

# KEY PRACTICAL CONSIDERATIONS

## Conducting an Investigation on Foreign Soil

By Brian J. Mich, J.D.

**A**s a result of the heightened regulatory and prosecutorial attention given to corruption in the United States and elsewhere, corporations increasingly have found themselves conducting investigations on foreign soil. These investigations can be conducted in a variety of different contexts, most notably, in the pressure cooker atmosphere created by an ongoing governmental investigation. They present special challenges and risks to which in-house counsel and compliance personnel, through the legal and forensic consultants they retain, must be sensitive. The failure to give appropriate attention to these issues could substantially frustrate the investigative steps taken and, ultimately, undermine the integrity of the investigation. This article will highlight some of the more vexing issues.

### Know the Culture

First and foremost, it is important that due consideration be given to the culture of the country in which the investigation is being conducted. While internal corporate investigations have become commonplace in the United States, in many parts of the world, particularly in developing countries where allegations of U.S. Foreign Corrupt Practices Act violations are most common, these investigations may run afoul to fairly well-entrenched cultural mores. Moreover, some conduct, such as the giving of gifts to or the entertaining of business associates, which may raise FCPA concerns, are accepted and, often, *expected* practices in some countries. It is imperative that those conducting these investigations become familiar with the accepted business practices of the country

involved as they pertain to the relevant industry, as well as the local attitude toward investigations.

A related concern for the investigative team involves communicating in the native tongue of the country or locale where the investigation is being conducted. The investigative team should include staff who are fluent in the local language. It may be easy to fall prey to

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the belief that, because business in a particular industry is conducted primarily in English, there is no need to utilize someone proficient in the local language. That approach, however, will risk missing vital information contained in local language documents. Perhaps more importantly, an investigation that does not include local language capability is missing an essential tool in securing the confidence of a potential witness, who will undoubtedly feel more comfortable speaking about the subject of the investigation in his/her native language and may very well find a person speaking a common language more trustworthy.

### Be Aware of Local Law

In addition to the potential cultural obstacles that an investigation might encounter, there are also some legal considerations. It is critical to be aware of the data protection and privacy restrictions that many countries have in place. These laws restrict the circumstances under which information that is obtained within a subject country may be removed. Much has been written about the European Union's data protection laws, as well as the restrictions on such information that countries such as Switzerland have long had in place. Data protection regimes have also become common in many Asian countries. The investigative plan must contain a strategy for data collection that contemplates these laws and any safe harbor provisions that may be available. Engaging competent local counsel, as well as other local resources familiar with these issues, is essential.

Data protection and privacy laws are not the only potential legal restrictions that could encumber an investigation. Immigration regulations relating to visa and work permits vary widely from country to country. For example, some countries have very restrictive rules regarding the type of activities that can be conducted pursuant to business visas and may not permit such activities as conducting interviews, writing reports, and performing computer forensics. In such cases, it is vital that the investigative team has access to local personnel who have the skills and resources to perform such tasks that foreigners will not be able to do.

Business corruption investigations present some particular immigration-related issues and challenges. The main locus of such an investigation might well be a country in which political and other



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forms of corruption are commonplace and, as a result, local government officials in that country will not be anxious to cooperate with the investigation. Therefore, a very delicate balance exists between the need to provide sufficient truthful information and limiting disclosure of details about the investigation. On one hand, the failure to comply with local law could compromise the integrity of the investigation and, worse, result in the arrest and deportation of investigative staff. On the other hand, the local government may very well refuse entry to investigative personnel if it is informed of the full nature of the work being performed on its soil.

#### Have an Interview Strategy

The attitude of local government and the local population also implicates strategic issues concerning the interviewing of witnesses. Conventional wisdom is that interviews should be conducted only after all relevant documentary evidence has been analyzed. Moreover, it is usually viewed as preferable to conduct interviews on site to allow for the possibility of being contacted by additional employees who were not known to possess relevant information and to allow for other serendipitous contact.

Consideration should be given, however, to the possibility that there may not be a second opportunity to enter the country and that, as a result, it may be better to interview some witnesses “cold,” without the benefit of a review of the documentary evidence. Additionally, pressure from coworkers and even governmental forces may make potential witnesses reticent to be interviewed. As a result, the investigative team must consider the option of interviewing wit-

nesses at a corporate location outside of their country.

#### Consider Local Work Rules and Technical Capabilities

Issues such as work schedule and work ethic can have a major impact upon the planning of an investigation. In many parts of the world, particularly in countries with very large Muslim populations, the weekend consists of Friday and Saturday. Likewise, the amount of hours worked may vary substantially from what is ordinarily expected in major cities in the United States. The investigative team needs to be aware of such issues and factor them into the scheduling of investigative steps.

The investigative component must also take into account that, in many developing countries, resources that it ordinarily would take for granted are not as plentiful. A major component of all internal investigations is the acquisition and preservation of documentary evidence, both in hard copy and electronic formats. The technological resources necessary to effectuate this portion of the investigation may not be prevalent in the country in which the investigative team will be operating. Again, as with many of the issues mentioned herein, leveraging local personnel to attain the necessary capabilities will be an important step in the planning of the investigation. Local personnel can greatly assist in arranging for any necessary third-party contractors to provide services such as document copying and scanning, which will likely be needed for completing the investigation.

#### Conclusion

In sum, the rise in foreign corruption investigations has created new challenges and risks for in-house legal and compli-

ance personnel. These challenges, which run the gamut from cultural to legal to practical, while not insurmountable, do require consideration and planning, as well as the making of some difficult decisions. As a result, the success of the investigation will rest in large part on the subject corporation’s ability to amass the necessary combination of knowledgeable international and local resources to tackle these issues. ■

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*Brian Mich can be reached at 212-885-8007 or [bmich@bdo.com](mailto:bmich@bdo.com)*



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