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DOJ ENFORCEMENT

Cross-Border Complexities in International White-Collar Investigations and Prosecutions: An Outline for In-House Counsel



BY LARA KROOP DELAMARRE

White collar investigations and prosecutions, notably those initiated by American authorities, have become increasingly international, reaching far beyond the borders of the U.S. The U.S. Department of Justice (DOJ) has promised that these international investigations and prosecutions will continue to grow as it intensifies its efforts to pursue violations globally. For example, in its April 5, 2016, release of “The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance” document, the DOJ’s Criminal Division said that “an international approach is being taken to combat an international criminal problem. We are sharing leads with our international law enforcement counterparts, and they are sharing them with us.”

Lara Kroop Delamarre’s practice focuses on antitrust, trade regulation, white-collar investigations, and international arbitration. Her extensive civil and criminal antitrust experience has included assisting corporate clients in both cooperative and adversarial roles, as well as investigative and prosecutorial matters. Her international arbitration experience includes both commercial and investor-state arbitration.

The DOJ is more serious than ever in pursuing FCPA violations. It makes clear in its FCPA guidance document that the “Department’s demonstrated commitment to devoting additional resources to FCPA investigations and prosecutions should send a message to wrongdoers that FCPA violations that might have gone uncovered in the past are now more likely to come to light.”

The Criminal Division is not alone in its zealous pursuit of violations. The DOJ’s Antitrust Division has also committed itself to uncover and pursue anti-competitive and cartel activities worldwide with increased resources and growing international cooperation. Last month, the Antitrust Division and the Federal Trade Commission issued updated Antitrust Guidelines for International Enforcement and Cooperation. The Division has also recently reiterated that “[i]nternational enforcement cooperation on cartel investigations remains a top priority for the Division.”

The explosion of white-collar investigations and prosecutions internationally presents a host of complex cross-border issues that have yet to be addressed and for which there is no clear legal framework.

Two significant factors have contributed to the increasingly international nature of white-collar investigations and prosecutions. First, the DOJ has made the global fight against both corruption and antitrust cartels priorities as it reaches far beyond the U.S. to investigate and prosecute foreign companies and foreign nationals. Second, international cooperation on both the anti-corruption and the antitrust fronts has increased

dramatically. International authorities have and will continue to cooperate with the DOJ.

The obvious impact of this internationalization is more white-collar investigations and prosecutions. This explosion of white-collar investigations and prosecutions internationally also presents a host of complex cross-border issues that have yet to be addressed and for which there is no clear legal framework. Companies must begin to consider these issues seriously to avoid the pitfalls that could accompany potential future white-collar investigations and prosecutions. In order to prevent, and be prepared to defend, an international investigation or prosecution, corporate counsel need to be mindful of (at least) the following issues.

■ **Juggling multiple authorities** requires deciding if, when and how to cooperate across jurisdictions and requires the following:

- * Identify all possible jurisdictions that could be involved.
- * Decide whether to cooperate and share information.
- * Decide whether to selectively cooperate or cooperate globally.
- * Decide how to share information, recognizing that authorities may share that information among themselves.
- * Consider the effect, or lack thereof, of resolutions or cooperation in one jurisdiction on other jurisdictions.
- * Will a resolution or cooperation in one jurisdiction expose the conduct and lead to new investigations from other jurisdictions?
- * Will a resolution or cooperation in one jurisdiction provide protection in other jurisdictions?
- * Will there be a piling on of regulators from multiple jurisdictions?
- * Determine whether consistent cooperation or resolutions are possible.

■ **There is a risk of multiple prosecutions by multiple authorities in parallel or consecutively** and this may result from the failure to think strategically and devise a plan early in the process.

■ **Data privacy laws** in some jurisdictions (for example, in France and other EU member countries) are strong and must be carefully considered when conducting internal investigations, collecting documents and contemplating providing evidence to the authorities.

■ **Employment laws** may be relevant. Conducting internal investigations, speaking with employees and collecting documents may run afoul of the employment laws in certain jurisdictions, as in France for example, and must be understood before any action is taken.

■ **It is essential to determine the scope of the attorney-client privilege** in the specific jurisdictions before beginning an investigation or interviewing em-

ployees. For example, the attorney-client privilege does not extend to all attorneys or in-house counsel who may be involved in an investigation in every jurisdiction.

■ **Immunities and criminal protections may differ widely across countries.** For example, in Brazil, a Brazilian's right against self-incrimination includes a right to lie to government investigators in her own defense, if necessary, and without negative legal consequences for her with the Brazilian authority. This has significant consequences in determining how counsel may proceed when conducting an internal investigation when cases involve Brazil and when facing the DOJ.

■ **Understand the possible ramifications of employees traveling to the U.S.** Employees traveling to the U.S. along with any data, phones, laptops and/or documents on their person may be subject to search and seizure immediately upon arrival, with no advance warning.

The DOJ has both demonstrated and promised that it will zealously pursue white-collar crime globally. This international pursuit has raised complex cross-border challenges for which there are no certain solutions or even a clear legal framework for their resolution. The unsettled and somewhat unpredictable nature of international white collar does mean that there may be a certain degree of flexibility in confronting and resolving international investigations. However, it is also essential that companies think both globally and locally when devising a strategy to address possible multijurisdictional investigations and prosecutions to avoid the pitfalls and to use the flexibility to their best advantage.

Perhaps the most important thing a corporate attorney should put on her "To Do" list is to take all reasonable steps to protect the company before the DOJ arrives. The first step to take is to evaluate the company's existing compliance programs. Are they up to date? Compliance programs should be updated annually to ensure they address new developments in the law and changes in the company.

In today's global enforcement environment, the policy on paper is only one piece of an effective compliance program. What truly matters is whether all employees across the globe understand, respect and have effective corporate incentives to actually follow compliance policies. A corporation has a responsibility to ensure that it has a compliance program with real teeth. It is in the corporation's own interest to do so. A compliance program with real consequences for employees is comparable to an insurance policy. No viable business should proceed without one.

When in doubt, and when navigating the complexities of cross-border investigations and prosecutions, in-house counsel should consult expert external counsel early in the process. Expert counsel should ideally have DOJ expertise and cross-border capabilities such as bilingualism and a strong understanding of foreign legal cultures.