multiple authorities to avoid repeated requests for substantially the same information.

Entities may also seek a coordinated or global resolution of multiple investigations, though such a resolution may be difficult to achieve, depending on the timing and focus of the investigations.

4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

The scope, burden, and pressures of investigations in the US are substantial and growing. The most complex internal investigations today involve large multinational corporations with witnesses and relevant conduct occurring in multiple jurisdictions, and massive volumes of electronic data stored in the US and abroad, which may be subject to a variety of different data-protection regimes that may require, among other things, review of key materials outside the US. To the extent an entity chooses to disclose the results of its internal investigation to government authorities, the unique nature of the US legal and regulatory environment – including: corporate criminal liability for illegal acts of employees and agents acting within the scope of their duties; potentially severe collateral consequences of corporate criminal convictions; increasingly aggressive prosecutions of financial institutions and multinational firms; and pressure to identify culpable individuals, if any – makes it increasingly challenging for entities to navigate internal investigations, disclosures to regulators and authorities, and criminal and civil enforcement actions. Furthermore, materials disclosed to government entities generally will not be deemed privileged, and may be subject to disclosure to civil litigants seeking monetary judgments against the entity on the basis of the alleged misconduct that is the subject of the internal investigation.

4.2 What steps should typically be included in an investigation plan?

An investigation plan should provide a clear scope, including the activities or practices at issue, the business, division, or entity to be reviewed, and the relevant time period. The plan should also set out the investigative steps to be taken, typically including document preservation, collection, and review, witness interviews, and expert analysis if needed. Ideally, the plan should lay out a roadmap to the investigation while providing sufficient flexibility to address new issues and areas that may arise in the course of the investigation.

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Entities should retain outside counsel to assist with investigations involving suspected civil or criminal violations, government subpoenas or voluntary requests, potential misconduct by members of management, and issues of similar significance. An entity should look to outside counsel with experience handling such matters and interfacing with government authorities.

Depending on the facts and circumstances of the underlying activity, corporations should consider retaining forensic consultants and other experts in consultation with outside counsel. Experts should be engaged by outside counsel to ensure that any communications with and materials provided by such experts in connection with the investigation are protected by the attorney-client privilege and attorney work product doctrine.

5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

US law recognises the attorney-client privilege, "common interest" or "joint defence" doctrine, and attorney work product doctrine.

The attorney-client privilege protects confidential communications reflecting a client's request for, or counsel's provision of, legal advice. Although the privilege shields the contents of the communication from discovery, the underlying facts are not protected even though they may happen to be reflected in an otherwise privileged communication. The common interest or joint defence doctrine extends the attorney-client privilege to communications with third parties (and their attorneys), if the client and the third party share a common legal interest and the communications are made in furtherance of that shared interest.

In contrast to the attorney-client privilege, which protects communications between a lawyer and client, the attorney work product doctrine protects materials prepared by attorneys or their agents in anticipation of litigation. Work product may be "ordinary" work product (e.g., gathered facts), "opinion" work product (reflecting an attorney's mental impressions, conclusions, opinions, or theories), or a combination of the two. The government or a private litigant can ask a court to compel the production of ordinary work product on a showing of substantial need, but opinion work product is virtually never discoverable.

To preserve these privileges and protections, individuals involved with an internal investigation should keep privileged materials and communications confidential, and privileged documents should be clearly marked. In preparing investigative materials such as interview memoranda or reports, counsel should include mental impressions and opinions and avoid *verbatim* transcripts or bare recitations of fact.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Communications with and materials prepared by document review vendors, forensic consultants, or other third parties engaged by in-house or outside counsel are protected by the attorney-client privilege and attorney work product doctrine, if the vendors act as agents of counsel for purposes of helping counsel develop the information necessary to render legal advice to the client. Each vendor's engagement letter should clearly define the nature and purpose of the relationship between counsel and the agent.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

US privilege law applies equally to in-house and outside counsel. However, communications with and materials prepared by in-house counsel may face stricter scrutiny, particularly if in-house attorneys also provide business advice or other non-legal advice to employees.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Privileged and confidential materials created by or for counsel in the course of an investigation should be marked privileged and confidential, and the applicable privilege should be clearly indicated on the document, preferably on each page. Pre-existing documents that are reviewed and identified as privileged during an investigation should be marked as such to avoid inadvertent productions or disclosures of privileged material in the future.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

US authorities do not necessarily keep the voluntarily disclosed results of internal investigations confidential. Entities may, and typically do, attempt to limit further disclosure of materials that they provide to US authorities, including through requests for confidential treatment of such materials under the Freedom of Information Act (FOIA) or through contractual limitations in proffer agreements. However, entities generally have little control or visibility as to whether law-enforcement agencies share the information with other domestic or foreign authorities.

6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

Unlike some other jurisdictions, the US does not have a specific data-protection or data-privacy regime applicable to internal investigations. With respect to documents, communications, and other records housed in the US, certain categories of non-relevant personal information may be redacted from materials provided to a government authority pursuant to a subpoena or voluntary request.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

An entity is legally required to retain and preserve all relevant documents and data only when litigation or a civil or criminal government investigation exists or is reasonably anticipated or foreseeable. Failure to preserve data once this duty arises can carry significant sanctions for evidence spoliation, tampering, or obstruction of justice, as well as potential criminal liability under SOX (and potential civil or criminal liability under other statutes) for the wilful alteration or destruction of a document or other record for purposes of impeding, obstructing, or influencing any matter within the jurisdiction of a US agency.

In light of the potentially severe consequences of failure to preserve data and the difficulty in determining precisely when a government investigation can be reasonably anticipated, entities often take a conservative approach and issue preservation notices to employees who are likely to possess relevant documents and data whenever an internal investigation is initiated. Such notices should state the existence of the investigation, briefly set out the relevant areas or activities in sufficient detail so that employees can identify documents and data that must be preserved, explain the importance of data retention, and identify potential locations and categories of relevant data and documents.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Non-US legal and procedural requirements – including bank-secrecy laws, data-privacy restrictions, and even protections for materials deemed to be state secrets – can impede and delay the gathering of information for an internal investigation. While US authorities understand that some foreign jurisdictions have complex and restrictive data-privacy, data-protection and bank-secrecy regimes, they nevertheless expect corporate entities to deliver the information that they request, and to identify ways to obtain that information without contravening foreign laws. Engaging local counsel who can offer insight into non-US data-protection regimes is critical to this effort. In many cases, if employees give informed consent, that consent may facilitate swifter data collection and production. Alternatively, the DOJ and other US authorities may be able to obtain such information directly, pursuant to a mutual legal assistance treaty (MLAT) with the relevant foreign government.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

Any documents of relevance to the potential issues and underlying activity should be collected. Typical examples include electronic communications, audio communications, policies and procedures, internal audit reports, payment messages, trade records, and account statements.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Corporate entities typically engage third-party vendors to extract and store large volumes of potentially relevant data for review, and often work with employees in parallel to gather pertinent documents manually in a more targeted fashion. In the course of an investigation, witness interviews may lead to further sources of relevant data. In the event that an investigation calls for analysis of complex financial or trade data, experts in that area may be retained to assist.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Generally, corporate entities, outside counsel, and document review vendors select a population of documents for review from a voluminous data set through a combination of search terms, date ranges, and custodians (i.e., employees with whom particular documents are associated). The resulting documents typically undergo at least two levels of review. If an entity is cooperating with and voluntarily disclosing information to the authorities, counsel should discuss these review parameters with the prosecutors or enforcement staff to ensure that they are comfortable with the proposed approach.

Some entities use predictive coding and other forms of technology-assisted review (TAR) *in lieu* of search terms and first-level document review. TAR has not yet been widely used to identify materials responsive to government requests and investigations, but in the event of a wholly voluntary proactive disclosure by an entity, the DOJ, SEC, and other authorities might be receptive to the use of TAR in connection with that entity's internal investigation.

7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Entities need not consult with any authorities prior to initiating witness interviews in connection with an internal investigation. However, if an entity is cooperating with a parallel, non-public government investigation, the entity should be mindful of the risk of disclosing that government investigation by, for example, seeking to interview third parties or former employees. Furthermore, authorities may request that a cooperating entity provide advance notice of any witness interviews. In some cases, US authorities may even request that the entity refrain from conducting certain interviews in order to allow the authorities to conduct those interviews first.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

While employees are not required to cooperate with internal investigations, and may decline to participate in a witness interview for any reason, they may be subject to a variety of sanctions for failure to cooperate, including loss of compensation or suspension or termination of employment.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

An entity is not required to supply legal representation for a witness, though it is relatively common to advise an employee to retain counsel if his interests diverge from those of the entity or if he may face criminal charges; and often the entity will pay counsel's fees, depending on the particular circumstances, including the corporate bylaws and applicable local law.

7.4 What are best practices for conducting witness interviews in your jurisdiction?

Some witness interviews – including interviews of whistleblowers, if any – may be conducted early in the investigation to explore the scope of the potential issues, identify sources of relevant materials, and frame document review parameters. Further interviews are typically conducted after relevant documents have been identified, often including second interviews of witnesses interviewed in the initial stage of the investigation. Interviews often begin with lower-level employees and proceed up the reporting chain.

Counsel should not create audio or video recordings of witness interviews, and ideally only one set of written notes should be taken. Attorneys should avoid preparing *verbatim* transcripts of interviews, as attorney work product protection for transcripts is weaker than for notes reflecting counsel's mental impressions.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Many employee interviews are cordial, informal, and non-confrontational in the US. However, each employee interview typically begins with a formal instruction known as an "*Upjohn* warning", which is intended to ensure, among other things, that the witness, under settled law, cannot later claim that in-house or outside counsel represented the witness, cannot limit counsel's ability to share the content of the interview with government authorities, and keeps the interview confidential.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Whistleblowers employed by public companies are afforded significant protections under the Dodd-Frank Act and SOX. Publicly traded companies may face civil or criminal liability for discriminating or retaliating against whistleblowers who provide information to supervisors or government officials. In interviewing a whistleblower, in-house or outside counsel should signal that

the entity is taking the complaint seriously and should assure the whistleblower that the company is committed to its policies of non-retaliation and non-discrimination.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

Entities should not promise immunity or amnesty to employees in the course of an investigation, both because information developed at a later stage may make such immunity inappropriate and because of the need to retain flexibility with respect to remediation. While government authorities typically do not dictate whether or how an entity should discipline its employees, authorities may form an unfavourable view of an entity that continues to employ an individual involved in misconduct, particularly in a supervisory role, and especially if the individual is criminally charged or the subject of a civil enforcement action. In the context of a negotiated resolution of corporate criminal liability, government authorities may insist that employees involved in misconduct no longer remain at the company.

7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

Employees are not entitled to review memoranda of interviews reflecting their statements, and requests of this kind are not typically granted. However, employees should be permitted to supplement their prior statements at any time.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

Government authorities need not be present at employee interviews during internal investigations and generally are not present.

Employees whose interests do not diverge from that of the corporate entity are often interviewed in the course of an internal investigation, and there is no requirement that such employees be represented by counsel or that counsel be present for such interviews. If an employee is represented by counsel in connection with the investigation, counsel will generally attend all interviews of the employee. While counsel's presence is not required by statute pertaining to internal investigations, ethical rules in many states prohibit counsel from contacting represented parties in the absence of their counsel in connection with the matter in which the party is represented – though a party may, with counsel's consent, waive counsel's presence under certain circumstances.

8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

The decision whether to draft a written report largely depends on case-specific factors. Factors against a written report include the risk of disclosure and privilege waiver and related reputational and litigation risk. Factors in favour might include the complexity of the facts and issues or the need to document the thoroughness of the investigation or explain particular remedial decisions. Moreover, if an entity has an interest in publicly disclosing the findings of its internal investigation, a written report may be preferable.

8.2 How should the investigation report be structured and what topics should it address?

A written report might include an executive summary, background of the investigation, factual findings, legal conclusions, and recommendations for remediation. Alternatively, the client may prefer to exclude legal conclusions and recommendations from the report in light of the risks of privilege waiver, litigation, and reputational harm. Ultimately, the structure of the report, the topics addressed, and the organisation of those topics will depend on the particulars of the investigation.

Acknowledgment

The authors would like to acknowledge the invaluable contributions of Daniel Merzel and Clifford Mpare, associates in Skadden, Arps, Slate, Meagher & Flom LLP's New York office, in the creation of this chapter.

Keith D. Krakaur
Skadden, Arps, Slate, Meagher & Flom LLP
40 Bank Street
Canary Wharf
London E14 5DS
United Kingdom

Tel: +44 20 7519 7100
Email: keith.krakaur@skadden.com
URL: www.skadden.com

Keith Krakaur is head of the firm's European Government Enforcement and White-Collar Crime practice. With over 30 years of experience, he represents corporations, their board committees, directors, officers, and employees in criminal and regulatory investigations and at trial. Mr. Krakaur has represented numerous institutions and individuals in cross-border investigations, including those relating to economic sanctions, corrupt practices, money laundering, and tax fraud.

Jocelyn E. Strauber
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036
USA

Tel: +1 212 735 3000
Email: jocelyn.strauber@skadden.com
URL: www.skadden.com

Jocelyn Strauber represents companies and individuals in a wide array of criminal and civil enforcement matters. Prior to joining Skadden in 2013, Ms. Strauber held numerous roles at the U.S. Attorney's Office for the Southern District of New York, including, most recently, co-chief of the Criminal Division's Terrorism & International Narcotics Unit. In this role, she supervised investigations and prosecutions involving terrorism and national security, arms trafficking, money laundering, violations of export controls and economic sanctions, and global narcotics trafficking.

Skadden

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

The Government Enforcement and White-Collar Crime practice of Skadden, Arps, Slate, Meagher & Flom LLP and affiliates is an internationally recognised leader in the representation of corporations, boards of directors, management, and other individuals in connection with a broad range of government investigations, enforcement actions, internal investigations, and white-collar criminal investigations and litigation. The close coordination between criminal and civil regulatory authorities when investigating allegations of wrongdoing has increasingly blurred the line separating criminal, civil, and administrative offences, resulting in heightened risks when conducting business, both domestically and internationally. Skadden is well positioned to help clients navigate the legal landscape when business conduct results in concurrent criminal, civil, and/or administrative proceedings that require a strategically coordinated response.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com