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Baker & McKenzie's quarterly corporate compliance publication, "Inside the FCPA," is an electronic and hard copy newsletter dedicated to the critical examination of developments in U.S. and international anti-corruption compliance that are of particular concern to global companies (and their officers and employees). The newsletter is written with the intention of meshing specialized U.S. coverage with a select international viewpoint in order to meet the expectations of an international client base and a discriminating readership. We seek to make our guidance practical and informative in light of today's robust enforcement climate, and we encourage your feedback on this and future newsletters.

If you would like to provide comments, want further information about the matters discussed in this issue, or are aware of others who may be interested in receiving this newsletter, please contact Maria McMahon of Baker & McKenzie at maria.mcmahon@bakermckenzie.com or +1 202 452 7058. We look forward to hearing from you and to serving (or continuing to serve) your FCPA, international anti-corruption, and corporate compliance needs.

Managing Internal Whistleblower Complaints in China: Challenges and Strategies

By Vivian Wu, Beijing and Michelle Li, Washington, DC

Although internal whistleblower complaints have long played an important role in the Chinese government's anti-corruption campaign against government officials, these complaints have recently become a significant concern and challenge for many multinational companies ("MNCs") operating in China. Legal counsel and compliance officers for such MNCs would be well served to thoroughly evaluate all internal whistleblower complaints and develop an effective strategy to proactively resolve the complaints.

Increase in Internal Whistleblower Reports

The number of internal whistleblower reports in China has increased substantially in recent years because of growing public awareness of compliance and greater ease in filing. Compared to just five years ago, people are now much more inclined to file whistleblower reports. Although the specific motivation to file varies from one matter to another, the filing is in many cases a result of the expansion of compliance knowledge and safeguards among employees. Various incentives to file may include, for example, an attempt to distance the whistleblower from suspicious practices, to help avoid a negative employment action (such as termination), or to retaliate against an employer.

A greater variety of reporting channels in 2015 also makes it easier to file whistleblower reports. Many companies have established a whistleblower hotline, an ethics and compliance email address, and other forms of information exchange to facilitate swift reporting and prompt intake and review. Moreover, some companies have appointed ombudsmen to receive and process whistleblower allegations from external sources, including business partners, third parties, distributors, agents, and even competitors.

How Internal Whistleblower Complaints Become "External"

Whistleblower complaints are often filed through corporate channels involving senior management and are therefore subject to internal review. But if a complaint is improperly handled or insufficiently investigated, a dissatisfied whistleblower may report directly to the authorities in China or another jurisdiction. Once the Chinese authorities receive a complaint, the likelihood of a government investigation in China or a dawn raid on the MNC's China-based operations increases significantly, particularly if the whistleblower submits evidence to substantiate his or her complaint.

Also, due to limited resources in China and increased pressure to investigate, regulators are most likely to act on substantiated whistleblower complaints -- that is, reports that provide regulators with sufficient evidence to prove the allegations in the complaint. For instance, in 2013, Chinese authorities initiated an investigation of a multinational pharmaceutical company after receiving anonymous reports that contained detailed evidence of misconduct.

Eventually, in 2014, the Chinese courts imposed a record fine on the company of RMB 3 billion (approximately USD $491 million)[1] for criminal bribery.

Moreover, in recent years, Chinese regulators have made it easier for whistleblowers to report wrongdoing directly to the Chinese authorities. In September 2013, the Central Commission for Discipline Inspection of the Communist Party of China ("CCDI") launched an official website for whistleblowers to report government corruption and other wrongdoing. The website also allows anonymous whistleblower complaints. On June 18, 2015, the CCDI made it even simpler for whistleblowers by creating a mobile phone application for filing whistleblower complaints. On the day the mobile phone application launched, the CCDI received 1,033 tips, which was a sharp increase from the previous daily average of 250-300. Of the 1,033 tips, 67 percent were filed from mobile phones.[2]

Although the primary goal of the recently established CCDI whistleblower channels is to target Chinese officials, MNCs can still be ensnared in a complaint alleging that the MNC is involved in a bribery scheme (either through offering bribes or receiving improper benefits). Beyond facilitating more efficient reporting to the Chinese authorities, the collateral effect of regulators' efforts has been to foster a broader whistleblower culture in China that may touch MNCs, even when government officials are not implicated.

In addition to the risk of increased whistleblower reporting in China, MNCs headquartered in the United States, of course, must also be concerned about the potential for reports to U.S. enforcement authorities. Indeed, whistleblowers may file complaints about the Chinese operations of a MNC headquartered in the United States directly to U.S. enforcement authorities.

The U.S. government has taken steps to incentivize such reporting by granting monetary rewards to whistleblowers. In August 2011, the Securities and Exchange Commission's ("SEC") new whistleblower program under the Dodd-Frank Act took effect. It enables the SEC to pay a cash reward to any individual (including a non-U.S. party) who voluntarily provides the SEC with original information that leads to a successful SEC judicial or administrative action resulting in monetary penalties of more than USD $1 million. The reward can range from 10% to 30% of the penalty collected. Also, importantly, whistleblowers are provided significant protections against retaliation by employers under U.S. law.

These incentives are having an effect on reporting. The 2014 annual report on the SEC's whistleblower program reflects a general increase in whistleblower complaints. The Office of the Whistleblower received 3,620 tips in fiscal year 2014 (almost 400 more than the prior fiscal year). Those whistleblower tips included 70 originating from the United Kingdom, 69 from India, 58 from Canada and 32 from China. Although the tips originating from China represent a relatively small portion of the total received by the SEC, whistleblower complaints originating from China will likely increase in coming years.

[1] The exchange rate used in this article is 6.367, which is based on the rate announced by the State Administration of Foreign Exchange on Sep. 17, 2015.

[2] *See CCDI Lures Whistleblowers with New App Function*, News Xinhuanet, June 21, 2015, available at http://news.xinhuanet.com/english/2015-06/21/c_134344740.htm.

Enhanced Protection for Whistleblowers

China's constitution provides general protections for whistleblowers. Although enforcement of these protections has been irregular, recent legislative efforts have sought to fortify it.

On July 21, 2014, China's Supreme People's Procuratorate issued the second amendment to the *Rules Dealing with Whistleblowing by the People's Procuratorate*. This amendment clarifies for the first time the rights of whistleblowers to inquire about the status of a complaint, request a review of the case docketing decision, request protection, and seek rewards. This amendment demonstrates meaningful progress in protecting whistleblowers and mimics China's current aggressive anti-corruption campaign.

Labor laws in China also grant whistleblowers protection by specifically prohibiting retaliation. For instance, the *Labor Law of the People's Republic of China* grants labor administration bureaus the right to impose fines on enterprises that retaliate against whistleblowers.[3] And the Regulation on Labor Security Supervision provides for enterprises that retaliate against whistleblowers to be fined between RMB 2,000 (approximately USD $314) and RMB 20,000 (approximately USD $3,141).[4]

Strategies for MNCs In Light of Increase in Complaints

Enforcement authorities across the globe are placing greater emphasis on establishing robust and risk-based corporate compliance programs. An effective compliance program and a sound compliance culture are fundamental to preventing corporate officers, employees, and third-party agents from engaging in illegal practices such as bribery, collusion, and fraud. In order for a compliance program to function properly, employees must feel empowered to ask questions and report problems. Significantly, the SEC has noted that it has received many complaints from employees who first reported internally but believed their complaints were ignored or not treated seriously.

To help increase the likelihood that employees first report potential issues internally, MNCs in China need to proactively foster a culture of open communication within the organization and establish comprehensive and effective whistleblower and non-retaliation policies. MNCs should also prepare for intervention by Chinese authorities by devising and implementing protocols for swiftly and comprehensively responding to investigations or dawn raids.

Upon receipt of a whistleblower complaint, it is important for MNCs to analyze the underlying allegations and facts to determine whether to initiate an internal review. Once this decision is made, the company should determine the appropriate scope of the review and, if necessary, map out an investigation plan. Key principles for conducting an effective internal investigation include independence, comprehensiveness, confidentiality, and timeliness.

For certain allegations, particularly those that may involve disclosure obligations under U.S. laws (e.g., Foreign Corrupt Practices Act violations that are material to a public company's business), the company should consider

[3] *See* Article 101 of the Labor Law of the People's Republic of China (issued by the National People's Congress on July 5, 1994).

[4] *See* Article 30 of the Regulation on Labor Security Supervision (issued by the State Council on November 1, 2004).

engaging experienced outside counsel to perform investigative tasks and help maintain the independence and integrity of the investigation. Then, at the conclusion of the investigation, the company should carefully evaluate whether there were any gaps or lapses in the company's compliance processes or controls that may have led to the impropriety. Compliance program shortcomings must be remedied in order to reduce the likelihood that the misconduct will recur. During the course of the investigation, it is also important to keep the whistleblower(s) aware that the complaint or concern is being taken seriously and that the investigation is being handled competently.

In cases where a whistleblower allegation is substantiated and a legal or ethical impropriety discovered, a company should take appropriate and proportionate disciplinary action against employees who engaged in the misconduct. Under Chinese law, an employer may take disciplinary action (up to and including termination) against an employee, if he or she violates the company's internal policies, provided that such policies (i) do not violate China's laws and regulations, (ii) were adopted by the employer through employee consultation procedures; and (iii) have been made available to the employee in advance.[5]

Finally, MNCs in China should be aware that terminated employees often bring employment claims against the company, and that the local labor arbitration committees, as well as the labor courts, are generally employee-friendly in their approach to these matters. Therefore, companies should carefully document every investigation that could lead to employee termination in order to minimize the risk of future employment disputes and appropriately prepare for the possibility that such a claim will arise. The company should also consult with experienced counsel to discuss the risks created by employee terminations that result from whistleblower allegations.

[5] *See* Article 39 of PRC Employment Contract Law issued by People's Congress on 29 June 29 2007; *see also* Article 19 of Interpretations of the Supreme People's Court Concerning the Application of Law to the Trial of Labor Dispute Cases (issued on 22 March 2001).

To Find the Needle, Move the Haystack: Deciding Where Best to Conduct Document Review in FCPA Investigations

By John P. Cunningham and Jacob I. Chervinsky, Compliance & Investigations, Washington, DC

A strategic, proportional, and comprehensive document review is one of the most critical components of an effective Foreign Corrupt Practices Act ("FCPA") investigation. A company's internal documents and data often contain the best evidence of potentially improper payments. It is not surprising, therefore, that U.S. enforcement authorities in FCPA matters place great emphasis on obtaining and analyzing relevant documents, data, and other reviewable information. For this reason, it is incumbent upon any company in a cooperative posture with the government to disclose as much relevant, non-privileged information as practicable.

When a document review is mishandled, the repercussions can be severe. Flaws in the document review process, for example, may cause enforcement officials to question the integrity of the investigation. This, in turn, can lead officials to dedicate more resources to their own search for evidence relating to alleged improprieties. Moreover, if a company fails to identify and disclose relevant documents that the government later obtains independently, the credibility of the investigation could be called into question, and the company may be forced to contemplate harsher penalties or sanctions.

Legal commentators have dedicated significant attention (in an FCPA context) to analyzing certain topics related to the document review process, including when to launch an internal investigation and how to handle issues such as e-discovery and disparate data privacy laws. In this article, we examine a less-explored but equally important topic: where should a company conduct document review during an FCPA investigation?

Some commentators have noted that documents pertaining to alleged bribery should be handled solely by U.S. lawyers in the United States, while others opine that potentially incriminating documents are best kept outside U.S. borders. Below, we analyze these and other important considerations to help shed light on how companies can select the best location to conduct document and data review in an FCPA investigation.

The Importance of Location

FCPA investigations often involve cross-border issues requiring the collection of documents, data, and other evidence from multiple jurisdictions around the world. To properly evaluate this information, a company will typically send it to a single (central) location for processing and review.

This decision alone can be quite daunting. Indeed, there is no shortage of options for a company to consider. For example, after more than a decade of robust, international anti-corruption enforcement, a plethora of third-party

vendors now offer e-discovery and document review services in numerous countries. Additionally, law firms conducting internal investigations may decide that it is in the company's best interests to assign firm attorneys to perform document review. Alternatively, firms and their clients may choose to supervise contract attorneys who can review documents at a discounted rate.

Moreover, when choosing a location to perform document review, no two jurisdictions are equal. The choice to conduct document review in a given country could significantly impact the cost and quality of the investigation, which in turn may affect the disposition of an FCPA enforcement action. As with every aspect of an internal investigation, companies must, therefore, carefully consider and select the best location for document and data processing and review, based on their unique circumstances.

Balancing Cost and Quality

Generally speaking, document review—like many other services—is less expensive outside of the United States. Because FCPA investigations can quickly become costly endeavors, companies may seek to defray costs by outsourcing document review to a foreign jurisdiction. The risk, however, is that the quality of the review may suffer if it is performed by non-U.S. lawyers who are perhaps not as well-versed in the intricacies of the FCPA or the principles of anti-corruption compliance.

At its most basic level, FCPA-related document review poses two essential questions. First, is the document relevant? And second, is the document privileged? Answering the first question requires a fair amount of knowledge about the FCPA and related enforcement actions. The reviewer must be able to identify red flags indicating that an improper payment was made, and know and understand the elements of an FCPA violation well enough to pinpoint facts relevant to the satisfaction of these elements. Before deciding to conduct document review outside of the United States, companies should determine whether a vendor's reviewers have the necessary FCPA experience to make accurate relevance determinations.

Answering the second question—whether a document is privileged—proves an even more complicated task. A privilege determination comprises two separate concepts: attorney-client privilege and work product doctrine. Attorney-client privilege protects any communication between an attorney and her client made in confidence for the purpose of obtaining or rendering legal advice. Separately, the work product doctrine protects any documents or tangible things prepared by or at the direction of an attorney in anticipation of litigation. Understanding and applying these two concepts can be difficult, even for experienced U.S. attorneys. Accordingly, companies must be careful to ensure that foreign reviewers are trained to make privilege determinations before deciding to conduct a review outside of the United States.

Despite these caveats, there are certain circumstances where it is preferable to conduct document review in a foreign jurisdiction. In particular, if the documents to be reviewed are in a foreign language, it may be wise to have the documents reviewed by native speakers. Although there are U.S.-based vendors with foreign language capabilities, these services are often expensive and may not afford the same level of quality that a native speaker would provide. Notably, FCPA red flags are sometimes concealed behind suggestive or nuanced language that a non-native speaker may fail to recognize.

If one of the company's primary objectives is to save time and money on document review, it may first want to consider strategies to reduce costs while keeping the review in the United States. For example, new technologies such as predictive coding can reduce the total number of documents that must be

examined. Also, a company could engage foreign reviewers to make initial relevance determinations and then employ U.S. attorneys to conduct a privilege analysis of the relevant documents. Such creative solutions can help companies balance the cost of a document review with its overall quality.

Implications for U.S. Civil Litigation

FCPA enforcement actions are often accompanied by civil litigation brought against a company by its shareholders in the form of class action or shareholder derivative suits. As a result, most companies conduct internal investigations with an understanding of the potential for shareholder litigation, and are appropriately concerned that a misstep in the investigation could have consequences down the road for such collateral litigation. Seeking to limit their exposure to the U.S.'s expansive civil discovery regime, some foreign companies elect to keep sensitive documents outside of the country, believing that this may protect the documents from disclosure to shareholder plaintiffs in U.S. civil litigation.

This approach, however, is misguided. In 1987, the Supreme Court of the United States held that foreign companies subject to jurisdiction in a U.S. district court must comply fully with the discovery processes mandated by the Federal Rules of Civil Procedure ("FRCP"). *See Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522, 541 (1987). This mandate includes FRCP 34, a discovery mechanism that plaintiff shareholders can use to obtain any relevant, non-privileged documents in a foreign company's possession, custody, or control. A foreign company may even be required to obtain and produce documents in the possession of a foreign affiliate if the company "controls" the affiliate. *See, e.g., Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 305-06 (M.D.N.C. 1998). Ultimately, this means that foreign companies cannot limit their exposure to discovery in U.S. civil litigation by conducting document review outside of the United States.

Compliance with U.S. Subpoenas

Many FCPA investigations are triggered by service of a subpoena by the U.S. Department of Justice ("DOJ") or the U.S. Securities and Exchange Commission ("SEC"). These subpoenas seek documents and information related to an alleged FCPA violation. In most cases, companies voluntarily comply with subpoenas to demonstrate to the government that they are cooperating with the government's inquiry. But what if a company chooses not to cooperate with the government—how can the location of document review affect the company's obligations to comply with a DOJ or SEC subpoena?

In short, maintaining documents and data outside of the United States could, at least temporarily, relieve a company from the obligation to produce those materials in response to a DOJ or SEC subpoena. Generally speaking, U.S. search warrants are not effective in foreign jurisdictions. Also, despite ongoing debate over the issue, the United States Code does not expressly grant independent authority for U.S. enforcement agencies to serve subpoenas on non-U.S. persons in foreign countries.

Even, however, if a non-U.S. company does not legally have to comply with a DOJ or SEC subpoena, federal prosecutors can seek foreign discovery through other mechanisms. Recently, prosecutors have succeeded in obtaining documents from foreign companies in FCPA matters by issuing requests for letters rogatory, mutual legal assistance treaty ("MLAT") requests, and informal diplomatic requests. As a result, although a company may initially be able to elude compliance with a government subpoena by maintaining its documents and data outside of U.S. borders, the company will

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likely have to turn that information over to (perhaps) a less tolerant enforcement agency at some point in the future.

Summary of Best Practices

The central consideration in deciding where to conduct document review in an FCPA investigation is how a company wants to balance the cost of the review with its quality. Conducting document review outside of the United States can yield some cost savings, but perhaps at the expense of highly-accurate relevance and privilege determinations. Furthermore, the law does not support the commonly-held belief that companies will enjoy limited exposure to discovery in U.S. civil litigation by maintaining their documents and data outside of the United States. The best reason to conduct document review in a foreign jurisdiction is to take advantage of native speakers tasked with reviewing documents in the language of their country.

Ultimately, companies that cut corners in the early stages of an FCPA investigation, particularly with respect to document review, may pay for any resulting complications when it comes to resolving an enforcement action or managing follow-on shareholder litigation. Before deciding to conduct document review outside of the United States, therefore, companies should be judicious in weighing the risk of any cost savings realized in the short term against the potential for more severe penalty assessments by U.S. authorities and/or elevated settlement payouts to shareholder plaintiffs.