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Proactive Thinking About International White Collar Investigations: How to Mitigate Risks and Manage Key Issues

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Introduction

International white collar criminal enforcement is an increasingly complex arena. Enforcement efforts by traditional players—such as the United States and United Kingdom—have become more coordinated and aggressive, while a growing number of countries are passing their own criminal statutes in key areas such as anticorruption and are initiating their own investigations. There are also more enforcement bodies in the United States that have taken an active role in this area, resulting in multiple state and federal actors who are potentially interested in evaluating the same conduct. As a result, an investigation may now involve multiple countries, and multiple regulators within each country—each with different areas of regulatory focus and concern, and potentially very different processes and procedures governing their investigatory efforts.

Adding further difficulty—and often time and cost—to an investigation, the resolution of an issue in one jurisdiction may be shortly followed by an investigation by another country's regulators who claim their own jurisdiction to pursue criminal or civil actions; and this potential string of investigations may not be the end. Particularly in the United States, civil litigants increasingly pursue lawsuits related to investigations, asserting claims that the board's or management's failure to appropriately manage the company resulted in the issues at hand and/or that the shareholders themselves were misled by the company's disclosures.

Faced with this increasingly difficult environment, multinational companies and the attorneys that advise them, need to carefully consider ways to manage risks including:

1. Market analysis before entry and the continuation of that analysis and evaluation once in the market,
2. Selection and creation of an appropriate business structure,
3. Preparation and tailoring of compliance programs and responses if an issue arises,
4. Thoughtful execution of the investigation in view of data privacy and employee rights, and
5. Careful drafting of disclosures and negotiation of the resolution papers ending an investigation.

In sum, consideration of certain core issues can both assist an entity in avoiding problems, and—when a problem occurs—increase the prospect that it is effectively resolved.

Evaluating International Markets

As a threshold matter, companies should take the time to closely examine the markets in which they do business both before entering the market, and periodically once there. What are the enterprise-specific risks? How do the relevant regulatory schemes operate in that market? What will be the likely regulator response to potential issues? It is important to keep in mind that the enforcement officials in countries where a company does business may not have a deep history of investigating corporate conduct and may lack an understanding of a corporation's particular industry or business practices, further complicating both the appropriate risk analysis and an entity's ability to effectively respond to issues as they arise. For example, complex financial hedging strategies, cash management efforts, and corporate structures involving multiple layers and holding companies between the local company and the parent company may raise issues of legitimacy and transparency in the minds of regulators unfamiliar with these activities and structures and who may be evaluating them for the first time. The rationales for these activities—whether for tax planning, asset protection, liability limitation, etc.—should be evaluated under not just the applicable laws, but also the market-specific regulatory environment in which they will be executed.

Even when a company believes it is entering a jurisdiction where regulators are likely to be relatively "sophisticated," material differences exist from jurisdiction to jurisdiction—including in civil versus common law jurisdictions. This distinction, while difficult to fully describe, cannot be underestimated. Some differences are obvious—civil law is much more code based and far less reliant on court precedent, judges can be more active in an "investigatory" capacity, and evidentiary rules can be quite different. But there are also subtle differences in legal reasoning, argument structure, and presentation. While it may sound trite, lawyers from a common law tradition really do tend to "think differently" than do lawyers from a civil law tradition. Differences in criminal systems are also worth considering. For example, outside the United States, criminal defendants often sit in a dock isolated from his or her lawyer—a posture that to the US

mind may suggest guilt. In addition, in many countries the investigating officers have a much greater role in determining charges and plea bargains.

Political and governmental structures, cultural considerations, business traditions, and infrastructure and logistics are also important factors to understand. Is the culture one in which gifts are an expected tradition in business? Are key clients and potential clients state-owned such that interaction with them may trigger additional regulatory obligations under anticorruption statutes or otherwise? Is the financial infrastructure of the market and/or the business model such that cash will be commonly used? What sorts of interactions with competitors create potential antitrust issues?

Ultimately, it is worthwhile to evaluate the legal and regulatory environment and compliance considerations in addressing whether a company can successfully operate in a particular market, and that evaluation is best performed before market entry occurs. A more difficult or challenging compliance environment should result in the expenditure of greater resources to ensure compliance along with more sophisticated (and likely burdensome) controls around business and financial activities. All of these efforts create both direct and indirect costs that figure into the questions of whether operating in a particular locale is truly worthwhile. The strategic value of operating in a particular market may, finally, be overwhelmed by the difficulty in doing so in a compliant manner. It is best to address that issue up front, develop a realistic assessment of the difficulty, and determine whether the benefits outweigh the burdens and the risk that even the best compliance efforts may fall short in a high-risk jurisdiction.

Finally, a company should also periodically evaluate whether it is wise to continue operating in a particular market as changes in the business and legal environment occur. A particular market may have increasing corruption problems, or political or business instability, that renders operating in that market materially more challenging and ultimately unworkable.

Choose the Appropriate Business Structure for the Specific International Market

With the benefit of the information gained from the above discussed market analysis, consideration should likewise be given to the type of business

structure that best fits the needs of and risks faced by the specific enterprise in the specific market. There are significant differences in the ways in which a US company can organize itself internationally—all of which can affect the way a later white collar criminal investigation proceeds. Foreign entities organizing in the United States likewise face a plethora of options with similar differences. For example, an entity may elect to work through a local agent, which can minimize the necessary personnel and infrastructure investment as well as certain kinds of risks. The use of an agent may also reduce at least some—although certainly not all—legal risks by placing certain liabilities on the agent. By contract, the agent acts for the company in the jurisdiction in question and serves as its legal representative. An agent, however, is its own entity and the only way to control its activities is through the agency agreement and any control permitted thereunder. Oversight is often similarly distant and many white collar criminal investigations have at their center agent misconduct. In a joint venture structure, by contrast, the US company is likely to have more operational control and greater oversight capabilities. But, in contrast to the agency arrangement, employee and asset exposure is almost certainly greater.

Critical to the structure analysis is the level of control an entity desires to maintain over the international business venture. At its most basic level, the question is whether the US company is better off directing operations, or whether a more passive investment structure better suits the goals for market entry. Much depends on the specific business model, the market-specific business goals, and the risk profile of the new market.

Closely related to issues of structure and control is the issue of agency authority—who in the market will be permitted to manage, control, and act for the entity, and who will be responsible for the activities of the business: partners, agents, others? Specific consideration should be given to the risks presented by the particular actors, and contractual protections and functional controls put in place accordingly. The contract should address what law governs the operation of the venture, and where US law is not the governing law, at least consider importing into the contract critical US law compliance issues. For example, while foreign law may by contract govern the venture overall, a provision stating all members of the venture agree to comply with US anticorruption regulations can be helpful in directing the venture's compliance efforts and dealing with white collar criminal issues if they arise. Other critical issues include representations, warranties, and

indemnities. These provisions can memorialize what was important at the outset and distribute risk. Voting rights and voting protection are important issues as well. Will a simple majority vote on issues rule the day? Are there some issues where super-majorities are required to give a minority holder a blocking position that can be used on certain, critical concerns? Audit rights similarly merit consideration and may provide helpful visibility into a partner's operations throughout the venture.

Relatedly, just as a company should know a market before it is entered, so too an entity should know its business partners. Risk-based due diligence tailored to the specific role of the potential business partner (whether agent, joint venture partner, or co-actor under another structure) should be undertaken to consider critical issues such as the ability of the partner to conduct the business in question, the partner's history of compliance (or non-compliance) with applicable law, and the ownership structure of the partner. For example, if the partner or its owners, have ties to foreign government officials or are actually foreign government officials themselves, this fact will require careful evaluation under US anticorruption laws, and likely counsels against retaining the partner in question. Similarly, joining with a partner with no relevant business experience in the market or industry is likely to create heightened scrutiny in any later criminal investigation where regulators may question the selection of a partner perceived as having little to no relevant experience. Due diligence—which again should be tailored to the specific risks and risk level posed by the partner at issue—most often includes background checks, media searches, interviews, reference checks, and financial review, and should be documented when conducted so it can be relied on later.

Finally, exit options need to be evaluated and formalized. As noted above, over time the benefits of a venture or market participation may be outweighed by the risks and costs of continued operations. Yet, it can be very difficult to walk away from an operating international business venture when a company decides that the risks of continuing have become too great, or if the venture has become enmeshed in a difficult international white collar investigation where market withdrawal would materially improve the company's posture in that investigation. Simply put, consider and put in place at the outset the mechanisms and procedures necessary to unwind the venture. It is much easier to address this issue through a written document

that essentially says, "In the event of problem A, B, or C, the owners can take actions X, Y, or Z in order to dissolve the venture." Without such protection, a company may find itself attempting to dissolve the venture during the period of heightened scrutiny that inevitably comes with a white collar criminal investigation—a period where there is also increased potential for the interests of co-owners or partners to conflict, making an agreement on exit or dissolution difficult—or impossible—to reach. Thus, without prior planning a company's only option for exit might be sale of its interest in the venture—an action which, in the midst of an investigation, will likely be at a depreciated cost if in fact it can be done at all.

Establish and Maintain an Appropriately Tailored Compliance Program

Of course, one of the most important components of any international business venture is a tailored compliance program coupled with effective internal controls. Companies should specifically consider the content of such a program, who will run it, where the program fits within the corporate organizational structure, the types of internal controls adopted, and what kind of compliance-related reviews/audits will be conducted. Because it is both necessary to detecting and deterring malfeasance and expected by international regulators, an effective compliance program is critical to avoiding a whole host of problems—both civil and criminal. For example, it can protect the company against both employee theft and use of company funds to pay bribes.

Furthermore, where issues arise and an entity finds itself involved in a criminal investigation, the compliance program can be a key element in demonstrating the company's efforts to avoid illegal business practices and train employees in critical areas such as antitrust and anticorruption. Basically, if a company becomes the subject of an international investigation, it will be in a much better position if it can say to a US or international regulatory entity, "We regret the actions of our affiliate in Country X, but we tried to prevent this problem—we counseled our people on antitrust, anti-bribery, and anti-money laundering issues. We also had robust policies and procedures in place to avoid collusion with our competitors, to protect trade secrets, and to avoid paying bribes to national officials. Unfortunately, those policies, training, and internal controls did not work in this particular instance."

Prepare Coordinated Crisis Management and Business Continuity Plan

Companies should prepare an emergency plan for dealing with challenging situations, such as a government raid, to ensure the security of personnel and property (including intellectual property) and avoid business disruption. For example, how will a company respond if local authorities were to suddenly show up at one of its international offices or factories and seize all company records, including computers and servers? Does a backup of data exist (preferably at a different location or remotely accessible, if permissible under applicable data privacy laws) or will the company be left in the dark if an office's or factory's entire information technology (IT) system is seized? The same sort of thinking should be done around employee issues. What if the local company management is arrested or threatened with arrest? What if they are denied reentry to the country due to a pending investigation? How will the company continue its local operations and, as important, how will it protect its employees? Does the company maintain lists of in-market employees and their personal and emergency contacts? Does the company have helpful diplomatic contacts? A company should think through the steps it will take in an emergency and include legal, compliance, human resources, diplomatic, IT, media, and communications concerns. In addition to internal planning, an external PR plan is also important, and generally entails working with an experienced crisis management firm that knows the business or creating an in-house crisis management function. While every entity hopes it will never have to use such a plan, an effective and integrated crisis management and business continuity plan takes significant time and effort, and is best put in place before the emergency occurs. It is too late to start to develop a plan as employees are being arrested and computers seized. People are less likely to make a mistake or miss critical issues in the middle of a crisis if there is already a game plan in place and ready to be executed.

Further, once the crisis is upon the company, some further issues need to be addressed: Who is likely to become interested in the issues? Do any present the risk of criminal investigation? Will the investigation start in the United States and then continue in a foreign jurisdiction, or will it start in a foreign jurisdiction and continue in the United States? If an investigation can expand to involve multiple jurisdictions and enforcement bodies, how can the situation be managed proactively on the front end, rather than simply defensively responding to events and investigation "creep" as they occur?

Thoughtfully Navigate Disclosure and Privilege Waiver Issues

Investigations often involve disclosures—voluntary, or not—and with them issues of whether, when, and over what to waive privilege. In an international investigation these already complex issues are further muddled by the presence of multiple regulators and differing legal regimes. For example, in the anticorruption arena, the US Foreign Corrupt Practices Act[1] contains an exception for facilitation payments and an applicable statute of limitations; the UK Bribery Act[2] has neither. Consequently, a company under simultaneous investigation by US and UK regulators relating to corruption may face a situation in which production of documents demonstrating a valid exception or a time bar to claims in the US is at the same time affirmatively establishing a violation of law in the UK.

Similarly, many countries' legal regimes are designed to encourage or reward voluntary disclosure and/or privilege waiver. These issues require careful consideration. There may be clear benefits to such disclosure. As an example, the US antitrust regime offers greater leniency to the first entity to make antitrust disclosures in the price-fixing setting. In the anticorruption space, regulatory guidance encourages voluntary disclosure, and entities routinely receive reduction in calculated penalties for voluntary disclosure and full cooperation. But these benefits do not counsel disclosure in every instance. Disclosure to one regulator may result in that regulator sharing the information with another, and often triggers disclosure obligations to regulators and/or shareholders in other jurisdictions that may or may not be beneficial to the entity. Analysis of these obligations and the full collateral impact of any disclosure must be part of any decision about whether and when to voluntarily disclose, and precisely what should be said.

There are also privilege waiver issues to consider, keeping in mind that the concept of privilege is viewed differently outside the United States. For example, people view the role of in-house lawyers very differently in other countries than we do in the United States. Likewise, the limited application of the selective waiver doctrine and the subject-matter waiver rule—which combined may mean that disclosure in one context waives privilege as to

[1] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (15 U.S.C. §§ 78dd-1, et seq.).
[2] Bribery Act, 2010, c. 23 (U.K.).

the full subjects covered in the disclosure in all contexts—must be considered. A company should carefully consider what is and is not considered privileged information—not just in one jurisdiction, but in each of the jurisdictions potentially at issue. There may be good reasons to waive privilege, for example, proving a defense, a time bar, or demonstrating that you were merely following "advice of counsel"—a valid defense in many jurisdictions. As with disclosure, the key is to understand the likely implications of the waiver in the particular situation and to make an informed decision as to precisely what should be produced.

The evaluation of disclosure and privilege considerations also must take into account potential civil litigation. Companies subject to US jurisdiction are more and more likely to face follow-on civil litigation trailing an investigation of any significance, and a waiver in an investigation in any jurisdiction may result in the waiver of privilege in future US civil suits. Consequently, materials provided to a regulator in the context of an investigation, even made pursuant to a confidentiality agreement with that regulator, are often then available to US civil plaintiffs who seek the information in support of their claims. Voluntary disclosure or privilege waiver made in the hopes of quickly appeasing a US regulator may have similar results. And any material provided to the government may be made public in certain circumstances via a request under the US Freedom of Information Act.[3] The key is to avoid being so focused on the investigation at hand that the company is laid bare in later contexts. Again, disclosure and privilege waiver may well be strategically appropriate; just take the time to analyze the ramifications—including those beyond the investigation itself.

Be Aware of Data Privacy and Employee Rights Restrictions

Multinational companies must consider data privacy regulations, which often vary widely from jurisdiction to jurisdiction and may restrict what information can be collected and reviewed, where it can be transferred, and what input or permission can/must be given by employees/custodians before the data can be retained, collected, or reviewed. The failure to consider and resolve these issues from the outset of an investigation can result in restrictions on the ability to use key information and—in some instances—even lawsuits from employee labor unions, works councils, and/or regulators for failure to honor

[3] Freedom of Information Act, 5 U.S.C. § 552 (2012).

employee rights with respect to the data at hand. In fact, in some countries, violating data privacy rules could lead to criminal prosecution of the company's managing directors.

Similar issues arise with employee interaction. In addition to data privacy, many jurisdictions provide employees with certain rights against interviews and adverse employment actions. These issues are particularly prevalent in Europe where the works councils vigilantly guard employee rights. Thus, an employer may find itself in the situation where it cannot take swift adverse action in the EU against a mid-level employee involved in price collusion with a competitor. In fact, the failure to appreciate the employee's rights and works council obligations may result in an even greater problem when the terminated employee—or works council on his behalf—takes adverse action against the company. As a result, it is critical to know the labor and employment regulations in the relevant jurisdiction. Who can you interview? Whose data may you collect? Can the data be removed from that jurisdiction? What must you do before interviews and/or data collection? What warnings or procedural protections—such as the US *Upjohn*[4] warning—should be observed in conducting the interview itself? Can outside counsel conduct the interview absent allowing the employee to be represented by independent counsel? Each of these questions should be considered generally before an issue arises and resolved in the specific context of the investigation prior to data collection or employee interviews. The failure to consider these issues may result in limitations on the ability to use the information obtained—or worse—corporate liability stemming from the failure to observe employee rights and protections. Entities that understand the applicable regulations and proactively engage a works council or other employee representatives in advance of an investigation are often able to put in place agreed protocols that can be quickly and effectively implemented when concerns arise.

Consider Progressive Public Disclosure and Negotiate Thoughtful Resolution Papers

Occasionally entities go to trial on a criminal matter. More commonly, these matters are resolved by agreed resolution. In most instances, these resolutions are written and public. Together with a company's public

[4] *Upjohn v. United States,* 449 U.S. 383 (1981).

disclosures, these resolutions often form the basis for follow-on civil shareholder suits asserting that management's failure to satisfy its fiduciary duties led to the underlying issues in the investigation and/or that the company's failure to make appropriate disclosures relating to the issue defrauded shareholders. Appropriate disclosure during the investigation followed by thoughtful resolution papers can mitigate these claims or provide companies an often-effective tool for rebuffing them.

Any publically traded entity must consider its applicable disclosure obligations regularly. For US companies, these obligations and potential liabilities warrant consideration both before and throughout an investigation. Even before an issue arises, an entity should ensure its entity- and market-specific risks are being appropriately disclosed. Similarly, a company's continued efforts to detect, prevent, and mitigate those risks through a compliance program and relevant controls should likewise be considered for disclosure. The lack of these disclosures may be used by civil plaintiffs to claim that material risks were not disclosed and/or that a company made no effort to counter them.

Once in an investigation, disclosures should be regularly considered. For instance, it is poor practice to reach year two of an international white collar crime investigation, learn that the company is likely to have a criminal fine levied against it in Country X, only to realize that the company never disclosed the investigation or the risks leading to it to its US shareholders. Similarly, disclosure of the mere fact that an investigation has commenced or is ongoing may be fodder for shareholder suits where this bare disclosure is rotely repeated and then abruptly followed by detailed factual findings in resolution papers containing a large settlement or fine. These types of omissions can result in claims brought under Section 10(b)(5) of the Securities and Exchange Act of 1934[5] by shareholders who claim that the company knew of the investigation and/or the underlying concerns for years but never bothered to inform shareholders until announcing the criminal fine. To best avoid these claims, once in an investigation companies should consider appropriate progressive disclosure, alerting shareholders to the investigation and its status, risks, and potential findings—all of which may help to inform the market and avoid later claims that the company and/or

[5] Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10(b)(5), 48 Stat. 881 (15 U.S.C. § 78a, et seq.).

management knew of the severity of the investigation or its outcome and wrongly hid the information from investors.

The content of the resolution papers themselves is similarly important. Like public disclosures, US courts often permit resolution papers to be considered as early in a civil suit as the motion to dismiss. Where these resolutions contain mitigating facts—such as those evidencing the company's relevant due diligence, compliance program, the thoroughness of any internal investigation, and facts demonstrating that the actor(s) deliberately hid their malfeasance from management—they can be useful in addressing shareholder claims that the company misled investors or that company officers and directors knowingly disregarded their duty to oversee the company. In fact, the threat of civil litigation and the potential to negotiate helpful resolution papers may itself counsel settlement of an investigation at a particular juncture. Of course, no one likes to pay a fine, but it may be worth paying a fine if it is accompanied by a resolution document that says, for example, "Company X made a strong effort to comply with the law, but it had a rogue employee. It is going to pay a fine, but overall it was very cooperative, has an excellent compliance program, and made further improvements on the basis of these events." Such a resolution document can send a positive signal to shareholders, business partners, and customers.

As in each area discussed, the end game must be considered throughout the investigation process—what kind of public disclosures and resolutions are there going to be, and what can be done to shape those documents in a way that reduces collateral effects? It all comes down to risk management, risk avoidance, and risk mitigation. A company's focus cannot be on just whether it paid the smallest possible fine or received the lightest penalty. A company should also ensure that the process, disclosures, and resolution convey the best overall impression of the company under the circumstances.

Conclusion

It is cliché, but in this area it is absolutely true—an ounce of prevention is worth a pound of cure. Know the playing field. There is simply no substitute for careful analysis by those who know a company's markets, know their risks, and know the type of investigations and civil litigation the entity may face. With this knowledge in hand, think through each of these

issues in advance—and assist your clients in doing the same. Something unexpected is bound to happen in a multinational company with complex business operations, and advanced planning is the best way to both avoid problems and effectively handle problems when they arise.

Key Takeaways

- Know each market and the specific risks it poses before market entry. In view of this risk analysis, select a business structure that best serves the business purpose while mitigating those risks.
- Design, implement, and regularly review and enhance a compliance program tailored to the specific risks faced by the entity in each market. Conduct appropriate, risk-based due diligence on all business partners, periodically evaluate market and business risks, and conduct additional diligence and/or enhance the compliance program as needed.
- Ahead of any issue, design an integrated crisis management plan to protect personnel and business property and ensure business continuity. Include in this plan personnel, data, and property security; internal and external communications and media relations; and diplomatic strategy.
- Be aware of data privacy and works council/labor law restrictions in each jurisdiction in which the entity operates. Ensure investigatory efforts appropriately comport with any restrictions on collecting and transferring data; creating, maintaining, and transferring work product; contacting and interviewing employees; and implementing remedial measures.
- Consider any disclosure and/or privilege waiver in view of its full and collateral impact. Proactively consider the need for disclosure in other jurisdictions or to other regulators, ensure public disclosures accurately and appropriately convey risks and investigatory status, and negotiate thoughtful resolution papers in view of potential follow-on investigations and litigation.

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