Global Investigations Review

The Practitioner's Guide to Global Investigations

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Publisher's Note

The Practitioner's Guide to Global Investigations is published by Global Investigations Review (www.globalinvestigationsreview.com) – a news and analysis service for lawyers and related professionals who specialise in cross-border white-collar crime.

The guide was suggested by the editors to fill a gap in the literature – namely, how does one conduct such an investigation, and what should one have in mind at various times?

It will be published annually as a single volume and is also available online, as an e-book and in PDF format.

The volume

This book is in two parts.

Part I takes the reader through the issues and risks faced at every stage in the lifecycle of a serious corporate investigation, from the discovery of a potential problem through its exploration (either by the company itself, a law firm or government officials) all the way to final resolution – be that in a regulatory proceeding, a criminal hearing, civil litigation, an employment tribunal, a trial in the court of public opinion, or, just occasionally, inside the company's own four walls. As such it uses the position in the two most active jurisdictions for investigations of corporate misfeasance – the United States and the United Kingdom – to illustrate the approach and thought processes of those who are at the cutting edge of this work, on the basis that others can learn much from their approach, and there is a read-across to the position elsewhere.

Part I is then complemented by Part II's granular look at the detail of various jurisdictions, highlighting among other things where they vary from the norm.

Online

The guide is available to subscribers at www.globalinvestigationsreview.com. As well as containing the most up-to-date versions of the chapters in Part I of the guide, the website allows visitors to quickly compare answers to questions in Part II across all the jurisdictions covered.

The publisher would like to thank the editors for their exceptional energy and vision in putting this project together. Together we welcome any comments or suggestions from readers on how to improve it. Please write to us at:
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Preface

The history of the global investigation

Over the past decade, the number and profile of multi-agency, multi-jurisdictional regulatory and criminal investigations have risen exponentially. Naturally, this global phenomenon exposes corporations and their employees to greater risk of potentially hostile encounters with foreign law enforcement authorities and regulators than ever before. This is partly owing to the continued globalisation of commerce, as well as the increasing enthusiasm of some prosecutors to use expansive theories of corporate criminal liability to extract exorbitant penalties against corporations as a deterrent, and public pressure to hold individuals accountable for the misconduct. The globalisation of corporate law enforcement, of course, has also spawned greater coordination between law enforcement agencies domestically and across borders. As a result, the pace and complexity of cross-border corporate investigations has markedly increased and created an environment in which the potential consequences, both direct and collateral, for individuals and businesses are of unprecedented magnitude.

The guide

To aid practitioners faced with the myriad and often unexpected challenges of navigating a cross-border investigation, this book brings together for the first time the perspectives of leading experts from across the globe.

The chapters that follow in Part I of the guide cover in depth the broad spectrum of the law, practice and procedure applicable to cross-border investigations in both the United Kingdom and United States. Part I tracks the development of a serious allegation (whether originating from an internal or external source) through its stages of development, considering the key risks and challenges as matters progress; it provides expert insight into the fact-gathering stage, document preservation and collection, witness interviews, and the complexities of cross-border privilege issues; and it discusses strategies to successfully resolve cross-border probes and manage corporate reputation throughout an investigation.

In Part II of the book, local experts from 12 national jurisdictions respond to a common set of questions designed to identify the local nuances of law and practice that practitioners may encounter in responding to a cross-border investigation. We look forward to updating and expanding both parts of the book in future editions as the law and practice continues to evolve in this emerging field. *The Practitioner's Guide to Global Investigations* has been designed for external and in-house legal counsel; compliance officers and accounting practitioners who wish to benchmark their own practice against that of leaders in the fields; and prosecutors, regulators and advisers operating in this complex environment.

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Judith Seddon, Eleanor Davison, Christopher J Morvillo, Michael Bowes QC, Luke Tolaini
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London and New York

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United States

Michael P Kelly[1]

General context and principles

1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects as it relates to your country.

There is never a shortage of high-profile corporate investigations in the United States. In the last 15 years, at least 26 of the US Fortune 100 corporations have been subject to criminal charges, deferred prosecution agreements, and non-prosecution agreements. Similarly, at least 25 of the Global Fortune 100 corporations have been the subject of criminal proceedings, DPAs or NPAs. Many other US and international companies have been subject to criminal investigations not resulting in either formal charges or agreements.

Right now, the investigation of FIFA is the highest-profile corporate investigation in the United States. The investigation, focusing on alleged corruption issues, is noteworthy in a couple of different respects. The investigation will highlight the extraterritorial reach of US law enforcement authorities. It may set standards for the conduct of business for international athletic organisations. Finally, the Justice Department's commitment to pursuing individuals in this matter may lead to some high-profile trials.

2 Outline the legal framework for corporate liability in your country.

Criminal and civil corporate liability can be imposed in the United States under the legal theory of *respondeat superior*. That theory allows a corporation to be liable for the conduct of employees who are acting within the scope of their employment, including low-level employees, where one or more employees conduct all of the acts necessary to commit a criminal

1 Michael P Kelly is a partner at Hogan Lovells US LLP.

offence. For instance, a corporation can be criminally prosecuted for fraud even if a low-level employee was responsible for the actions and his or her actions were not approved by or known by company management. Law enforcement authorities in the United States are given discretion whether to prosecute a corporation, and they weigh many factors in deciding how to exercise that discretion. Civil claims can be brought against corporations by either the federal or state law enforcement authorities or by private plaintiffs.

3 In your country, what law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies relating to the prosecution of corporations?

In the United States, corporations are generally regulated by a variety of law enforcement authorities from the federal government and each of the 50 states. The United States Justice Department is principally responsible for prosecuting violations of federal criminal law, while each state has its own Attorney General (or an equivalent) to enforce state criminal laws. Depending on the subject matter, there are a variety of federal law enforcement agencies that investigate and assist the Justice Department in bringing criminal prosecutions of federal law, including the Federal Bureau of Investigation, the Drug Enforcement Agency, the Department of Treasury, the United States Postal Service, the Food and Drug Administration and the Environmental Protection Agency.

There are also federal and state agencies that have the power to bring civil complaints against corporations. The Securities and Exchange Commission is one of the most prominent examples.

4 What grounds must the authorities in your country have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

There is no threshold of suspicion necessary to trigger an investigation in the United States. Federal or state prosecutors may initiate an investigation simply to satisfy themselves that no criminal violation has occurred. Federal grand juries have broad powers to conduct investigations and issue subpoenas.

5 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another country?

Double jeopardy does not prevent a corporation from facing exposure in the United States after it resolves charges on the same set of facts in another country. However, prosecutors in the United States consider similar prosecutions as a discretionary factor in determining whether and how to prosecute a corporation in these circumstances, including whether to consider fines paid to foreign law enforcement authorities. For instance, in 2016, the Justice Department entered into a deferred prosecution agreement with the telecommunication company VimpelCom Limited to settle a foreign bribery investigation, and gave VimpelCom credit for approximately US$230 million that it paid to prosecutors in the Netherlands for the same conduct.

6 Describe the principal challenges in your country that arise in cross-border investigations, and explain whether and how such challenges are dependent on other countries involved.

The principal challenge in cross-border investigations is to provide full co-operation to US law enforcement while fully complying with the laws of other countries, including foreign data privacy laws, blocking statutes, bank secrecy laws and labour restrictions. US law enforcement has voiced great scepticism about the scope of foreign laws restricting the ability of corporations to disclose information to the US government, and prosecutors often pressure companies to disclose information notwithstanding those foreign laws. In deciding what information to collect and provide to US law enforcement authorities, corporations often must weigh the risk that a foreign country may disagree with their legal interpretation of foreign laws (which may impose criminal or civil penalties for violations) against the risk that US law enforcement authorities will conclude that the corporation is not co-operating with the US investigation and that the US government must therefore bring criminal charges against it.

7 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

In some circumstances, the decision of foreign authorities can influence an investigation in the United States. If US law enforcement authorities have confidence in the rigour of the investigation being conducted by the foreign authority, and if the matter principally relates to events in that country, US law enforcement authorities have sometimes agreed to monitor the investigation and allow foreign law enforcement authorities to take the lead. In other cases, the Justice Department will not defer to foreign authorities and will conduct its own investigation independently from foreign authorities. This might occur where the US law enforcement authorities have concerns about the execution of the foreign investigation, intend to prosecute individuals in the United States, believe that there is a strong nexus to the United States, or believe that the investigation is important to the interests of the United States.

8 Do your country's law enforcement authorities have regard to corporate culture in assessing a company's liability for misconduct?

Corporate culture is a very important factor for US law enforcement authorities. The Justice Department carefully examines the 'tone at the top' of every corporation that it investigates. If the Justice Department believes that the corporation's leadership created an atmosphere contributing to or permitting the unlawful conduct, the corporation will be treated more harshly. The Justice Department will be more likely to bring criminal charges and to seek higher penalties against that corporation. The Justice Department will be more likely to seek the imposition of a corporate monitor in any settlement, and the monitor will be responsible for reporting extensively on the corporation's remedial efforts. The Justice Department is unlikely to trust the representations of corporations that have not committed to an appropriate culture of compliance, and the Justice Department will expect such a corporation to undertake more drastic remedial measures, including the dismissal of more high-ranking executives.

9 What are the top priorities for your country's law enforcement authorities?

The Justice Department's priorities are continually evolving. Its current top priorities include the investigation and prosecution of terrorism and national security violations, violent crimes, cybercrime, corruption, and fraud (including financial, securities, wire and healthcare fraud). The Justice Department has also emphasised the importance of prosecuting culpable individuals and not simply accepting corporate settlements when companies break the law, highlighted by a September 2015 directive from Deputy Attorney General Sally Q Yates (known as the Yates Memorandum).

10 How are internal investigations viewed by local enforcement bodies in your country?

Internal investigations are generally viewed favourably by US law enforcement authorities, provided that they believe that the investigation (1) is being conducted by experienced lawyers and other professionals (such as accountants), (2) is being overseen by a trustworthy corporate decision-maker not involved in the conduct being investigated and (3) is not interfering with law enforcement interests. Law enforcement authorities recognise that internal investigations can benefit the government by sparing resources and by providing information in a timely way that the authorities might not be able to obtain through their own efforts.

In the Yates Memorandum, the Justice Department expressed concern that some internal investigations have not fully identified all the evidence relating to culpable individuals and prevented the government from prosecuting them. The Yates Memorandum therefore instructs prosecutors to withhold all credit from corporations if they do not identify all evidence concerning culpable individuals.

In other instances, the Justice Department may ask a company to defer its internal investigation if it may interfere with the objectives of the Justice Department's own investigation. For example, if the Justice Department intends to conduct its own interviews or to conduct undercover work, it may ask corporate counsel to delay its investigation. However, the Justice Department has suggested this would be unusual.

Before an internal investigation

11 How do allegations of misconduct most often come to light in companies in your country?

Allegations of misconduct come to light in many ways, but they arise most often through allegations of whistleblowers, internal audit and media reports. There are a variety of statutes and programmes designed to incentivise whistleblowers to come forward. For instance, pursuant to the Dodd-Frank Act, the SEC has established a programme which can award whistleblowers between 10 to 30 per cent of monetary awards recovered by the SEC and other law enforcement agencies in enforcement actions involving US securities laws.

Regardless of the source of the allegation of the misconduct, corporations must treat allegations of misconduct seriously and investigate them appropriately. The size and shape of the review will depend on the circumstances. Some allegations will require a more comprehensive investigation than others. But law enforcement authorities and courts will make judgments about corporations based on how corporations responded to allegations even when no one

else was looking. Corporations can hurt themselves by retaliating against whistleblowers or dismissing significant allegations without basis, and can help themselves by carefully investigating allegations appropriately.

12 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress the company has if those limits are exceeded.

Search warrants and dawn raids are a feature of law enforcement in the United States, though they do not arise daily. A search or an arrest warrant is required for a dawn raid, and US law enforcement authorities must follow the terms of the warrant (which will set forth the property sought and the location to be searched) as approved by a court. To obtain a search warrant, law enforcement authorities must show there is probable cause (or a fair likelihood) to believe that a crime occurred and that specified evidence of a crime will be found at the location listed in the search warrant. If law enforcement authorities fail to comply with the terms of the warrant, or if they were not truthful when obtaining it, a court may preclude law enforcement from using any improperly seized document as evidence in a court proceeding. If law enforcement authorities obtain other evidence derived from illegally obtained evidence, courts may exclude the derivative evidence too.

13 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

While a search warrant is being executed, a lawyer for the company can notify law enforcement authorities that privileged material exists and describe the existence of privileged material. The government will generally establish a taint team, consisting of law enforcement officers not involved in the investigation, who will review the materials to determine if there is a colourable privilege claim. If those officers agree that those materials may be privileged, those materials will either be returned to the corporation or will be separated so the parties can later ask a court to resolve any dispute as to whether the materials are privileged and subject to seizure. If the taint team determines that the documents are not privileged, a corporation can file a motion with a court and request the return of privileged material. Throughout this process, lawyers and corporations must be exceedingly careful not to obstruct the execution of a search warrant or to do anything that could be construed as removing or concealing privileged materials while the search warrant is being executed.

14 Are there any privileges in your country that would prevent an individual or company from providing testimony? Under what circumstances may an individual's testimony be compelled in your country? What consequences flow in your country from such compelled testimony?

If the government attempts to compel an individual to provide testimony, that individual can claim the protection of Fifth Amendment right against self-incrimination and decline to answer questions that might incriminate him or her. The Fifth Amendment right extends not only to answers that themselves would directly support a conviction, but extends to innocuous answers that would provide a 'link in the chain of evidence' needed to support a

conviction. This right against self-incrimination also extends to the act of producing documents. However, only people can claim Fifth Amendment rights, and corporations do not have a right to refuse testimony or refuse to produce documents.

The government can compel an individual to provide testimony if the questions do not have the potential to incriminate that individual. For instance, the government may be able to persuade the court that the question has no tendency to incriminate. Alternatively, the government may provide the individual with immunity and request the court to order the individual to testify. If testimony is compelled, it cannot be used to prosecute the individual.

15 What legal protections are in place for whistleblowers in your country?

There are a series of patchwork laws providing protection to whistleblowers, but there is no omnibus statute or regulation that protects every whistleblower in every situation. For instance, the Dodd-Frank Act gives whistleblowers the right to bring a civil lawsuit against employers who retaliate against them for providing information to the SEC about violations of US securities laws. Moreover, the Dodd-Frank Act requires the SEC to protect the confidentiality of the whistleblower's identity. However, if the same whistleblower brings a tip to the Justice Department about violations of sanctions laws at his employer, he or she may not have the same right to a bring a civil lawsuit for retaliation if fired, and the Justice Department may or may not protect his or her identity. Legal protection for whistleblowers depends greatly on the context.

16 What rights do employees possess under local employment law that determine how they are treated within a company if their conduct is within the scope of an investigation? What employment rights would attach if they are deemed to have engaged in misconduct? Does it differ for officers and directors of the company?

Employees generally do not have rights under local employment laws if a company conducts an internal investigation. An employee can refuse to be interviewed by company counsel, though a company may terminate that individual's employment for refusal to co-operate with the investigation. Companies usually have the right to review the work email of employees to determine whether there was misconduct, and notice or consent of the employee is typically not necessary. Most employees in the United States are subject to at-will employment, and their employment can be terminated at any time. The same is true for officers and directors.

Under local law, corporations are sometimes required to pay the legal fees of officers, directors, and employees if they are involved in an investigation. This right depends on state law and the corporation's by-laws and other governing documents. This can be the most important right for individuals accused of misconduct, because it can be the only way that officers, directors or employees can afford to mount an aggressive defence of their conduct.

17 Are there disciplinary or other steps that a company must take in your country when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation? Can an employee be dismissed for refusing to participate in an internal investigation?

A company cannot discharge its duties to shareholders while turning a blind eye to misconduct. Corporations typically have the freedom to take any number of disciplinary actions

against employees suspected of misconduct, including suspension or termination. In most circumstances, a corporation may dismiss an employee if he or she does not co-operate with an investigation.

Commencing an internal investigation

18 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?

Corporations and their lawyers sometimes prepare a document setting forth the scope of an investigation. It depends on the type and complexity of issues being investigated, the level of detail needed to brief members of the board of directors or management about the scope of investigation, and the preferences of the companies and the professionals running the investigation.

19 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?

The issue must be elevated to the board of directors or company management, which must decide whether internal or external counsel are needed to advise on the issue. With advice of counsel, the corporation must ensure that the appropriate documents and materials are preserved. Through counsel, the company should conduct an appropriate review of the issue. The corporation should take appropriate remedial measures to fix any problem that is identified. Throughout the process, the board of directors or company management must decide whether the corporation should voluntarily disclose the issue to law enforcement.

20 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from law enforcement?

It depends on the circumstances. Privately held corporations with no reporting obligations under the securities laws are generally not required to publicly disclose the existence of an internal investigation or contact from law enforcement. It is more complicated for corporations whose securities are publicly traded or who have reporting obligations under the federal securities laws. These corporations must consider a complex series of rules and principles governing the disclosure of litigation and threatened proceedings, including whether the disclosure of an investigation or contact from law enforcement would be considered 'material' under the federal securities laws.

21 When would management typically brief the board of a company in your country about an internal investigation or contact from law enforcement officials?

It again depends on many factors (including the nature of the internal investigation or the law enforcement contact), but management generally should inform the board as soon as there is a possibility that the investigation or the law enforcement contact could affect the corporation's operations in some substantive way. In many cases, the notification should occur

immediately. For instance, management obviously should not wait if the Justice Department serves a subpoena demanding a large swathe of the company's financial records. In other cases, the notification may occur at the next scheduled board meeting. There is not the same urgency to report to the board about an internal investigation concerning a small-scale theft of goods at one of the company's thousand locations. As a general rule, management should be keeping the board of directors (and specifically the audit committee) informed of potential risks facing the company in a timely way.

22 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?

A company should work with outside counsel and ensure that the relevant data has been preserved. Litigation-hold notices to relevant employees are usually the first step in this process, but the corporation and its counsel must ensure that no email or electronic data are being deleted and should suspend document destruction procedures. Depending on the size and scope of the investigation, counsel may need to image the laptops and other electronic devices maintained by employees and may need to collect hard copy documents. The company's counsel should also meet with the government to discuss how the subpoena can be narrowed and how the company can prioritise the production of the documents.

23 How can the lawfulness or scope of a notice or subpoena from a law enforcement authority be challenged in your country?

A corporation can file a court action to quash a subpoena from a law enforcement authority. Federal prosecutors and federal grand juries are usually given wide discretion to conduct investigations, and federal courts are usually reluctant to quash a subpoena for overbreadth. However, there are circumstances in which courts will decline to enforce a subpoena. For instance, in *United States v. Microsoft Corp* (*Microsoft*), the 2nd Circuit Court of Appeals recently declined to enforce a subpoena because it sought documents held outside the United States, which was beyond the scope of the particular statute authorising the issuance of the subpoena.

Attorney–client privilege

24 May attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

Companies can protect the confidentiality of internal investigations in the United States by asserting the attorney–client privilege. To protect the privilege and the confidentiality of the information, companies must ensure that the information is not shared with any third party. For this reason, during the course of interviews in an internal investigation, witnesses are routinely warned not to disclose their communications with company attorneys to anyone. Companies can also assert the work-product doctrine, which protects the confidentiality of the attorney's work prepared in anticipation of litigation.

25 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

Corporations enjoy the protections of the attorney–client privilege in the United States. The attorney–client privilege protects communications between an attorney and a company (including its employees) made in confidence and for the purpose of providing legal advice to that company. Communications between company lawyers and lower-ranking employees are still protected so long as the communications were made for the purpose of providing advice to the company. There are well-recognised exceptions to the privilege, including the crime-fraud exception (which provides that a client's communication to the attorney is not privileged if made for the purpose of committing a crime). The privilege can be waived if the client reveals the advice to third parties to advance its interests. The same general principles apply to the attorney–client privilege when the individual is a client.

26 Does the attorney–client privilege apply equally to inside and outside counsel in your country?

The attorney–client privilege applies equally to inside and outside counsel in the United States. However, particularly with respect to inside counsel, courts will carefully examine whether they were acting as lawyers (whose communications are protected by the privilege) or as business advisers (whose communications are not protected by the privilege).

27 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

The Justice Department has consistently stated that it is not interested in the waiver of attorney–client privilege by corporations and that the waiver of the attorney–client privilege is not a prerequisite to obtain credit for co-operation. Instead, the Justice Department has stated that it evaluates the co-operation of the corporation based on whether the corporation has disclosed the relevant facts. Where it is necessary to learn the underlying facts, there may be instances where the Justice Department might request a waiver of privilege from a company.

28 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

The concept of a limited waiver of the attorney–client relationship exists, but it has been rejected by most federal courts of appeals. If a company provides privileged information to the government, it must be prepared for the possibility that a court may order the disclosure of the information to third parties if that information is potentially relevant in another litigation.

29 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

For the reasons described above, it usually will be difficult to maintain the privilege in the United States in those circumstances.

30 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

Common interest privileges exist in the United States. Sometimes called a joint defence privilege, it protects communications between attorneys representing different clients when their respective clients share a common legal interest in a legal matter. Parties cannot establish a common legal interest simply because they merely desire the same outcome or share a financial interest in the outcome of a litigation. Some form of joint strategy is necessary to establish a common legal interest. Once a common interest privilege is established, it cannot be waived without the consent of all of the parties to the privilege.

31 Can privilege be claimed over the assistance given by third parties to lawyers?

If the lawyers have retained professionals to assist the lawyers in rendering legal advice to the client, that assistance may be protected by the attorney–client privilege. For instance, lawyers typically hire accounting firms to assist in the investigation of claims of accounting improprieties, and the work performed by the accounting firm under the direction of the lawyer generally would be protected by the attorney–client privilege. However, if the accounting firm was not acting under the direction of the lawyer and was not retained to assist the lawyer in providing legal advice, the work of the accounting firm may not be protected by the attorney–client privilege.

In other contexts, the attorney–client privilege generally does not apply to assistance given by third parties to lawyers, but a similar protection may be provided by the work-product doctrine. For instance, if a lawyer interviews a third party unaffiliated with the client, that conversation may not be protected by the attorney–client privilege, but the lawyer may be able to invoke the work-product doctrine to protect the confidentiality of the communications.

Witness interviews

32 Does your country permit the interviewing of witnesses as part of an internal investigation?

Yes.

33 Can the attorney–client privilege be claimed over internal witness interviews or attorney reports in your country?

Yes, unless an exception to the privilege applies.

34 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

To avoid potential conflicts, company counsel must inform an employee being interviewed that counsel represents the company and not the individual and that the interview is protected by the company's attorney–client privilege. To maintain the company's privilege, counsel must inform the employee that the communication must be kept confidential and that the employee should not discuss the contents of the communication with any third party. To prevent the employee from being potentially misled, counsel must also advise that the company may decide to waive the privilege and could reveal the communications to third parties. This is known as an *Upjohn* warning, which is usually given to current and former employees at the beginning of an interview.

35 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

The corporation typically arranges for its counsel to meet with employees at the corporation's offices. With limited exceptions (such as corporate in-house counsel), other company employees are generally not present for the interview. When the interview begins, counsel advises the employees about the nature of the interview, including the *Upjohn* warning. The substance of the interview will generally cover topics such as the employee's professional history, the employee's current and past responsibilities, the company's procedures or training with respect to the issue in controversy, the chronology of the relevant events, and the employee's understanding of those events. Unless they are unavailable, documents are usually shown to the employee during the course of the interview. There are many circumstances where employees may have their own legal representation at the interview, but this may not be an absolute entitlement. There are also many circumstances where the corporation would not be required to pay for individual counsel for their employees.

Reporting to the authorities

36 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

There is no general duty to report misconduct, but there can be specific situations where it is mandatory. This is particularly true in closely regulated industries such as insurance or banking. See, for example, Section 405 of the New York Insurance Code (requiring insurers to report insurance fraud).

37 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

A lawyer might advise the company to self-report if the benefits of self-disclosure outweigh the costs. Context is critical in deciding whether to recommend self-disclosure because

the benefits and costs will be different for each potential self-disclosure and company, and because each company will have a different tolerance for risk. To cite an obvious example, all other things being equal, an attorney might advise a company to self-disclose to the federal government if it is closely regulated by federal and state regulators and does substantial business with the United States government. For that company, the loss of regulator confidence or a major customer could be devastating to the viability of the company as a going concern. Similarly, other clients may be interested in reducing their potential exposure as much as possible, and a lawyer may recommend a voluntary self-disclosure as the most effective way to give the company its best opportunity to obtain a declination or obtain a reduced penalty, or both, from the Justice Department.

38 What are the practical steps you need to take to self-report to law enforcement in your country?

An attorney must obtain permission from the board of directors or company management (as the case may be) before self-reporting, but the permission does not need to be recorded in a specific document. Once the company directs the attorney to self-report to law enforcement authorities, the process is informal, and the attorney will call the contact in the law enforcement agency as promptly as possible to ensure that the corporation receives credit for its timely self-reporting. A meeting in person with the law enforcement agency will generally follow the initial telephone call to discuss the self-report in greater detail. A company should not wait to make the self-report, because it might discover that the law enforcement agency learned of the underlying conduct days earlier through a whistleblower. In that situation, a law enforcement agency might threaten to withhold credit for self-reporting from the corporation.

Responding to the authorities

39 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

A company should generally rely on its outside counsel to respond to a notice or subpoena from a law enforcement authority. Outside counsel can initiate a dialogue with the law enforcement agency about the scope of the subpoena, including whether it can be narrowed without risk to law enforcement objectives. Outside counsel often are in the best position to conduct a broader dialogue with law enforcement about the concerns that prompted the notice or subpoena.

40 Are ongoing authority investigations subject to challenge before the courts?

In the absence of very unusual circumstances, courts in the United States do not consider broad challenges concerning how law enforcement agencies conduct investigations. Courts can hear challenges that may be relevant to some aspect of an ongoing investigation, such as whether a law enforcement search improperly seized privileged materials from its owner. But

that is a much more limited oversight and does not regulate who should be investigated and how extensively.

41 In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?

It depends on a number of factors, including whether the law enforcement agencies are co-operating with each other and whether the company is co-operating with the investigations of each country. There may be situations where it would make sense to negotiate a consistent disclosure package with multiple countries even if it exceeds what the initial notices or subpoenas sought. In other cases, it may be in the company's best interests to respond separately to each subpoena or notice, including where the law enforcement authorities are antagonistic to one another.

42 If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for and produce material in other countries to satisfy the request? What are the difficulties in that regard?

A notice or subpoena in the United States generally requires the recipient to produce relevant documents under their control, custody or possession. In the past, if the record was located in another country and a company could obtain that record from its custodian as a business matter, courts in the United States tended to conclude that the document was under the 'control' of the subpoenaed party and must be produced. As a result of the 2nd Circuit's recent *Microsoft* decision (see question 23), it is likely that courts will give closer scrutiny in deciding whether Congress has authorised the issuance of subpoenas to obtain records outside the United States.

If a court concludes that the subpoena has the power to compel the production of documents outside the United States, the next difficulty arises if the production of documents would potentially violate the law of the country where the documents are held. The primary difficulty arises when the production of that document would potentially violate the law of the country where the document is held. That situation leads to a more complicated and fact-intensive analysis where courts evaluate whether it would be appropriate to compel production even if it means exposing the company and its agents to criminal liability in another country.

43 Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?

It is not unusual for law enforcement authorities to share information or investigative materials with their counterparts so long as they are persuaded that their own investigations will not be compromised or weakened as a result. Co-operation can occur through formal mechanisms, such as mutual legal assistance treaties, or through more informal discussions.

44 How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?

The company must take a hard look at the laws of the other country and determine if the production would truly violate them. If it would, the company should obtain a legal opinion from a well-respected lawyer from that country, present that opinion to the law enforcement authority in the United States and explore whether there are other avenues for the US government to obtain that information. The company should also explore whether it would be feasible to produce the documents through a mutual legal assistance treaty request. If none of the options work, the company must face a difficult decision about whether to produce.

45 Does your country have data protection statutes or blocking statutes? What related issues are implicated by complying with a notice or subpoena?

There is no data protection statute in the United States comparable to EU Directive 95/46/EC, and there is no blocking statute comparable to the French Blocking Statute. Depending on the nature of the information sought, there may be information covered by privacy statutes, and a company would have to ensure that it complies with any applicable privacy statute.

46 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Voluntary productions are usually preferable to the compelled production of material in the United States, because voluntary productions help the company to show that it is co-operating with law enforcement authorities and because compelled production of documents requires a subpoena from a federal grand jury. The primary risk in a voluntary production is that a third party may argue that the production of privileged material resulted in a waiver of privilege as to all privileged material, but that risk exists with respect to compelled productions too.

Productions made pursuant to grand jury subpoenas are generally treated under the law as confidential. The company can request that the government treat materials as confidential under exceptions to laws such as the Freedom of Information Act. Law enforcement authorities also generally resist requests for disclosure from third parties such as civil litigants. However, once a company has produced documents, it should be prepared for the possibility that the documents could be distributed to other parties.

Global settlements

47 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Corporations must be aware of collateral consequences of any settlement with US law enforcement authorities. The public announcement of a settlement may prompt scrutiny from law enforcement authorities from other jurisdictions, including foreign regulators and state regulators, and it may prompt civil litigation. Federal or state governments might suspend or

debar the company or key officers from participation in government contracts. The market might have an adverse reaction, and there might be negative publicity that could harm the company. Before entering into a settlement, a company must carefully analyse these potential outcomes and develop a plan to address these risks.

48 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Companies can face fines, restitution, disgorgement, forfeitures, suspension or debarment, installation of corporate monitors, and other administrative penalties. In addition to suspension and termination from their employment, individuals can face imprisonment, fines, restitution, disgorgement, forfeitures, suspension or debarment, and other collateral consequences flowing from a conviction.

49 What do the authorities in your country take into account when fixing penalties?

Law enforcement authorities consider a wide variety of factors, including those set forth in criminal statutes, sentencing guidelines (such as the United States Sentencing Guidelines), and policy guidelines adopted by the relevant law enforcement agencies (such as the Principles of Federal Prosecution for Business Organizations adopted by the Justice Department). Broadly speaking, the most important factors usually include the history and characteristics of the company or individuals being sentenced, the nature and severity of the offence, the role that the corporation or individual played in the offence, the amount of money gained or lost because of the offence, the extent of any other harm caused by the offence on victims or society as a whole, and the assistance provided to authorities by the corporation or individuals being penalised. For corporations, law enforcement also consider the existence (or lack) of an effective ethics and compliance programme.

50 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Non-prosecution and deferred prosecution agreements are available and frequently used in the United States, particularly with respect to corporations. The primary advantage of a non-prosecution agreement is that the government does not file charges against the corporation with a court. The primary advantage of the deferred prosecution agreement is that the government promises to dismiss the charges within a definite period if the corporation complies with its obligations under the agreement. The primary disadvantage of these agreements is that they can allow prosecutors in some situations to make unreasonable demands on corporations and to stretch statutory interpretations without significant judicial oversight when the facts do not support the filing of any charges.

51 Is there a regime for suspension and debarment from government contracts in your country? Where there is a risk of suspension or debarment or other restrictions on continuing business in your country, what are the options available to a corporate wanting to settle in another country?

A suspension and debarment regime exists in the United States, and corporations must be very careful to investigate the potential for suspension and debarment before entering into a settlement agreement with domestic or foreign authorities. Otherwise, the corporation may unwittingly agree to a settlement containing terms that automatically trigger a suspension or debarment and jeopardise the corporation's business. In many situations, in negotiations with prosecutors and regulators, the corporation may negotiate terms that avoid or mitigate the potential for suspension or debarment.

52 Are 'global' settlements common in your country? What are the practical considerations?

Global settlements are becoming increasingly common as US law enforcement authorities establish stronger relationships with their international counterparts. Global settlements can be attractive to companies because they provide a greater sense of finality and ensure that companies received full credit for payments to other law enforcement authorities. However, global settlements can be more complicated, and companies must be careful that the dynamics of the negotiations do not lead law enforcement authorities to compete against each other and make higher settlement demands on the company than they would have made individually.

53 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Depending on the type of civil claim, parallel private actions may be allowed. Securities fraud, for instance, can give rise to criminal liability and to civil liability in parallel private actions. Private plaintiffs generally may not gain access to the entirety of the government's files, but might gain access to some materials in the government's files through subpoenas to the company, Freedom of Information Act requests, and access to public dockets in ongoing criminal cases.

Publicity and reputational issues

54 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

At the investigatory stage, the federal government is required under the Federal Rules of Criminal Procedure to conduct its grand jury proceedings in secrecy. Companies are free to make public statements about criminal cases at the investigatory stage, but generally decline to make lengthy statements concerning an ongoing investigation. Once the case is before a court, lawyers for the company and the government have an ethical duty to refrain from making statements out of court that might materially prejudice the court proceeding, and the

court can issue a gagging order on the parties if necessary. General public denials of misconduct or of liability are usually permitted.

55 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

Corporations must ensure that corporate communications are carefully coordinated with their litigation strategy. Although not universal, it is common for companies to use a public relations firm to advise on how to respond to corporate crises in the United States. However, no public relations release should be made that has not been thoroughly examined and approved by the legal team. Corporate communications can be used against the corporation in criminal or civil cases.

56 How is publicity managed when there are ongoing, related proceedings?

When there are ongoing, related proceedings, companies need to follow the same principles, coordinating closely between their attorneys and public relations officials. Statements about ongoing litigation should be brief and comply with local court rules. As a general rule, companies are usually best served by trying cases in the courtroom and not in the media.

Duty to the market

57 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

For corporations with reporting obligations under the securities laws, disclosure will generally be required for settlements resolving claims of potential liability asserted by the government in these circumstances. There may be exceptions in unusual cases (such as where the settlement with the government did not involve an issue material to the company's financial statements qualitatively or quantitatively), but those situations will be relatively rare. For corporations with no reporting obligations under the securities laws, there is no law requiring public disclosure of settlements with the government.

Appendix 1

About the Authors

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Michael P Kelly represents corporations and individuals in a wide range of matters involving US criminal law. He has successfully defended companies and individuals facing criminal cases and investigations brought by the United States Department of Justice. He has successfully helped boards of directors and corporations respond to allegations of potentially illegal conduct.

In defending clients in criminal cases, Mike has helped them resolve issues involving a wide range of US criminal law, including the Foreign Corrupt Practices Act (FCPA), money laundering, conspiracy, tax fraud, wire fraud, mail fraud, healthcare fraud and sanctions issues. He has conducted investigations in numerous countries, including in the United Kingdom, France, Switzerland, Austria, the Czech Republic, Poland and Brazil. Martindale-Hubbell has awarded Mike with its highest rating in white-collar crime, criminal law and litigation. Prior to entering private practice, Mike served as a law clerk to US District Judge Ewing Werlein Jr of the US District Court for the Southern District of Texas.

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