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Not Your Everyday Investigation: Key Issues to Consider When Conducting Internal Investigations Into the Potential Violation of U.S. Export Controls and Sanctions Laws

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When done correctly, the decision to conduct an internal investigation into potential violations of U.S. law can have significant benefits for a company. These include allowing the company to make an informed decision about how to proceed, and assisting the company's current and future compliance with U.S. law, by identifying what went wrong, stopping it and making sure to prevent similar problems down the road.

In the event of an enforcement proceeding, moreover, conducting a timely, thorough, credible investigation will also help convince U.S. regulators that the company is serious about compliance with U.S. law.

- Inside or outside the U.S., there are five critical aspects of a good internal investigation:
- The attorney directs the investigation in a way that maintains attorney-client and other relevant privileges whenever possible and establishes a structure that maintains the independence of the investigation;
- The attorney institutes reliable document management practices so that the investigation preserves, gathers and analyzes all available evidence and facts;
- The attorney conducts witness interviews that gather all available information in a credible, fair manner;
- The attorney presents the investigation in a way that allows the company to make an informed decision whether to voluntarily disclose and/or cooperate; and
- If the decision is made to disclose, to do so in the most effective way possible.

Every good investigation has these features, but how they are achieved will vary, depending upon the nature of the conduct at issue, and the scope and size of the investigation. If an investigation involves purely domestic conduct, issues related to attorney direction, document management and witness interviews involve purely domestic law considerations, and questions about voluntary disclosure often involve only the practices of the U.S. Department of Justice (DOJ) or a state level criminal enforcement agency.

By contrast, where the conduct at issue involves a violation of U.S. law related to export controls or economic sanctions, the number of potential enforcement agencies is generally greater, and the scope of the investigation is almost certainly broader. The U.S. export controls and sanctions laws are enforced on the front lines by civil agencies—primarily the U.S. Departments of State, Commerce and Treasury—whose practices and procedures must be given major consideration from the outset.

Moreover, in almost all cases, the export controls and sanctions laws are triggered by sending a good or a service outside the U.S. The major exception to this rule is an investigation involving a "deemed export"—*i.e.*, when certain information or data is shared with a foreign national, even if the transfer of information takes place entirely within the U.S.

The scope of the investigation will, therefore, almost always have an international component due to the location of the bulk of the documents and witnesses abroad. This means that counsel conducting such an investigation will almost certainly be doing so outside the U.S., where other laws and enforcement authorities may come into play.

We discuss below how these factors shape the manner in which internal investigations must be conducted when the case involves a potential violation of the export controls and sanctions laws.

1. Attorney Direction

One critical feature of a good internal investigation is that it is conducted under the direction of an attorney. Why? There are generally two reasons: (1) preservation of the company's attorney-client privilege, and (2) maintaining the independence of the investigation by keeping it outside the control of potentially interested parties. We discuss each consideration below.

a. Maintaining privilege.

The company has an attorney-client privilege, and communications between an attorney and/or his or her agents and the company's employees and officers for the purpose of securing legal advice are protected by the attorney-client privilege. The company also has a work product privilege, which presumptively protects materials generated in anticipation of litigation. If the attorney is directing the process, and its purpose is to secure legal advice in anticipation of litigation, the attorney-client and work product privileges will likely attach to the fruits of the investigation. This means the company will be able, in the first instance, to determine whether it wants to share the results of the investigation or whether it keeps the results of the investigation privileged.

So far, so good. But when the investigation reaches into other countries, the scope of the attorney-client privilege can change significantly, including the rules that govern what sort of attorney direction is required to maintain the privilege.

Thus, in some countries, for example, application of the privilege for a company may depend on whether the attorney is in-house or outside counsel—some jurisdictions hold that the privilege does not apply to conversations with in-house counsel under certain circumstances. See Case C-550/08 P, Akzo Nobel Chems. Ltd. v. Comm'n of the European Communities, 2010 E.C.R. I-08301 (holding that internal communications with in-house counsel are not covered by legal professional privilege under European competition law).

As a result, when portions of an investigation are conducted in countries that follow such a rule, the lawyer directing the internal investigation must attempt to factor local law into the process, in a way that potentially limits the role of in-house counsel in the investigation.

To be more concrete, consider the situation of a lawyer who is interviewing witnesses in Spain in connection with an investigation looking into allegations that a company sent U.S. goods into Spain, which later wound up in Iran. If Spanish law would not afford attorney-client privilege to interviews with company employees conducted in the presence of in-house counsel, the internal investigation must factor that rule into the structure of the investigation from the outset.

Otherwise, the Spanish law definition of the attorney-client privilege may threaten the attachment of attorney-client privilege to the interviews, even for interviews conducted by a U.S. company looking into potential violations of American law, because it may be that the scope of the privilege will be governed by the law of the jurisdiction where the interview was conducted.

Likewise, the contents of such an interview, if conducted in a non-privileged fashion in Spain, might be accessed by Spanish regulatory authorities looking into potential violations of their own sanctions laws, which also may restrict the shipment of goods and services into Iran.

As a result, any internal investigation into potential violations of the export controls and sanctions laws must include an analysis of local law, and the investigation must be designed in a way that takes those laws into account. This is a critical part of ensuring that the investigation remains under attorney direction, thus providing the company with maximum protection over the fruits of an investigation.

b. Maintaining the independence of the investigation.

One other important (and sometimes overlooked) feature of attorney direction is that it can maintain the independence of the investigation. This issue is often critical, since internal investigations often involve allegations of potential wrongdoing by individuals high up in the company, and/or individuals whose job it was to ensure company compliance with the law.

To the extent that these same individuals could be seen to have controlled or even substantially influenced the investigation, it is likely to be met with skepticism or distrust by enforcement authorities. By contrast, where the investigation is directed and controlled by outside counsel with no potential involvement in the violations and no stake in the outcome of the investigation, the fruits of the investigation are much more likely to be trusted by enforcement authorities.

Thus, it is accordingly important at the outset of every investigation to create a structure that ensures the independence of outside counsel, so that the investigation can be conducted without involvement from potentially culpable participants. In export controls and sanctions cases, this will often require that compliance personnel are kept outside the investigation and, in cases where there is any suggestion that high-level management may be implicated, that those individuals are kept outside the investigation too.

It should be emphasized that this is for their own good: If the investigation ultimately exonerates compliance officers or other executives, its results will be much more trustworthy if those individuals were kept outside the investigation from the outset.

2. Document Management

Another critical portion of a good internal investigation is document management. The attorney conducting the investigation will generally issue a "hold" letter at the outset—ensuring that all potentially relevant documents are preserved during the course of the investigation—and will then attempt to determine and acquire all potentially relevant documents for review, including electronic data such as e-mails, text messages and social media communications.

What happens, however, when documents are located in an international jurisdiction? For example, if counsel investigating a potential violation of U.S. economic sanctions against Iran learns that some of the documents related to the transaction consist of e-mails sent and received within a foreign subsidiary in Spain, can counsel secure those e-mails and return them to the U.S. for review? The answer to this question often involves resolving complicated issues of foreign data privacy laws and blocking statutes.

The European Union countries—and other countries as well—often impose considerable restrictions on the manner in which private information, including work e-mails, can be taken out of the country and/or used in a foreign proceeding.

A lawyer conducting such an investigation must analyze the local laws—Spanish and EU law in our example—that could potentially affect his or her ability to acquire relevant documents, and must then design the investigation in a way that takes those laws into account. This is a critical part of document management, making sure that the company can obtain relevant material as part of its investigation, without running afoul of foreign law in the process.

On this subject, one final point is worth adding. In recent years, U.S. enforcement authorities have repeatedly expressed frustration with defense counsel who claim to be unable to secure pertinent documents because of foreign data privacy or blocking statutes, and have grown skeptical of such claims. Before raising the issue with U.S. authorities, therefore, counsel should consider carefully what foreign law prohibits, what it allows and whether any foreign law provisions can successfully be navigated in way that allows a cooperating company to provide such information lawfully to U.S. authorities as part of its cooperation.

3. Witness Interviews

A third critical aspect of a good internal investigation is conducting effective, credible witness interviews—ones that elicit essential facts and allow the interviewer to make an initial assessment of the witness's demeanor and credibility, and allow the investigator to analyze the situation from the perspective of those who experienced it.

In the export controls and economic sanctions context, one unique aspect of these interviews is that they often involve a high degree of technical detail, particularly when the potential violation involves defense articles or services regulated under the International Trafficking in Arms Regulations (ITAR). Especially after export control reform, such technical issues can also arise when conducting an investigation into potential violations of the Export Administration Regulations (EAR).

When conducting investigations of these issues overseas, counsel must take care in handling any technical data or other sensitive information during the interview process, as taking such information out of the country to conduct the interviews could itself create issues under the export controls laws. Counsel also must allow even more time than is usually required to assess this often technical information and synthesize the results into the investigation as a whole.

Another aspect of witness interviews that must be adapted for cross-border investigations involves the ground rules that must be set up front. In domestic investigations, those ground rules include providing a warning to the witness that the lawyer represents the company, not the witness; that the purpose of the conversation is to allow the company to secure legal advice; and that the conversations are confidential, but the ability to waive confidentiality belongs to the company not to the witness.

When an interview is conducted in another country, however, there may be other aspects to the initial ground rules, since some countries provide significant worker protections that may limit or revise the ground rules during employee interviews. This is yet another reason that the investigation, including the witness interviews, must be preceded by a thorough examination of the governing local law.

4. Voluntary Disclosure and/or Cooperation

The primary benefit of a good internal investigation is that it allows the company to make an informed decision about what to do next. Sometimes the investigation determines that no legal violation occurred, and the matter is closed without reporting. In some investigations, a company might determine that, although a violation potentially occurred, it has no obligation to disclose the potential violation and is comfortable not reporting it. In other investigations, the company may determine that a disclosure to regulatory and/or criminal authorities is in its best interest.

Although these considerations are present in virtually all internal investigations, some factors are unique to the export controls and sanctions context. In the first place, companies that export are subject to an extensive regulatory regime. This regime, moreover, permits regulators to impose civil penalties for any violation, whether it is intentional, negligent or completely innocent.

Often, exporters must obtain licenses to export their goods from the very same U.S. regulators that enforce the export and sanctions law. And in some instances, exporters are under obligations to self-report violations and even when there is no obligation, such disclosures are “strongly encourage[d]” under the ITAR (22 C.F.R. § 127.12(a)).

The encouragement of voluntary disclosures is similar under the Commerce Department’s Bureau of Industry and Security and the Treasury Department’s Office of Foreign Assets Control enforcement guidelines (see 15 C.F.R. § 764.5(a); 31 C.F.R. Part 501, Appendix A). When viewed in combination, these factors create extremely powerful incentives for companies to voluntarily disclose any potential violations – they need to stay in the good graces of regulators who are also their licensing authorities, the standard for proving a violation is low and companies may be under a legal obligation to report the violation to civil authorities.

5. Effective Disclosure

If a decision is made to disclose, the investigation must also be structured to ensure the best possible result for the company. In the export controls and sanctions context, the U.S. civil regulators have also established enforcement guidelines that impose vastly decreased punishments for violations that are voluntarily disclosed—often providing for no penalty or a warning letter—but also generally require that the company making the disclosure provide a detailed

description of the facts and circumstances surrounding the violation, accompanied by substantiating documents. In other words, the guidelines seek precisely the sort of information that a good internal investigation can and should provide.

The export and sanctions enforcement guidelines also generally require cooperating companies to disclose information § 127.12(c)(2)(iii) (ITAR); see also 15 C.F.R. 764.5(c)(3)(iii) and 31 CFR Part 501, Section A). These sorts of provisions already give cooperating companies significant incentives to investigate and disclose the activity of culpable individuals in the export controls and sanctions context, and to focus on such issues when conducting internal investigations. But recent events may make these incentives even stronger.

In September 2015, Deputy Attorney General Sally Yates circulated a memo to the DOJ and to every U.S. Attorneys' Office entitled "Individual Accountability for Corporate Wrongdoing." The Yates memo, as it has since become known, identified "six key steps" for federal prosecutors to follow "in pursuit of corporate wrongdoing." These steps focused largely on requiring federal prosecutors to ensure that companies cooperating in a criminal investigation identify responsible individuals and provide facts relating to those purportedly responsible individuals. The Yates memo also emphasized increased cooperation between civil and criminal agencies in the enforcement process.

In November 2015, the Offices of the United States Attorneys revised several sections of Title 9, Section 28 of the U.S. Attorneys Manual to conform to the policy changes set forth in the Yates memo. And in March 2016, David Laufman, Chief of Counterintelligence and Export Controls and the National Security Division of the DOJ, suggested that his division would also be providing soon some guidance about how the Yates memo will affect export controls and sanctions matters going forward.

These developments suggest that there will be an increasing focus among regulators and prosecutors on the identification of culpable individuals during the internal investigation process. In addition, the Yates memo's focus on increased civil and criminal cooperation could be extremely important in the export controls and sanctions context, where regulatory involvement in the business practices of U.S. exporters is already widespread, and where the enforcement agencies have long been the primary enforcers of these laws.

In the past, the involvement of the DOJ in export controls and sanctions matters was often limited, and the number of cases in which civil regulatory authorities worked together with the department was quite small. Given the department's stated focus on increased cooperation with civil regulators, however, it will be important for counsel conducting an internal investigation of a potential export controls or economic sanctions violation to keep in mind that the DOJ is a likely audience of any voluntary disclosure, and the investigation should in all cases include a serious analysis of the potential willfulness of any violation.

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