Chapter 24
METHODOLOGY AND ETHICS OF INTERNAL INVESTIGATIONS OF ENVIRONMENTAL CRIMES—DOMESTIC AND INTERNATIONAL CONSIDERATIONS

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Synopsis

§ 24.01 Introduction*

The techniques, ethics, and legal considerations associated with internal investigations of even routine employment claims, securities issues, and corporate crime test experienced attorneys in those disciplines.[1] Investigating environmental crimes and high-stakes environmental compliance issues poses additional difficult, often unique, challenges due to complex governing law and the highly technical nature of environmental regulatory requirements. Everything about internal investigations of environmental crimes is complicated, multi-variable, and high stakes. Potentially at play are substantial civil or criminal fines and penalties; injunctive relief against the company; the careers and liberty interests of employees, executives, and in-house counsel; corporate and individual debarment from governmental contracts; and the reputations of all involved.

Multinational companies with foreign operations encounter a host of additional challenges when conducting internal investigations of serious

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[1] *E.g.*, Barry F. McNeil & Brad D. Brian, *Internal Corporate Investigations* (ABA 3d ed. 2007).

environmental compliance issues in foreign jurisdictions. Prosecution of environmental crimes and human rights violations under foreign laws is becoming more commonplace, making internal investigations of foreign operations even more sensitive and important.

Section 24.02 of this chapter provides practical guidance for conducting internal investigations of alleged environmental crimes in the United States, including consideration of key ethical issues involving the attorney-client privilege, identifying the client, witness interviews, *Upjohn* warnings, and indemnification of employees.[2] Section 24.03 addresses further challenges faced by U.S. companies and their counsel conducting internal investigations at foreign operations. Ethical considerations when conducting investigations abroad include compliance with the Foreign Corrupt Practices Act of 1977 (FCPA)[3] and other domestic laws with extraterritorial application, consideration of professional and ethical rules governing both local and foreign counsel, and application of data privacy laws.

§ 24.02 Practical Tips for Conducting Internal Investigations Domestically

[1] Defining the Scope

The scope of an internal investigation should reasonably and fairly reflect the breadth and depth of the allegation(s) at issue. An investigation that is too narrow runs the risk of missing relevant facts and providing erroneous legal advice to the client; an investigation that is too broad is inefficient, wasteful, and costly. Where a government investigation is already underway, the company's internal investigation should be at least as broad as the issues analyzed by the government. Defining the scope of the investigation where no government investigation or enforcement action is underway is more complicated. Sometimes the scope of an internal investigation can be narrowly defined to respond to a whistleblower's allegations, or to evaluate compliance with specific company policies, procedures, or legal requirements in order to enhance environmental compliance. In other instances, the scope should include gathering facts and developing legal arguments necessary to defend against potential future enforcement actions. Care must be given when defining the scope of work to avoid both an open-ended fishing expedition and the appearance or implication that the internal investigation was designed to achieve a predetermined outcome or avoid issues.

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[2] Section 24.02 of this chapter is partially based on a prior article published by the Environmental Law Institute. *See* Craig D. Galli, "Internal Investigations of Environmental Crimes," 45 *Envtl. L. Rep.* 10,350 (Apr. 2015).

[3] 15 U.S.C. §§ 78dd-1 to 78dd-3.

Regardless of scope, company management and counsel should define the parameters of the internal investigation in writing in order to: (1) document that the internal investigation is undertaken by legal counsel for the purpose of providing legal advice to the corporate client; (2) memorialize the directive to preserve relevant materials; (3) determine who within the company or on behalf of the company is the primary contact and in charge of the investigation;[4] (4) describe the tasks to be undertaken by counsel during the internal investigation (e.g., document preservation, collection, and review; witness interviews; factual development and legal research; coordination with auditors and technical consultants); (5) set forth the expectation that relevant privileges will be protected; (6) articulate the objectives of the internal investigation (e.g., enhance compliance, prepare for settlement or litigation, self-report to regulators); and (7) indicate whether the company and counsel expect the final report to be written or oral.

Scoping the internal investigation should include a detailed work plan; division of labor between in-house counsel, outside counsel, and other company personnel; a schedule; and briefing procedures (usually periodic oral briefings). If it becomes apparent that company employees are or likely will become targets of the government's investigation, the scope of work should describe the use of and coordination with separate counsel, use of joint defense agreements, and compliance with ethical obligations.[5] Additionally, before any employees are interviewed, counsel must determine which company employees may be entitled to independent counsel either contractually or legally.

[2] Who Conducts the Investigation?

Once company management decides to conduct an internal investigation, a threshold question is whether the company should use legal counsel (in-house or outside counsel), the company compliance officer, or another trusted non-attorney officer. For the types of events triggering an internal investigation discussed in this chapter, legal counsel normally should undertake the investigation in order to maximize confidentiality and maintain the attorney-client privilege and attorney work-product

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[4] If corporate officers or directors are substantively involved in the issues under investigation, they should be excluded from overseeing or making decisions regarding it. For example, it may be necessary for the board of directors to form an independent committee consisting of independent board members to oversee the internal investigation. *See* Am. College of Trial Lawyers, "Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations," at 23 (Feb. 2008).

[5] *See generally* Rebecca J. Wilson & Elizabeth A. Houlding, "Using Joint Defense Privilege Agreements in Parallel Civil and Criminal Proceedings," 68 *Defense Counsel J.* 449 (Oct. 2001).

doctrine. Internal investigations conducted by non-attorneys likely will not be viewed as privileged, particularly if the investigation is required by law or is a necessary part of day-to-day operations.[6]

The next question is whether the internal investigation should be conducted by in-house or outside counsel, or a combination of both. Generally, in-house counsel will have greater familiarity with the issues and personnel involved, although their real or perceived objectivity may suffer especially when they report to or have close personal ties with personnel who are subjects of the investigation, or have had extensive involvement or responsibility for the subject of the investigation, or work closely with company personnel being interviewed. The same concerns may apply to outside counsel who work closely with the company personnel being interviewed. Similarly, if outside counsel provided specific legal advice that may have contributed to the noncompliance, both outside counsel and the corporate client may conclude that a conflict of interest exists if the attorney who rendered the advice now under review participates in the internal investigation. Company management may need to avoid the temptation to engage their preferred outside counsel who may have provided legal advice on the very issues under investigation.

Outside counsel often can more effectively establish and maintain the attorney-client privilege and work-product protections, and is less likely to be viewed by a court or government agency as providing routine business advice that could jeopardize privilege protections and diminish credibility of the investigation.[7] Use of outside counsel may also reduce the distractions and disruptions of using internal legal resources to conduct the internal investigation. These factors of course must be balanced against the higher price of outside legal counsel. Where the magnitude of the risk and complexity of the issues warrant, sophisticated companies often engage an internal investigation team headed by specialized outside environmental counsel who may have knowledge of the underlying issues. In-house counsel plays an important role in improving efficiency and identifying documents and witnesses, supported by outside counsel to ensure compliance

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[6]Some authority exists to protect internal technical reviews as protected work product. *See* Transocean Deepwater, Inc. v. Ingersoll-Rand Co., No. 2:08-cv-04448, 2010 WL 5374744, at *3 (E.D. La. Dec. 21, 2010); ECDC Envtl., L.C. v. N.Y. Marine & Gen. Ins. Co., No. 1:96-cv-06033, 1998 WL 614478, at *14 (S.D.N.Y. June 4, 1998).

[7]However, the U.S. Court of Appeals for the D.C. Circuit recently upheld application of the attorney-client privilege to an internal investigation conducted at the direction of in-house counsel even though government regulations required the investigation and non-attorneys conducted the employee interviews. *See In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 758–60 (D.C. Cir. 2014).

with internal investigation protocol to avoid inadvertently increasing company exposure.

[3] Role of Counsel During a Concurrent Government Investigation

If the internal investigation is conducted as part of a concurrent government criminal investigation or a non-routine civil inspection, and if logistics permit, counsel should immediately visit the facility and meet with the lead investigator to determine the scope of the investigation and how counsel can assist to ensure order, cooperation, and protection of trade secrets. When a search warrant has been issued, counsel should normally contact the government attorney who obtained the warrant to discuss the scope and goals of the search, and to negotiate the process for seizing documents and other evidence, while ensuring that critical documentation and computers necessary for the company's operations and workers' safety can be left in place while copies are made.

Most civil inspections commence with an "opening conference" during which introductions are made, logistics discussed, and the investigation objectives described.[8] Criminal investigations often dispense with an opening conference. Investigators simply appear, present credentials, and begin interviewing witnesses and seizing evidence, leaving company personnel the unsettling task of quickly determining, if possible, the nature and scope of the investigation. In one situation, the U.S. Environmental Protection Agency's (EPA) criminal investigators arrived with a search warrant and backhoe. By the time legal counsel had arrived, the EPA had already commenced excavating in a location where they believed drums of hazardous waste had been buried as company personnel stood by watching.

If documents and equipment are seized pursuant to a search warrant, counsel can request that boxes of seized materials be labeled and indexed, and that a copy of the index be provided to the company before the documents leave the facility. Counsel should also work with government investigators and prosecutors to ensure that privileged materials remain segregated and properly marked, and that investigators do not inadvertently seize privileged documents. Care should also be given to ensure that company personnel do not give investigators access to privileged files, which could result in a waiver.

If samples are taken, counsel can request split samples. Even though required to do so, EPA investigators are sometimes reluctant to provide

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[8] *See generally* U.S. Envtl. Prot. Agency (EPA), "Multi-Media Investigation Manual," at 25–28 (rev. ed. Mar. 1992) (Investigation Manual).

split samples until pressed.[9] If possible, counsel should arrange to allow the company's technical personnel or environmental engineering consultant to observe and photograph the sampling process. Care should be given not to interfere with the sampling event or other aspects of the investigation, which could lead to allegations of obstruction of justice.[10]

[4] Defending Witness Interviews by Government Inspectors

Perhaps the most important evidence the government collects during the execution of a search warrant or an inspection is statements by company employees during interviews with government agents. Sometimes a company receives notice of an imminent investigation, in which case the company has the chance to engage counsel experienced in environmental criminal investigations to prepare witnesses in advance of interviews by government investigators. After delivering the appropriate *Upjohn* warning, discussed below, counsel can explain that while the employee has the right to refuse to be interviewed by the government investigators, the company requests that the employee submit to the interview and truthfully answer questions, not speculate, and not answer questions that were not asked. Counsel should further explain that providing false information to government investigators can result in increased exposure to the company and its employees.[11] Counsel should further inform the employee that he has the right to ask the investigator about the nature of the investigation and whether the employee is a target of the investigation or simply a witness. After the interview, the employee has the right to speak to anyone, including management or company counsel, about the substance of the interview despite any representations by government investigators to the contrary.

During a surprise inspection or execution of a search warrant, witness preparation can rarely occur. In such a situation, some lawyers recommend not allowing the interviews without counsel being present and having an opportunity to meaningfully prepare a witness. This approach may prove

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[9] Under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6987, the EPA must provide split samples, if requested, and promptly disclose the analytical results. *Id.* § 6927(a). Under the Clean Water Act, 33 U.S.C. §§ 1251–1387, and the Clean Air Act, 42 U.S.C. §§ 7401–7671q, the EPA is not expressly required to provide split samples or the analytical results. However, EPA guidance and general practice recognize such a duty. *See* EPA, "NPDES Compliance Inspection Manual," at 2-17 (July 2004); Investigation Manual, *supra* note 8, at app. M-8.

[10] *See* 18 U.S.C. §§ 1501–1521.

[11] Criminal prosecutors can assert claims for false statements under the authority of the federal criminal code. *See id.* § 1001.

risky, however. Government investigators might assert that the company's lawyer has no right to attend interviews and proceed with the employee interview without company counsel; this is not necessarily preventable. On the other hand, corporate counsel can maintain that employees have the right to request that they be interviewed in the presence of the company's counsel or, where appropriate (as discussed below), the right to their own independent counsel. Some commentators further suggest that the company's counsel inform the employees that participation in government interviews is voluntary and that employees have the right to have counsel present, or to speak to the company's counsel prior to the interview if they desire, although it is not required by the company. Counsel should not advise employees not to cooperate.[12]

To avoid an impasse, counsel can request that company counsel be present during employee interviews to facilitate the interview process and ensure that the investigator receives requested information. Counsel can even offer to arrange witness interviews. Conducting witness interviews in this manner serves the best interests of both the government and the company in order to ensure that the government receives accurate and timely information and documentation. Approaching government inspectors in this manner usually results in a mutual accommodation and avoids a showdown over whether the company attorney has the right to sit in on the witness interviews or whether the government has the right to interview the witness without any counsel present.

[5] Preserving Evidence and Privileges

Preserving applicable privileges requires careful management of existing documents and documents created during the internal investigation.[13] Normally, counsel and the client should not alter, place legends or labels, or otherwise write on documentation or materials compiled during the investigation.

A company normally has the duty to preserve relevant documentation when it knows, or reasonably should have known, of pending or threatened litigation or regulatory investigation. To comply with its preservation duties, the company must inform records custodians of their duty to

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[12] McNeil & Brian, *supra* note 1, at 102.

[13] In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the U.S. Supreme Court recognized that the attorney-client privilege applies to communications between company counsel and company employees in the context of an internal investigation provided that the requirements of each privilege are satisfied. *Upjohn* involved an investigation by outside counsel, though the same considerations normally would apply to investigations by in-house counsel. *See Kellogg Brown*, 756 F.3d at 758 ("a lawyer's status as in-house counsel 'does not dilute the privilege' " (quoting *In re* Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984))).

preserve documentation and electronic data and provide instructions for doing so. Sophisticated companies often automate this process to ensure relevant custodians receive a formal notice and agree to its terms. The company should distribute periodic reminders to specific custodians to confirm receipt of preservation notification and compliance with preservation procedures. Counsel should periodically remind the client of the ongoing duty to preserve.

Because companies often use contractors, care must be taken to ensure document preservation by outside consultants and contractors. Overlooking the need to carefully coordinate document preservation with contractors and consultants can prove disastrous if documentation essential to asserting defenses cannot be located during an enforcement action, sometimes years later. Maintaining chains of custody of samples and other materials collected as part of the internal investigation is critical to ensuring the future admissibility of evidence in court and advancing legal defenses. Care should be given to ensure that original copies of privileged documents are segregated and maintained in a secure location to avoid inadvertent production or disclosure to others without a need to know.

At the commencement of an internal investigation, counsel should advise senior management and other relevant employees to limit email communications regarding the substance or process of the internal investigation. In addition, depending on the volume of relevant documents compiled during an internal investigation, documents can be scanned into a document management database to more readily tag key issues, search documents, and identify "hot" documents. To increase data security and reduce the risk of inadvertent disclosure, such a database is normally maintained by outside counsel rather than the client.

[6] Conducting Employee Witness Interviews

Interviews of employees may be the most valuable tool available to legal counsel during an internal investigation. Mistakes during interviews can lead to ethical issues, waiver of a privilege, and liability for the company and its counsel. Conduct in interviewing employees is governed by statute, case law, and ethics rules and opinions. Several aspects of employee interviews merit mention. First, counsel should never interview a witness alone. An additional person (usually another outside counsel, in-house counsel, or paralegal) should assist counsel by carefully memorializing the interview in a memo, manage interview exhibits, ask follow-up questions where the record is not clear, and act as a witness to the statements of the interviewee.

Second, prior to any interview of an employee as part of an internal investigation, counsel must provide the appropriate advisement under *Upjohn*, i.e., explaining to the employee that:

(1) Counsel represents the company, not the interviewee personally;

(2) The interview is taking place to gather facts in order to provide legal advice to the company on determining how best to proceed;

(3) The communications with the attorney are protected by the attorney-client privilege;

(4) The privilege belongs solely to the company, not the employee, meaning the company alone may elect to waive the attorney-client privilege and disclose the communication to third parties, including the government, without notifying the employee; and

(5) The employee is requested and expected to maintain the information discussed as confidential.

Failure to provide and memorialize an adequate *Upjohn* warning can result in loss of the privilege, exposure to the company, and discipline of counsel.[14] Prior to or at the same time as the *Upjohn* warning, it may be necessary for a company officer or manager to explain to the employee to be interviewed that the company expects all employees to cooperate fully with the internal investigation. Full cooperation includes providing truthful responses, providing responsive documents, and assisting in any other way requested during the investigation process. Employees who withhold information, do not provide truthful responses, and otherwise fail to cooperate in an internal investigation should be informed that they could be subject to discipline or termination.[15] Similarly, any employee who interferes with an internal investigation is subject to discipline or termination.

Third, counsel must consider the right timing to interview an employee suspected of wrongdoing or negligence in the internal investigation process. Interviewing an employee who may suffer discipline or liability, or whose conduct may support liability against the company, requires careful preparation, a robust understanding of facts and key documents, and detailed questioning. Interviewing a key witness too early (i.e., without sufficient preparation or knowledge of the facts) can result in a lost opportunity to obtain crucial information; waiting too long can result in an inability to

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[14] *See* United States v. Ruehle, 583 F.3d 600, 604 n.3 (9th Cir. 2009). Difference of opinion exists on whether counsel should provide employees a written *Upjohn* warning as a best practice. At a minimum, counsel should prepare a contemporaneous record of the witness interview and substance of the *Upjohn* advisement. Failure to do so results in risks to both counsel and the client. Additionally, interviewing union members, minors, or employees in certain specified industries often requires additional advisements that are beyond the scope of this chapter, but should be considered by counsel.

[15] Employment law counsel can assist management in determining whether refusing to answer questions or otherwise cooperate constitutes a breach of the employee's duty of loyalty to the corporation and constitutes sufficient grounds for termination.

interview the witness (e.g., if she leaves the company, retains counsel, dies or becomes incapacitated) or an interview after memories have faded or cooperation lessened.

Fourth, some lawyers approach internal investigations the way they would depositions with carefully scripted interview outlines. This approach often puts the witness in a more defensive posture and can lead to missing important details not specifically the focus of a question. A better approach is to provide the witness a preliminary overview of the subject matter and solicit narrative responses in a non-threatening way (e.g., "what can you tell me about XYZ?"). More probing lines of questioning and use of documents in the examination should be left for later in the interview process.

Fifth, an employee to be interviewed frequently feels intimidated or threatened. This is particularly the case with employees with compliance or supervisory responsibility. A proper *Upjohn* advisement can increase the anxiety. Counsel must exercise judgment and respect in setting the witness at ease regardless of the circumstances. This generally includes expressing appreciation for the witness's cooperation and acknowledging the unease or anxiety of the situation. Counsel can explain that they have been asked by the company to gather all the relevant facts, and that the company values the opinions and information the employee may provide.

Sixth, counsel should memorialize the interview consistent with the attorney work-product doctrine and purposes of the investigation. The interview memorandum should include the attorney's mental impressions, not just a transcript of the questions asked and answers given. Notwithstanding the availability of privileges, experienced counsel prepare the interview notes in a highly professional and objective manner, assuming that the interview memorandum may at some point become discoverable or voluntarily produced to regulators. The interview memorandum should also reference the *Upjohn* warning provided at the beginning of the interview.

[7] Indemnifying Employees

An ethical issue that often arises in the course of internal investigations is whether a company should offer to provide counsel to employees or officers and directors. This issue has become more complicated since the *United States v. Stein*[16] case in which the court dismissed criminal charges after determining that prosecutors violated the defendants' Sixth Amendment rights by signaling a preference to the defendants' employer regarding providing counsel to the defendants. Although *Stein* resolved the issue (at least theoretically) regarding the government's intrusions in this area,

[16] 541 F.3d 130 (2d Cir. 2008).

the issue continues to raise complex contractual, legal, constitutional, strategic, and ethical issues for the company and its lawyers.

Sometimes corporate executives have a contractual right to independent counsel during an internal investigation. Other times, indemnification is required under a company's bylaws or state law. In those instances, a company must comply with those requirements, which typically obviate the more difficult ethical and strategic questions that emerge in interacting with employees in the context of an internal investigation. But for the vast majority of employees with no contractual right to counsel, company counsel must determine who should receive legal representation paid for by the company, and what should be said to such employees. At what point should or must a company indemnify an employee? Is the indemnification decision different if the employee is facing criminal liability? In that case, should or must the company indemnify an employee upon discovery by company counsel of the existence of potential exposure, when the employee requests indemnification, or when an employee is criminally charged? Often an employee with no criminal exposure is requested to interview with the government, testify before a grand jury, or produce documents. Should the company indemnify that employee? Once contractual and state or other legal requirements requiring indemnification are considered, the answers to these and related questions largely relate to the culture and self-interest of the company. In other words, indemnification becomes a discretionary, strategic decision made in accordance with the company's loyalty to its employees and the company's best interests.

Nevertheless, paying for counsel for an employee may run counter to the company's strategic interests. For example, a company would not indemnify (and should probably terminate) an employee who clearly has acted directly contrary to the company's interests, such as by stealing trade secrets. In the environmental arena, however, the issue becomes more nuanced. Perhaps the company and the employee disagree on whether the conduct in question was illegal, and the regulations themselves are ambiguous. Perhaps the employee acted negligently, and the statute requires knowing conduct for criminal liability to attach. In these instances, it may be tactically advantageous for the company to provide counsel for the employee, enter into a joint defense agreement, and coordinate a defense to the government's allegations.

[8] Effective Use of Technical Consultants

Counsel conducting internal investigations of environmental crimes or serious compliance matters frequently engage technical experts, including analytical chemists, engineers, forensics specialists, industrial hygienists, operations experts, and other subject-matter experts to assist counsel.

Counsel should engage the technical experts to preserve the attorney-client privilege and work-product protection even though the client company is directly billed for their services. A good practice is for the consultant to bill counsel with a copy to the client company, which actually pays the invoice. The engagement agreement should explain that the consultant is engaged to assist counsel in the evaluation and interpretation of technical information in order to provide legal advice to the client. The agreement should also include a confidentiality clause and a requirement that the expert's work product and communications with counsel be marked as "attorney-client privilege, attorney work product." In-house technical experts should execute a written charter with counsel that includes similar information. Case law supports the protection of an expert consultant's factual analysis as part of an internal investigation, not simply the attorney's mental impressions and legal analysis.[17]

[9] Reporting to the Corporate Client

When an internal investigation occurs over the course of weeks or months, counsel should update the company regularly. Given the preliminary nature of the findings in interim reports or updates, such an update typically is provided orally or using a web-based PowerPoint or other presentation remaining in the possession of outside counsel. At the conclusion of the investigation, counsel should provide a detailed report to the client, including an assessment of the facts, applicable law, and legal counsel. Whether the final report is written or verbal is a question of strategy, risk, and client preference.[18] Typically, an oral report minimizes the risk of disclosure and associated damage. On the other hand, a written report may better satisfy the requirements of the Sarbanes-Oxley Act of 2002[19] to show that company management, the board of directors, the audit committee, or others, depending on the reporting approach adopted by the company, have undertaken a full review of the issues, been advised of legal considerations,

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[17] *See* Atl. Richfield Co. v. Current Controls, Inc., No. 1:93-cv-00950, 1997 WL 538876, at *3 (W.D.N.Y. Aug. 21, 1997) (holding that documents prepared by non-attorney consultants and company employees that contained mostly factual data, such as testing results and remediation cost data, were work-product protected); *see also id.* at *2 (noting that "[i]n light of the surrounding circumstances—including the EPA's activities and the nature of environmental law, which often leads to litigation involving numerous parties with past or present associations with contaminated property—[the company's anticipation of litigation] was objectively reasonable").

[18] Even when the client decides it does not want to receive a written report of the internal investigation, experienced counsel maintain a database of all documents reviewed and interviews taken. At the conclusion of the internal investigation, counsel should maintain a record of the results of the internal investigation and advice provided to the corporate client.

[19] 15 U.S.C. §§ 7201–7266.

and directed corrective measures to achieve compliance. Written reports provide greater clarity regarding findings and legal conclusions especially in connection with complex alleged violations, but a written report carries risks, such as inadvertent or malicious disclosure. Careful consideration must be given and risks and benefits must be weighed regarding the form of the final report and who retains a copy, if written, based on the particular circumstances of the compliance issue and associated risks. No matter what the form of the final report, experienced counsel generally prepare it in a highly professional and measured manner in the event it does see the light of day.

Whether the final report should include recommended corrective actions should be discussed with the client at the outset or early in the investigation. Some companies may decide that the final report should only include factual findings without recommendations regarding remedial measures. A better practice is to include in a draft final report recommendations that have been orally vetted and for the final report to document corrective measures already agreed to by senior management. Failure to include recommendations from counsel in the final report limits the ultimate usefulness of the internal investigation and the final report. It could also be construed by others after the fact as an unnecessary but intentional limitation of the thoroughness and scope of the investigation. In the unlikely but unfortunate event that noncompliance recurs and senior management and corporate officers become the targets of a criminal investigation, including in the final report recommendations that were implemented in good faith often will provide the best exculpatory evidence for the company and its senior management.

[10] Self-Reporting the Results to Regulators

Whether a company should self-report instances of ongoing noncompliance revealed by the internal investigation should be decided promptly. Anything less runs the risk of knowing (i.e., intentional) continuing violations, with a commensurate risk of corporate or individual criminal exposure. In some cases, the results of the internal investigation must be reported to regulatory authorities as a matter of law based on various statutes, regulations, or permit provisions that dictate the manner and timing of mandatory compliance reports and certification.[20] In most cases,

[20] For example, the Clean Air Act requires operators of major stationary sources to certify compliance with terms and conditions specified in the Title V permit, identify continuous or intermittent noncompliance, describe the emission unit for which the discrepancy took place and the applicable requirement against which the deviation occurred, and provide information regarding the duration of the deviation and any corrective actions. *See* 40 C.F.R. pt. 64. Under the Clean Water Act, National Pollutant Discharge Elimination System permits require discharge monitoring reports with a compliance certification. 40 C.F.R. § 122.22.

however, the decision whether, how, when, and to whom to voluntarily self-report a noncompliance event or condition requires a careful balancing of risks and competing interests.

Normally, the objective of a self-report is to reduce the risk of criminal prosecution and avoid large penalties. Depending on the nature and number of violations, avoiding criminal prosecution or penalties may not be possible.[21] Companies with compliance issues generally consider whether regulatory authorities likely would learn of the noncompliance absent the self-report. For most companies in most industries, the vast majority of noncompliance is detected and corrected without any internal investigation, self-report, or detection by regulatory authorities. If a violation cannot qualify for penalty reduction, self-reporting may serve little purpose. For example, the EPA's "Audit Policy" provides various "conditions" for a reduction in gravity-based penalties for violations of federal environmental requirements discovered and disclosed to the EPA, including conditions regarding the ineligibility of repeat violations.[22] Thus, disclosing a repeat violation that otherwise is not subject to a mandatory reporting obligation may trigger enforcement that might not otherwise occur if undetected, and yet the company receives little benefit from the self-report. It is critical that counsel be familiar with applicable guidance issued by federal and state regulatory authorities setting forth conditions and limitations regarding whether a self-report will reduce penalties.

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[21] Under the EPA's "Audit Policy," 65 Fed. Reg. 19,618 (Apr. 11, 2000), provided that specified conditions are met,

> EPA will not recommend to the U.S. Department of Justice or other prosecuting authority that criminal charges be brought against the disclosing entity, as long as EPA determines that the violation is not part of a pattern or practice that demonstrates or involves:
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> (i) A prevalent management philosophy or practice that conceals or condones environmental violations; or
>
> (ii) High-level corporate officials' or managers' conscious involvement in, or willful blindness to, violations of Federal environmental law.

Id. at 19,625. However, the EPA may still "recommend for prosecution the criminal acts of individual managers or employees . . . ." *Id.*

[22] By "repeat violation," the EPA explains that "[t]he specific violation (or a closely related violation) has not occurred previously within the past three years at the same facility, and has not occurred within the past five years as part of a pattern at multiple facilities owned or operated by the same entity." *Id.* at 19,626. Additionally, "[i]f a facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion." *Id.* at 19,623. Other conditions for reducing penalties include systematic discovery of a violation through either "(a) [a]n environmental audit; or (b) [a] compliance management system reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations," and voluntary discovery of a violation that was not detected as a result of "a legally mandated monitoring or sampling requirement." *Id.* at 19,625.

Should a company self-report a violation even though the company does not qualify under the applicable federal or state policy? The answer depends on a variety of factors. Depending on the circumstances, it may be highly advisable to self-report given that regulatory authorities, the U.S. Department of Justice, and state attorneys general still retain substantial prosecutorial discretion to reduce the amount of penalties or injunctive relief they might otherwise be entitled to seek, or to decline prosecution in favor of civil or administrative resolution of a case.[23] The decision whether to self-report requires careful analysis by companies and their counsel.

[11] Correcting Deficiencies and Closing Out the Investigation

Nothing motivates a company to improve compliance more than a probing government inspection or enforcement action. Environmental compliance can suddenly become a company's top priority. Correcting compliance problems discovered during an internal investigation before regulatory enforcement is essential. Failure to do so after reporting the violations to company management could expose the company and relevant corporate officials to enhanced liability. Yet once the internal investigation concludes, the temptation exists to breathe a collective corporate sigh of relief before returning to business as usual. This is especially true when the compliance issue has been previously settled with regulators. Other operational issues take priority and management's attention turns elsewhere even though additional work may be needed to improve environmental management systems, implement enhanced training and monitoring, and implement equipment upgrades and personnel changes.

Counsel should assist and encourage their corporate clients to resist this temptation once a report is made, as it presents several unnecessary risks. First, a company can fail to "close out" the internal investigation. Companies and their lawyers sometimes mistakenly assume that the internal investigation concludes at the time counsel reports the findings and recommendations to senior management. If counsel have prepared and provided management with a written internal investigation report and recommendations, it is critical that there also be a subsequent follow-up report (or corrective action plan report) explaining that the recommendations were in fact implemented or are being implemented.

Second, for those recommendations or open compliance matters that cannot be immediately corrected and closed out, a supplemental report needs to include an action plan and timeline for implementing the corrections or

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[23] *See generally* David M. Uhlmann, "Prosecutorial Discretion and Environmental Crime," 38 *Harv. Envtl. L. Rev.* 159 (Apr. 2013).

recommendations, or explain why they were not necessary. Once all open matters have been closed out, a final report should be prepared by counsel and reported to management. The final report normally contains factual information confirming implementation of corrective measures consistent with prior findings and recommendations. Sometimes counsel must be somewhat assertive to ensure that the client understands the importance of not leaving the final closeout of an internal investigation in limbo.

Third, despite best efforts to investigate alleged violations, the results of an internal investigation are sometimes inconclusive. For example, a whistleblower might anonymously report that a particular worker in the wastewater treatment plant is illegally diluting the effluent stream to achieve compliance, which arguably invalidated the company's Clean Water Act monitoring reports and compliance certifications. Such an allegation may be difficult to investigate and prove or disprove. The worker may deny the allegations. In the face of inconclusive evidence, it is important for the final report to identify the nature and source of the allegations, efforts to investigate them, and preventive measures, such as training and enhanced inspections and monitoring, implemented to reasonably address any issues. Reference to the report should be included in the employee's personnel file in the event that additional allegations or information regarding the same employee surfaces down the road, allowing the detection of a pattern of questionable conduct.

[12] Reducing the Risk of Debarment and Suspension

In recent years, federal agencies have stepped up debarment and suspension activities, including among agencies that traditionally did not have much experience suspending and debarring contractors and recipients of federal benefits.[24] The debarment and suspension procedures are intended to prevent waste, fraud and abuse in federal procurement and nonprocurement actions (e.g., awarding grants) and are not intended to constitute a form of punishment.[25] Rather, debarment or suspension procedures are intended to ensure that federally funded business is conducted by responsible and ethical companies and individuals. Nevertheless, debarment and suspension can have a profound punitive impact on both traditional

[24] *See* U.S. Gov't Accountability Office, "Federal Contracts and Grants: Agencies Have Taken Steps to Improve Suspension and Debarment Programs" (May 2014). Debarment refers to the exclusion of individuals or businesses from participating in federal procurement and/or nonprocurement transactions, while suspension is the "temporary" exclusion. *See* 48 C.F.R. §§ 9.400–.409.

[25] *See* 2 C.F.R. § 180.125.

government contractors and companies that receive nonprocurement government benefits such as oil and gas lessees.[26]

An internal investigation and the implementation of corrective measures can reduce the risk of debarment and suspension in two ways. First, after a company receives a suspension or debarment notice, the applicable regulations give the company the opportunity to contest the proposed debarment orally or in writing, but information the company considers important must be submitted in writing to be considered on the record.[27] While the debarment regulations do not require the debarring official to informally meet with the company, the regulations provide the debarring official authority to enter into settlements.[28] In practice, debarring officials or agency counsel are willing to informally meet with all recipients of notices of suspension or debarments at any time.

Debarment officials consider various "mitigating and aggravating factors" in determining whether to debar and the length of debarment.[29] These factors cover many of the internal investigation topics discussed above, including whether the company fully investigated the circumstances surrounding the cause for debarment, fully cooperated with the government's investigation, took appropriate disciplinary action against the responsible individuals, and took other appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.[30] Even if the debarring official finds that cause for debarment exists, she may reduce the scope of debarment or decide not to debar.[31] Thus, companies that receive debarment notices and expeditiously undertake internal investigations and implement corrective measures can meet with debarment officials to demonstrate sufficient business integrity. Companies that use the results of internal investigations and corrective measures stand a better chance of avoiding or limiting debarment than

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[26] In addition to the list of transactions subject to debarment in the general nonprocurement debarment regulations at 2 C.F.R. § 180.970, the Department of the Interior (DOI) debarment regulations list includes: "(a) Federal acquisition of a leasehold interest or any other interest in real property; (b) Concession contracts; (c) Disposition of Federal real and personal property and natural resources; and (d) Any other nonprocurement transactions between the [DOI] and a person." *Id.* § 1400.970. The DOI interprets these regulations to include oil and gas leases.

[27] *Id.* § 180.815.

[28] *See id.* § 180.635 ("[A] Federal agency may settle a debarment or suspension action at any time if it is in the best interest of the Federal Government.").

[29] *Id.* § 180.860.

[30] *Id.*

[31] *Id.* § 180.845(a).

companies that outright contest debarment.[32] Notably, this may require disclosing the results of the internal investigation.[33]

Second, if a company is under investigation or is negotiating a settlement relating to serious regulatory violations, the company may wish to consider contacting the agency's suspension and debarment office to present information demonstrating that, notwithstanding the underlying allegations that may result in a criminal or civil settlement, the company has appropriately investigated the underlying causes of the noncompliance and implemented corrective measures. The debarment officials will want to see evidence of "present responsibility" (i.e., that the company has a corporate culture that encourages ethical behavior along with strong ethics and whistleblower policies that assist senior management in identifying compliance problems).[34] Debarment officials are less likely to initiate a suspension or debarment action if the company has self-reported the noncompliance to both the regulatory officials within the agency and the debarment officials.

§ 24.03 Practical Tips for Conducting Internal Investigations Abroad

Companies conducting internal investigations abroad of serious environmental noncompliance and environmental crimes confront many of the same issues as domestic investigations, particularly with respect to defining the scope of the investigation, determining who conducts the investigation, delineating the role of counsel in a concurrent government investigation or inspection, gathering and preserving evidence, interviewing employee witnesses, protecting applicable privileges, determining whether to self-report, correcting deficiencies, and closing out the internal investigation. However, for each of these issues, local laws and other considerations may significantly impact the methods and strategies used during an internal investigation, and even limit its reach. Local laws, such as violations of workplace safety laws, may make internal investigations by the company mandatory. Foreign governments increasingly cooperate and assist each other with criminal and civil enforcement efforts in their

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[32] Courts apply the deferential "arbitrary and capricious" standard in reviewing debarment decisions, but will require a rational relationship between the facts found, the protective purpose of the debarment proceeding, and the sanction imposed. *See, e.g.*, Shane Meat Co. v. U.S. Dep't of Def., 800 F.2d 334, 339 (3d Cir. 1986).

[33] *See* 2 C.F.R. § 180.860(o) (including the factor of "[w]hether you have fully investigated the circumstances surrounding the cause for debarment and, if so, *made the result of the investigation available to the debarring official*" (emphasis added)).

[34] To avoid debarment, the debarment officials may require that the company negotiate an administrative agreement that demonstrates that the company is "presently responsible" notwithstanding past misconduct. *Id.* § 180.855(b).

respective countries. The U.S. government provides extensive training to regulators and prosecutors abroad. In short, when conducting internal investigations abroad, the U.S. lawyer must prepare to change mindsets and rely extensively on local counsel to understand the dynamics of local law, practice, and culture.

A detailed comparative analysis of the laws governing or affecting internal investigations falls beyond the scope of this chapter. Rather, the discussion below provides 10 practical considerations that may be useful to a U.S. lawyer conducting an internal investigation of a serious compliance matter at a client's foreign operation.

[1] Know Foreign Law Through Competent Local Counsel

North American lawyers must have seasoned and reliable local counsel to provide accurate information regarding local laws. During his first day visiting his corporate client's operation in a developing country, one U.S. lawyer learned that local personnel disposed of used oil, waste fuel, and off-specification diesel fuel by using it as a dust suppressant. He notified the client that an internal investigation was likely needed. That evening he realized that the practice might not be illegal in that country: when he was shown his sleeping quarters the steward proudly noted that the floors had just been freshly mopped with diesel fuel to keep down the dust and bugs. Many common practices used at foreign operations may be imprudent and harmful to the environment and public health, requiring training and implementation of best management practices. However, overreacting to local practice that may be legal and common can result in a loss of credibility and reduced cooperation and candor by local personnel.

Finding reliable counsel to assist with an internal investigation may be easier said than done. A client sent a U.S. lawyer from a large law firm to investigate a tip that its foreign subsidiary had violated anti-money laundering laws. Through a global law firm network, the lawyer found a reputable local law firm to assist with the internal investigation. Upon reviewing the situation, the local lawyer, who seemed eager to please and receive more work, concluded that there was no problem in the approach the subsidiary had taken. After reporting the favorable results to his client, the U.S. lawyer decided to obtain a second opinion, this time through a referral from another U.S. lawyer. The second opinion identified numerous violations of local law. A third opinion from yet a different law firm confirmed the illegality of the financing structure.

Competent and ethical local counsel may be found almost anywhere in the world, especially in most nations' capitals. Prominent foreign law firms increasingly employ lawyers with advanced law degrees or work

experience in North America and Western Europe as the legal market becomes more global. Nevertheless, checking multiple references of local counsel and obtaining multiple legal opinions on critical matters remains a wise practice, especially when conducting a high-stakes internal investigation of potential illegal activity.

[2] Managing Uncertainty in Foreign Law

Environmental laws and regulations in the United States are notoriously complex. But in many countries throughout the world, environmental regulatory programs remain largely undeveloped. Foreign constitutions may broadly grant citizens the right to live in a clean environment and legal standing to pursue injunctive relief to protect environmental health,[35] and sweeping environmental framework laws impose obligations to achieve sustainable development and impose strict liability for environmental damage.[36] But detailed emissions limits, effluent limits, waste characterization and disposal requirements, technology forcing provisions, and monitoring and reporting requirements may not exist.

In countries such as Argentina, citizens may file a lawsuit to enforce rights and duties not only under Argentine law but also under treaties to which Argentina is a signatory.[37] Some modern treaty obligations deal with important environmental and other regulatory matters directly relevant to the operations and activities of industry even though applicability normally requires national implementing legislation. Constitutional citizen suit provisions may give citizens and nongovernmental organizations an argument that they can enforce treaty obligations against private companies as a matter of national law. In conducting environmental audits and internal investigations in the aftermath of compliance issues, companies must consider the risk of exposure from such citizen suits.

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[35] For example, Argentina's Constitution protects "the right to a healthy and balanced environment fit for human development," and states that "environmental damage shall bring about the obligation to repair it according to law." Argentina National Constitution art. 41 (1994). Any damaged party or nongovernmental organization that fosters environmental protection may seek injunctive relief against any person who "currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by [the] Constitution, treaties or laws, with open arbitrariness or illegality." *Id.* art. 43.

[36] Again, using Argentina as an example, the General Environmental Law broadly defines environmental damage as any relevant alteration that negatively impacts the environment, natural resources, the ecosystems' balance, or nature's collective goods or values, and imposes strict liability on those who cause environmental damage to restore the environment to its previous condition. When that is not technically feasible, the polluter must pay compensation in an amount to be established by the court, payable into the Environmental Compensation Fund. General Environmental Law No. 25,675, § 28 (2002) (Arg.).

[37] *See supra* note 35.

Some multinational corporations fill regulatory gaps by voluntarily agreeing to apply international, North American, or European standards to their foreign operations. Companies that employ lower environmental and worker protection standards than their North American or European operations give credence to the "race to the bottom" notion. To provide clarity to their workforce and avoid criticism from stakeholders, multinational companies frequently agree to apply more stringent standards than those required under local law. When conducting internal investigations of serious compliance issues, the issue of applicable standards must be carefully factored into the scope of the investigation at the outset. If a company has voluntarily committed to comply with international standards and best management practices, the scope of the internal investigation should clearly identify those standards that are merely voluntary and those that have become binding on the company.

When companies commit to comply with higher standards than required by local law, such commitments may become enforceable conditions of approvals of environmental impact assessments and permits. One company conducted an extensive internal investigation after a major upset event and release to the environment and reported findings to the government, concluding that no environmental laws or obligations had been violated, and that the incident was largely unforeseeable. Senior managers were later embarrassed when regulatory authorities pointed out that the company had failed to implement environmental controls it had committed to years earlier that, if implemented, would have eliminated the risk. The company was fined and lost substantial credibility with regulatory officials and the community.

Depending on the nature of the compliance issue, counsel conducting internal investigations (as well as compliance audits) may also wish to consider more general voluntary commitments the company has made through its memberships, such as the chemical industry's "Responsible Care" program.[38] Assessing a company's performance of its voluntary commitments, even though perhaps not legally enforceable, can provide senior management with useful information to evaluate the overall strength of a company's compliance culture.

[3] Do No Harm

The well-known Hippocratic Oath maxim, "*primum non nocere*" ("above all, do no harm"), provides excellent guidance for any North American lawyer conducting an internal investigation on foreign soil where false

[38] *See* Int'l Council of Chem. Ass'ns, "Responsible Care," http://www.icca-chem.org/en/Home/Responsible-care/.

assumptions and inexperience can exacerbate compliance and public relations problems. North American lawyers must recognize that they carry the bias of their own legal system and culture, and avoid supposing that even basic legal principles apply the same way under governing foreign law. Even when local foreign law is well understood, it is easy to wrongly assume how the law will be interpreted, applied, and enforced in the foreign jurisdiction.

One company learned during an internal investigation that a local manager was taking kickbacks from indigenous people who were being paid to relocate from company property needed for road construction. The corrupt manager invited squatters to move onto land he knew fell within the right-of-way for planned road construction. He then received kickbacks from the funds paid to the squatters to abandon their hastily constructed shanties and relocate. The internal investigation action plan recommended termination of the manager and the forced removal of the squatters as trespassers if they refused to relocate after a week's notice. Local law enforcement was willing to assist for a fee. This approach may have worked in the United States, where the law in most states allows a landlord to evict a trespasser or tenant for cause after minimum notice and due process, and through a constable who places an evicted tenant's personal belongings on the sidewalk or in storage. Unfortunately, the internal investigation team did not consult local counsel regarding indigenous people's squatter rights. The company's security personnel removed the shanties with a bulldozer in the early hours of the morning as local police observed to keep order. The incident resulted in a government investigation and public relations firestorm with widespread condemnation by local churches and human rights groups. It took the company years and substantial resources to restore good will in a country key to its operations. A similar incident in Brazil resulted in a highly critical report issued by Amnesty International documenting violations of local law and international human rights.[39]

The issue of squatter rights provides an excellent example of the need to understand local law and practice. In some rural areas of Peru, for example, only about half of all land holders actually possess legal title. Acclaimed Peruvian economist Hernando de Soto championed issuance of legal title in order to promote economic growth and political stability.[40] Yet enforceable property titles have progressed largely only in urban locations. This presents a substantial challenge for natural resources extraction compa-

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[39] *See* Palash Ghosh, "Brazil: Activists Condemn Forced Eviction of Sao Paulo Squatters," *Int'l Bus. Times* (Jan. 25, 2012).

[40] *See generally* Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000).

nies that receive government concessions to develop natural resources in the same areas in which Peru grants rights to squatters without notice of preexisting concessions.[41] In countries with a weak rule of law, the public and government relations risks may exceed the legal risks. Legal counsel who conduct internal investigations and make recommendations regarding corrective actions must have the support and sage guidance of seasoned local counsel and public relations experts.

For a variety of reasons, government regulators may more stringently enforce requirements against multinational corporations than against domestic companies, which can operate with substantial disregard for compliance, labor and human rights, and environmental sensitivity. Furthermore, North American lawyers may not appreciate that in many civil law countries, criminal enforcement actions are more common than civil actions—criminal enforcement actions cannot be brought against the corporate entity, only against a responsible officer or manager, and the law readily allows imputation of personal liability for the acts of subordinates. Criminal laws in civil law countries may be applied in a more inquisitorial manner with judges taking a more active and aggressive role in direct examination of defendants who have fewer due process rights than available under criminal procedures in the United States.

[4] Managing Language Barriers

Some lawyers with fluency in a foreign language mistakenly assume they can conduct crucial witness interviews without the assistance of native language speakers. Even native foreign language speakers recognize significant language nuances depending on the country. One experienced Chilean litigator confided that he would not conduct a highly sensitive witness interview of an Argentine national without an Argentine lawyer present to assist due to the differences in idiomatic expressions and slang. Similarly, an Argentine lawyer reported that during an internal investigation of an incident involving Uruguayans, Argentine attorneys spent over an hour looking in dictionaries and calling Uruguayan attorneys to understand the meaning of a single critical word repeatedly used in a key document.

Another issue that commonly arises during internal investigations is whether to conduct overseas interviews in person, telephonically, or via video conference, and whether this can be done effectively with translators for foreign-language interviews. While these approaches can be used with friendly witnesses, key witness interviews ideally should be conducted

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[41] *See* "Land Rights in Peru—Whose Jungle Is It?: A Scramble for Land Sets Investors Against Locals," *The Economist* (Mar. 19, 2009).

with at least one native speaker asking questions in the same room as the interviewee.

[5] Managing Cultural Barriers

Perhaps even more important than language barriers is an understanding of cultural differences that influence communication. In some cultures, "snitching" on a co-worker or fellow countryman to a foreigner violates the strictest of taboos, surpassing loyalty to one's employer or legal obligations. Some would rather lose their job than face community ridicule for disclosing information prejudicial to a close associate. Such social proscriptions may be difficult for North American lawyers to appreciate but can greatly influence the reliability of information obtained from, and cooperation of, employee witnesses.

Social mores also may influence the subtlety used by witnesses to communicate sensitive issues. One North American lawyer reported that during an interview of a critical and somewhat hostile witness, the lawyer received the following answer (translated into English) to a question regarding whether a third person had participated in certain illegal conduct: "[X] is very particular and does many things." Upon receiving this apparently evasive answer, the lawyer became annoyed. Fortunately, local counsel called for a break to explain to the lawyer that while the lawyer correctly understood the words the witness used, he clearly did not understand the meaning: "[X] not only did what you say, but he has engaged in other illegal conduct." Local counsel warned the lawyer that if he failed to take the cue, the witness might tighten up and not cooperate. Upon recommencing the witness interview, the lawyer warmly thanked the witness. Over time the witness became more open and direct, giving the lawyer critical information needed to conclude the investigation. Sometimes a lawyer conducting a witness interview abroad needs a cultural interpreter as much as or more than a language interpreter. Often they may be the same person.

Another experienced North American lawyer fluent in the foreign language nevertheless routinely has reliable local counsel first question the witness alone. Thereafter, the three meet together with local counsel summarizing in front of the witness what was learned during the initial interview, and allowing the North American lawyer to ask any clarifying questions. This technique normally saves time and delivers more reliable information.

[6] Navigating Data Privacy Issues

Counsel conducting internal investigations abroad must be sensitive to local data security laws that can limit or impact an internal investigation

in a variety of ways. First, many countries outside the United States have enacted strict data protection laws that cover compliance hotlines. If the investigation is based on a tip from an anonymous compliance hotline, the investigators must ensure that the hotline satisfies applicable legal requirements before relying on hotline information. Some countries in Europe, for example, require consent from employees and government registration of the hotline before its use, while other countries simply ban the use of anonymous hotlines altogether.[42]

Second, some countries regulate the collection, use, international transfer, and other processing of personal data. For example, in Argentina both public and private databases must register with the National Commission for the Protection of Personal Data before they may be compiled and used unless they are private databases exclusively intended for personal use.[43] The definition of personal data is broadly defined to include "[i]nformation of any kind referred to certain or ascertainable physical persons or legal entities."[44] Transfer of personal data out of the country is prohibited unless it falls within an express exception.[45] Thus, internal investigation reports identifying employees' names usually cannot leave the country without consent of those involved. Some countries take an even more restrictive view. Data privacy laws in Belgium and the Netherlands, for example, expressly prohibit the cross-border transmission of "workplace accusations."[46]

Third, certain countries require that employers grant employees access to personal database information about themselves. Argentina's Constitution establishes the "right of habeas data," whereby any person may file a judicial action to obtain personal information contained in public or private records or databases. In the case of false data or discrimination, a "writ of habeas data" may be filed to request the suppression, rectification,

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[42] *See* Donald C. Dowling, Jr., "Global Whistleblower Hotline Toolkit: How to Launch and Operate a Legally-Compliant International Workplace Report Channel," 45 *The International Lawyer* 903 (2011).

[43] *See* Personal Data Protection Law No. 25,326 (2000) (Arg.); Regulatory Decree No. 1,558/2001 (Arg.).

[44] Personal Data Protection Law No. 25,326, § 2 (2000) (Arg.).

[45] Argentina's prohibition on the international transfer of data exempts the transfer of personal data for the following conditions and purposes, when the subject of the data has consented to the transfer: international judicial cooperation; exchange of medical information needed for medical treatment; effectuation of stock exchanges or bank transfers pursuant to applicable law; data transfer pursuant to a treaty obligation; and data transfer between intelligence agencies. *Id.* § 12.

[46] *See* Lucian E. Dervan, "International White Collar Crime and the Globalization of Internal Investigations," 39 *Fordham Urban L.J.* 361, 375 n.57 (Dec. 2011).

confidentiality, or updating of false data.[47] The notion that an internal investigation team would have to disclose the internal investigation files, notes, and reports to the target of the investigation, if requested, makes no sense to U.S.-based lawyers. Nevertheless, this is a common approach in countries that subordinate employers' rights to employees' rights.

Fourth, data privacy laws in the United States and abroad may impact whether and how employers and their lawyers may conduct electronic searches of employee emails, cellular phones, laptop computers, and Internet records, as well as physical searches of employee desks, lockers, and vehicles. Local data privacy law may protect information even though the employer has obtained right-to-search acknowledgments from its employees. The use and placement of video surveillance and audio recording equipment under local laws should also be considered. Because data privacy laws may be new and relatively complicated, North American counsel undertaking the internal investigation must be sure to use local counsel with sufficient experience and expertise with data privacy issues to flag issues of importance.

Fifth, while most companies or their lawyers maintain internal investigation reports and documents, this practice may run afoul of data privacy laws that impose a duty to purge dated or obsolete personnel data regarding employees. This may be the case notwithstanding strong and valid business reasons companies may have for retaining such records.

Some lawyers conducting internal investigations in countries with strict data privacy laws may be tempted to ignore the requirements and restrictions described above. However, doing so could render the internal investigation itself illegal and subject to employee claims or government enforcement for violating applicable data privacy laws. To avoid violating strict local data privacy laws, some multinational companies routinely redact the names and identifying employee information from internal inspection reports used within or transferred out of the country.

[7] Privilege and Confidentiality Considerations

In the United States, protecting privileged or work-product protected communication and documents requires careful thought and planning. A waiver of applicable privileges may prove prejudicial to the company, particularly if it results in production of sensitive documentation to the government, a citizen group, or other third parties.

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[47] *See* Argentina National Constitution art. 43 (1994). Other Latin American countries with similarly broad constitutional habeas data provisions include Brazil, Ecuador, Paraguay, and Peru. *See* Organization of American States, "Comparative Study: Data Protection in the Americas" (Apr. 3, 2012). Many other countries have enacted legislation that accomplishes the same. *See generally* DLA Piper, "Data Protection Laws of the World" (Mar. 2013).

Foreign jurisdictions may have no discovery as it exists in the United States. In some countries, parties submit documentary evidence with their complaints and answers, and then proceed directly to the expert and witness testimonial phases before the judge or magistrate. There often is no method to compel production of documents under the rules of local civil procedure.

Most countries recognize some form of the attorney-client privilege, although it may be codified by statute as one of a number of professional privileges (usually applicable to lawyers, doctors, and accountants), and the privilege may not apply to in-house counsel in some, including the European Union.[48] Moreover, outside counsel who are not licensed in the foreign jurisdiction should verify with local counsel the availability of privileges when the work is performed by attorneys from outside the country. Similarly, attorneys should not assume that technical experts engaged as part of the internal investigation team fall within privileges reserved for attorneys. By contrast, some countries have much broader privileges than found in the United States, allowing a witness to refuse to answer questions that would reveal professional, military, scientific, artistic, or industrial secrets or discredit the witness's honor.[49]

In summary, issues of privilege should be determined prior to the commencement of the internal investigation. Failure to do so could jeopardize the success and legality of the internal investigation.

[8] Self-Reporting the Results to Regulators

At the conclusion of an internal investigation conducted in the United States, Canada, or Europe, corporate clients in natural resources industries frequently consider the risks and benefits of self-reporting the results to government regulators pursuant to incentives set forth in statutes and guidance documents that offer leniency to companies that self-report and correct violations.[50] Outside the developed world, fewer self-reporting, voluntary cleanup, voluntary compliance agreements, and similar programs exist, although voluntary compliance approaches may be on the rise. Colombia, Chile, and Mexico have put in place voluntary compliance

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[48] *See* Case C-550/07, Akzo Nobel Chems. Ltd. & Akcros Chems. Ltd. v. Comm'n, 2010 ECJ EUR-Lex LEXIS 807 (Sept. 14, 2010); *see also* Clinton R. Long, "Akzo and the Debate on In-House Privilege in the European Union," 8 *BYU Int'l L. & Mgmt. Rev.* 1 (2011).

[49] Richard M. Mosk & Tom Ginsburg, "Evidentiary Privileges in International Arbitration," 50 *Int'l & Comp. L.Q.* 345, 350 (Oct. 2013).

[50] *See* Galli, *supra* note 2, at 10,351–52.

agreement programs with varying degrees of success and utilization.[51] Nevertheless, in countries with a high corruption index, self-reporting a violation of law may be treated as an offer to pay a bribe to a government official.

Conversely, some legal regimes are moving toward more mandatory reporting that could impose the duty to disclose certain information obtained through an internal investigation. For example, the European Union has amended existing accounting legislation to require large companies (mainly stock exchange listed companies with over 500 employees and certain financial institutions) to disclose information on policies and risks regarding environmental matters, social and employee-related issues, respect for human rights, anti-corruption and bribery matters, and diversity on boards of directors.[52] Depending on how the legislation is implemented, the new requirements may have extraterritorial reach, requiring disclosure of a company's worldwide activities, not just those within the European Union. Mandatory reporting obligations should factor into the scope of the internal investigation, including how the investigation is concluded and reported out.

While rare, some countries prohibit an internal investigation of certain types of criminal activities based on the public policy consideration that enforcement agencies have exclusive investigative authority that private employers cannot infringe. In such countries, no self-reporting to regulatory authorities is realistically feasible and the scope and nature of the internal investigation should be structured as fact gathering for legal analysis, not as an internal investigation into suspected crimes. Similarly, some countries prohibit an employer from questioning an employee about what she may have disclosed to law enforcement or other government officials. Data privacy laws may also effectively prohibit self-reporting criminal conduct of employees, although this may not have been the legislative intent.

In the absence of reporting obligations or incentives to self-report, the decision to disclose the results of an internal investigation in a foreign jurisdiction largely revolves around government and public relations considerations. Companies sometimes disclose internal investigation reports to reassure the public, regulatory authorities and stakeholders, especially after a high profile incident or in order to refute claims by nongovernmental

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[51] *See generally* Allen Blackman et al., "Voluntary Environmental Agreements in Developing Countries: The Colombian Experience" (June 2009); Allen Blackman & Nicholas Sisto, "Voluntary Environmental Regulation in Developing Countries: A Mexican Case Study," 46 *Nat. Res. J.* 1005 (Fall 2006).

[52] Press Release, European Comm'n, "Disclosure of Non-Financial Information by Certain Large Companies" (Feb. 26, 2014).

organizations and even churches. For example, in Latin America and the Philippines, church leaders adhering to "Liberation Theology" have issued reports of environmental violations and human rights abuses in their communities.[53] Mining and other companies have countered these reports based on the results of internal investigations they relied upon or released to government authorities and sometimes to the public and media.[54]

[9] Navigating Foreign Corrupt Practices Act Compliance Issues

Corruption, especially bribery of government officials, exists in almost every country, but various studies indicate that it is more common in emerging economies, developing countries, and least developed countries.[55] The Foreign Corrupt Practices Act of 1977 (FCPA)[56] contains an express exception for "facilitating payments" meant to secure the performance of non-discretionary "routine governmental action,"[57] which the FCPA defines to include obtaining permits, licenses, or other official authorizations to qualify a person to do business in a foreign country; processing governmental papers, such as visas and work orders; and other similar ministerial or clerical acts.[58] However, "routine governmental action does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party . . . ."[59] The extractive industries in developing countries are notoriously susceptible to bribe requests.[60] During an internal investigation, FCPA compliance issues can arise in at least three ways.

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[53] *See generally* William N. Holden & R. Daniel Jacobson, "Ecclesial Opposition to Non-ferrous Metals Mining in the Philippines: Neoliberalism Encounters Liberation Theology," 31 *Asian Studies Rev.* 133 (June 2007); Javier Arellano-Yanguas, "Religion and Resistance to Extraction in Rural Peru: Is the Catholic Church Following the People?" 49 *Latin Am. Research Rev.* 61 (2014).

[54] *See* Barrack Gold Corp., "Statement by Barrick Gold Corporation in Response to Human Rights Watch Report" (Feb. 1, 2011) (referencing internal investigation); *see also* Newmont Mining Corp., "Chaupe Events – February 3, 2015," http://www.newmont.com/files/doc_downloads/Chaupe/Chaupe-Events-Facts-23-Feb-2015.pdf.

[55] *See generally* Edward Fokuoh Ampratwum, "The Fight Against Corruption and Its Implications for Development in Developing and Transition Economies," 11 *J. of Money Laundering Control* 76 (2008).

[56] 15 U.S.C. §§ 78dd-1 to 78dd-3.

[57] *Id.* § 78dd-1(b).

[58] *Id.* § 78dd-1(f)(3)(A).

[59] *Id.* § 78dd-1(f)(3)(B).

[60] According to the Organisation for Economic Co-operation and Development (OECD), bribery of government officials is largely concentrated in four industries: (1) extractive;

First, the internal investigation uncovers evidence of past bribes, such as to obtain mining concessions or operating permits. Such information may trigger the need to expand the scope of any internal investigation and to conduct a legal analysis into whether the payment satisfied the facilitating payment exemption. If not, complex questions may arise as to whether and how to self-report the violation to officials of the foreign and U.S. governments.[61]

Second, during an internal investigation of a major release to the environment or other noncompliance event, local counsel, business partners, or agents may offer assistance negotiating with the local authorities based on their close contacts. Such assistance from third-party agents triggers the duty to conduct FCPA due diligence. Among other forms of due diligence, the company's managers and lawyers must be on the lookout for the following common red flags of bribery: rumors of prior improper payments or other unethical behavior by the persons involved; attempted avoidance by an employee, agent, or joint venture partner to certify FCPA compliance; unnecessary or multiple agents retained to perform similar functions; requests by agents or business partners for payments in cash; poorly documented reimbursement requests from agents or business partners; unusually large payments or contingency fees that appear excessive compared to the actual service rendered; and the fact that a country or particular government office at issue may have a reputation for corruption.[62]

Third, during an internal investigation an internal investigation team may have discovered the lack of a robust FCPA compliance program. The U.S. Department of Justice and the Securities and Exchange Commission have issued joint guidance describing the hallmarks of an effective compliance program.[63] Such compliance programs not only reduce the risk of FCPA noncompliance, but also provide a basis for requesting leniency when an

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(2) construction; (3) transportation and storage; and (4) information and communication. OECD, "OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials," at 8 (Feb. 2014).

[61] For the complexity of self-reporting to the U.S. Department of Justice, see generally Elkan Abramowitz & Jonathan Sack, "Dilemma of Self-Reporting: The FCPA Experience," 251 *N.Y. L.J.* 5 (Jan. 8, 2014).

[62] *See* U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, "A Resource Guide to the U.S. Foreign Corrupt Practices Act," at 60–62 (Nov. 2012).

[63] *Id.* at 57–62 (the hallmarks include: commitment from senior management and a clearly articulated policy against corruption; code of conduct and compliance policies and procedures; oversight, autonomy, and resources; risk assessment; training and continuing advice; incentives and disciplinary measures; third-party due diligence and payments; confidential reporting and internal investigation; periodic testing and review; and pre-acquisition due diligence and post-acquisition integration).

FCPA violation occurs as a result of the conduct of a rogue employee acting in violation of the company's compliance program.

[10] Whistleblower and Labor Law Considerations

As part of a global effort to reduce corruption, some countries have enacted whistleblower protection laws that require public and private sector entities to implement procedures for receiving and investigating whistleblower allegations.[64] While still a nascent legislative effort in most countries, companies and their counsel should be aware of laws governing whistleblower allegations if the internal investigation originates from either an anonymous or a self-identified whistleblower. Employees who cooperate with an internal investigation may be entitled to whistleblower protections depending on local law. Counsel relying on whistleblower allegations should also carefully consider whether they can assure the whistleblower that information received can be indefinitely maintained as confidential.

North American lawyers are accustomed to employer friendly labor laws under which most employees have "at-will" status and can be terminated without cause.[65] Employment at will is uncommon outside the United States, and many countries limit the grounds for terminating an employee with cause and impose a short time frame in which to investigate and terminate an employee after receiving credible evidence of wrongdoing. This may require expedited handling of an internal investigation. Labor laws in some countries allow an employee to refuse to answer questions of alleged wrongdoing, a rough analog to the Fifth Amendment. Such laws protect employees from termination even though they refuse to cooperate with an internal investigation.

Even when an employee apparently has committed employment offenses constituting actionable cause, the burden of proof may be impossibly high, assuring the payment of severance. In some instances, the termination grounds and payment must be ratified by the labor ministry. In conducting internal investigations, local labor laws and mandatory collective bargaining agreements may also require that the internal investigation and questioning of employees occur through union representatives. For these reasons, prior to commencing the internal investigation, counsel would be well-served by discussing with trusted local labor counsel the legal

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[64] *See* Simon Wolfe et al., "Whistleblower Protection Laws in G20 Countries: Priorities for Action" (Sept. 2014).

[65] In all but one state, the United States follows the principle that, in the absence of an explicit contract, an employment relationship may be terminated for any reason. This approach to labor law is almost unique in the world. *See* Patricia Pattison & John W. Mogab, "A Comparison of U.S. and Chilean Labor and Employment Law," 12 *ALSB J. Emp. & Lab. L.* 22, 28 (Spring 2011).

requirements applicable to conducting witness interviews and disciplining employees.

§ 24.04 Conclusion

Internal investigations in the environmental and natural resources arenas within the United States implicate routine legal and ethical requirements attendant to conducting internal investigations. However, they also may pose distinct risks to counsel and corporate clients due to the complexity and technical nature of environmental laws and regulations. These risks can include potential (and in some instances mandatory) corporate and individual debarment from government contracting activities, discretionary (and in some instances mandatory) self-disclosure to the government, parallel criminal and civil proceedings, surprise government visits, use of technical experts, potential serious risks to health or the environment, possible emergency responses by the client and the government, and managing employee interviews by regulators that could impact criminal proceedings. As a result, counsel conducting investigations in this area must know the law and ethics of internal investigations, have an in-depth understanding of the relevant environmental law and regulations, and understand how to balance competing risks that the client will inevitably face throughout the investigation. Counsel conducting internal investigations must possess impeccable credibility with regulators and government lawyers.

Virtually all of the above holds true for internal investigations conducted abroad. But once leaving the complicated, but familiar soil of the United States, U.S.-based counsel must contend with a host of additional challenges, including glaring regulatory gaps in substantive environmental and natural resources laws, more common criminal enforcement of environmental laws, and political and public relations risks that may exceed the legal risks in magnitude. Language and cultural barriers can complicate and limit the effectiveness of witness interviews. Privileges may not exist or apply to internal investigation work product. Data privacy, labor, and whistleblower protection laws can pose risks unheard of in the United States, and can actually render illegal the basic approaches and routine tools used to conduct internal investigations in the United States. Finding and using highly qualified and reliable local counsel to navigate these hazards is critical to the success and legality of any internal investigation. Finally, any lawyer conducting internal investigations of U.S.-based entities must be mindful of compliance requirements under the FCPA that commonly arise during internal investigations abroad.