

# THE WEIGHT OF THE WORLD

## Meeting the Challenges of Global Corporate Investigations

Traveling the world to collect evidence and artifacts has long been romanticized in novels and movies, from *Around the World in 80 Days* to *Raiders of the Lost Ark*. The international fact gatherer is a Hollywood archetype: in film, the protagonists' journey is depicted by a moving line on a world map as the plane crosses oceans and continents. Most often, it is a journey to discover hidden truths in faraway places.

Much less romantic than Indiana Jones or James Bond, but much more true to life these days, are the very real stories of international fact gathering that have become a growing part of the legal profession in the service of our corporate clients. Every day, in-house and outside attorney-investigators search the globe, collecting facts and evidence for multinational clients in global investigations. Moviegoers might not find fascination in watching these women and men in business suits, shuttling between airports and hotels and conference rooms, interviewing witnesses with translators and examining accounts in foreign currencies. But these real-life explorers also face traps and pitfalls, complex puzzles and ticking clocks that test their skill and resolve in surprising ways, with stories and cliffhangers that many screenwriters would struggle to concoct. The needs of global corporations, more and more, merit well-designed, well-implemented

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(and, most critically, reasonable and cost-effective) international inquiries by trusted counselors and advocates, with the benefit of the attorney-client privilege, to discover and respond appropriately to the true and full facts from business dealings overseas. And, frequently, companies rely on this work to show the enforcement community (e.g., the U.S. Department of Justice, the SEC Division of Enforcement, and scores of other domestic and foreign regulators that have jumped into the act) that the company and its leaders "get it" and are committed to doing the right thing.

Global investigations are a phenomenon, to be sure, one that occupies the minds and schedules of thousands of in-house and outside attorneys and their clients every day. When to conduct a global investigation, and how, and with the right cost and minimal disruption to the business, are among the key components of any effective international review.

### THE WEIGHT OF THE WORLD: THE PHENOMENON OF GLOBAL INTERNAL INVESTIGATIONS

In the current era of FCPA, antitrust, export controls, insider trading, earnings management and money laundering enforcement (to name just a few of the "hot" areas of white collar crime), the leaders of a multinational corporation carry the weight of the world on their shoulders. Not only must CEOs, CFOs, and corporate General Counsels assure their boards and shareholders that they are running a profitable and efficient global operation, but they must also devote significant thought, time, and resources to the area of *compliance*. The days are long gone when business leaders could simply rely on employees to adhere to the company's written code of ethics.

### As Compliance Obligations Intensify, Investigations Rise

Compliance, now, is viewed and understood as an elaborate activity unto itself. In addition to the never-ending requirement to generate revenues and grow the business, corporate leaders are also now expected and required to build and maintain an intricate global ethics and compliance program, and to affirmatively monitor and test that program to ensure its effectiveness. The compliance cycle never stops: \*assess the company's compliance risks, \*devise and document clear and good rules, \*disseminate them widely and in the

right languages, \*train and certify completion of trainings, \*monitor and test compliance around the world, \*punish and remediate violations, \*rinse, repeat.<sup>1</sup>

In particular, being a General Counsel of a multinational corporation in this era means that the sun never sets on your compliance responsibilities: during the night in the U.S., the compliance program must work effectively during the work day in China, Russia, and India. The program must effectively influence and govern the judgments, actions, communications, documents, and accounting entries created by people on different continents and raised in different cultures, most of whom the GC has never met. And, when evidence surfaces that something may not be working properly, or worse — that someone lied or acted improperly — the company and its leaders are expected to respond, swiftly and appropriately. Put another way, nighttime may come here in the United States, but for GCs of global corporations there is little time to rest.

As compliance requirements and expectations have become more detailed and onerous, privileged reviews conducted by trusted advisors have become more and more important to the company's ability to address those obligations. The symbiosis between compliance and investigations is clear: inquiries by counsel allow the company to gather and understand the facts in a confidential setting when a question arises about whether the compliance program is working effectively. Gathering the facts, and responding to them the right way, allows the company to say that the program *is* effective.

The impetus to conduct an investigation can come from all kinds of different sources: whistleblowers on the company's anonymous reporting hotline, a red flag in acquisition due diligence, an unprompted inquiry from a government investigator, or through the company's own assessment of its compliance program. Common to all of these is the need to determine the answer to two fundamental questions: (1) "What happened?" and (2) "How should we respond?"

### The Data Conundrum: Easy Access, More Accountability

The world is shrinking rapidly in a number of important ways, perhaps none more important than the real-time availability of data. E-mails and instant text messages

track and record business conversations for future review by insiders and outsiders. Many global communications, now, are not only instantaneous but visual and high-resolution, permitting business people in different hemispheres to sit across the table from one another using life-size video and sound systems that capture the smallest furrow of an eyebrow or clearing of the throat. For large companies, the monthly and quarterly financial close for an international division can reach headquarters in the U.S. in nanoseconds at the touch of a button.

All of these innovations make information more accessible to leadership, which is good, but they also increase the (often unfair) perception by outsiders that leadership should be knowledgeable about and accountable for everything that happens, down to the finest detail, everywhere around the world. And, the accessibility of the same data here in the U.S. makes our government feel that all of it is fair game for subpoenas and voluntary requests — even data that never crossed the U.S. border. Belatedly, prosecutors and regulators are sometimes surprised or even appalled to learn that a large company maintains a manual system in a foreign location where some of that data may be difficult to access remotely.

### **Corporate Enforcement: Fertile Ground for Prosecutors**

At the same time, the U.S. government has learned that corporate investigations and prosecutions are profitable, high-profile, and an endless and fruitful source of interesting work. Prosecutors, like all participants in the economy, have to find productive things to do with their time. For a prosecutor, that means finding fertile cases where people under pressure made bad and improper judgments to benefit themselves or others. Of course, uncovering and punishing wrongdoing is the mission of the prosecutors, but they need to know where to look. U.S. prosecutors have learned from experience that the world of business, and in particular the world of large corporations, presents stories where people under pressure to show results, in a competitive environment, have both access to funds and discretion over how to handle sensitive matters. When you add in an international component, and local culture and business practices that sometimes condone conduct that we would call fraud, prosecutors see the perfect recipe for a vibrant docket of corporate enforcement cases.

Adding to the complexity is an age-old dynamic that can be found in many criminal cases, but which corporate clients find endlessly

frightening and frustrating: prosecutors often see the world in black and white, right and wrong. Business people, on the other hand, spend their lives and careers finding ways to succeed through negotiation and pragmatic compromise, frequently in perfectly ethical and legitimate ways. Finding a common vocabulary between these two world views is how a good corporate defense lawyer earns his or her keep.

### **Big International Cases Lead to More Big International Cases**

Despite the press reports about the DOJ's supposed setbacks in its FCPA enforcement program,<sup>2</sup> the U.S. government has very successfully framed the dialogue about the punishment of international corporate crime with one big settlement after another: Siemens (\$450 million for a global bribery scheme); Daimler AG (\$93.6 million for the systematic bribery of foreign officials in over eighteen countries); Panalpina World Transport (\$236 million for making illicit payments to public officials in Africa, Asia, and South America). While the FCPA grabs many of the headlines, international enforcement of corporations continues to escalate in other areas: LG Display, AU Optronics, and Toshiba (\$571 million for artificially inflating the price of LCD displays); Barclays (\$453 million to U.S. and British authorities to settle charges of manipulating the LIBOR lending rate); ING (\$619 million for violating U.S. sanctions against Iran and Cuba). Additionally, numerous financial institutions are being investigated for potential money laundering in connection with international drug cartel activity.

Corporate board members and executives read about these settlements and understand the playing field. Compliance obligations are intense, the U.S. government wants to make cases (and big ones). Companies can best protect themselves by knowing the facts and responding to them appropriately, even if those facts are overseas. Having trusted advisors gather those facts and advise what to do, in a confidential setting, is increasingly helpful.

### **International Investigations: Best Practices, Pitfalls to Avoid**

The components of an effective international review are straightforward in concept, but difficult to implement: (1) develop a sound work plan that addresses the issues presented through document collection and witness interviews, including translation of relevant foreign language materials and statements; (2) engage trustworthy and reputable local counsel to navigate local legal issues, and, when appropriate, forensic accountants

with the necessary scope and experience to address international accounting issues; (3) evaluate data privacy and other local laws that may impact the review (e.g., state secret laws in China); and (4) always consider what remediation might be necessary and, where appropriate, what discipline might be warranted to address problematic conduct. Throughout the review, counsel should return to these simple ideas to ask whether the review is on track and addressing the client's needs in an efficient way, despite the global scope of the inquiry.

As with all legal work, the most important feature of an effective global corporate investigation is good judgment. As advisors and advocates for our clients, our judgments at each step of the review will determine how the investigation and the company's reactions to the facts are received by the intended audiences. Making good judgments while searching in remote locations present challenges that are unique and compelling, in areas of critical importance to our clients. The work we do overseas may not be the stuff of a novel or movie, but it is fascinating work. And, when the end credits roll, knowing that the work was done well, thoroughly and cost-effectively, with good judgment and in the client's best interests, is a satisfying way to resolve any good story.



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<sup>1</sup> The most frequently cited reference for the components of an effective compliance program is Section 8B2.1 of the United States Sentencing Guidelines, titled "Effective Compliance and Ethics Program."

<sup>2</sup> See, e.g., "Sting Case Failure Should be Lesson to Justice Department," [www.mainjustice.com](http://www.mainjustice.com), February 21, 2012.