

## **Handling an Overseas FCPA Investigation**

We recently came across an article entitled, “*Coordinating Investigations Between US Companies and their Subsidiaries or Suppliers Overseas*”, by two Jones Day attorneys, **John Edwards** and **Gillian Garrett**. While not strictly focused on investigations of FCPA matters, we nevertheless found the article to be very instructive for either the in-house counsel who may perform a front line FCPA or other compliance investigation or a private practice lawyer.

The authors initially note that investigations into overseas operations present challenges different from those involved in domestic investigations. First, there are obvious cultural and linguistic barriers to completing a thorough investigation. Second, because of the time and expense involved, investigations in other countries often are done on a compressed schedule, usually on a “one-shot” basis, with no opportunity for follow-up interviews. Finally, many people outside the U.S. view the American legal system with a particularly jaundiced eye. While they know little about U.S. litigation, they have heard enough to know they do not want to be involved. In some cases, this reluctance leads to recalcitrance. These factors may hinder an investigation and the authors give advice on techniques in the investigate process which manage these issues.

### ***1. Obtain Corporate and Departmental Organization Charts***

One of the first steps that an investigator should take is to obtain organizational charts of the operations which may be the subject of the investigation. The investigator should have a good grasp on the reporting relationship between the foreign subsidiary or entity and the US company. One must also understand the roles, responsibilities and reporting relationships of the relevant employees. This should include the company leadership which may be under investigation and the departments involved.

### ***2. Review the Company’s Relevant Public Statements***

The authors believe that it is important to review the U.S. company’s public statements relevant to the investigation and to its overseas operations. One important focus of the investigation will be to assess the accuracy of these statements. The investigators should also establish a liaison with the company’s public-relations department to ensure that its future statements are consistent with the results of the investigation and the overall strategy for handling the situation.

### ***3. Identify Key Witnesses and Records Custodians; Preserve Documents***

The authors believe that the investigators should interview US personnel before they head overseas. These US interviews should be aimed at identifying key witnesses and records custodians outside the US. The investigators also need to immediately establish communications with the company’s IT department to preserve as many documents as may be possible. However the authors caution that before collecting documents and data, counsel should review both the company’s internal policy and the laws of the relevant jurisdiction(s). Lastly another key liaison

should be with the company HR department, specifically to determine if any relevant employees have been disciplined and/or terminated and to coordinate any such actions on a go-forward basis.

#### ***4. Prepare for the Witness Interviews***

The authors suggest four specific areas of preparation for the interviews.

- a. Learn as much as possible about the foreign business or subsidiary.
- b. Review any audits, testing reports or other company material on the performance of the foreign business or subsidiary.
- c. Review all applicable contracts.
- d. Prepare interview outlines.

#### ***5. Secure the Required Visas***

The authors suggest that after the investigator completes the preparation phase, they should you should plan your trip abroad. I would digress here and urge that the visa process being as soon as you might reasonably believe that you may be required to go overseas as obtaining a visa can sometimes take weeks. Whenever an investigator starts the process, your initial step should be to obtain the appropriate visas for all the countries you wish to visit. To build flexibility into your schedule, request more time in the host countries than you think you will need.

#### ***6. Schedule Witness Interview***

The authors suggest that you should schedule your interviews before you leave the US. The interviews should be during working hours. I would add that you should try and have the interviews offsite but at a minimum in a closed conference room. There should be two persons present for the investigative team to record as much of the interview as possible on paper. You should also arrange a translator, whether or not the witness speaks English as second language. While it may be appropriate to have a forensic accountant or other technical specialist present, I would not have a company representative present because it may inhibit the witness even more than simply being questioned by a US lawyer.

#### ***7. During the Interview***

An attorney should explain the interview process and even in a foreign jurisdiction, give an *Upjohn* warning. After introducing yourself, begin with general background questions. After establishing some rapport with the witness go through the facts that you need to investigate. The authors caution that an investigator should not be wedded to his outline, but should listen to the witness's responses and question therefrom. The investigator and the note-taker should also watch the body language of the witness and assess the witness's demeanor. Before closing, the investigator should review their notes and follow up on any open points.

## **8. Prepare a Witness Interview Memoranda**

The authors conclude their paper by noting that the investigator should prepare an interview memoranda as soon as possible. This memorandum should include a recitation of the facts elicited and the lawyer's thoughts and impressions. All memoranda should clearly be marked as attorney/work product and attorney/client privileged. Lastly, the investigator should maintain a file of his interview process, procedure, notes and memoranda.

The article is a good review of how to prepare for an interview overseas. We recommend that you follow these general guidelines as you prepare for any FCPA or compliance investigation outside the US.

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