

Battle Strategies for an FCPA Investigation

With the relaxing of Foreign Direct Investment (FDI) norms in India, business is booming and economy has seen a flurry of activities. The collaboration between Indian and foreign companies has significantly increased. Greater influx of multinational companies and global investments in Indian companies has also increased the purview of Anti-Bribery and Anti-Corruption (ABAC) laws and regulations. In addition, enhancement of corporate governance procedures and an increase in whistle-blower allegations has led to a greater number of violations. While most companies have internal protocols and procedures to conduct an ABAC investigation, there are certain measures and protocols especially in investigating Foreign Corrupt Practices Act (FCPA) cases which have proven effective. This article attempts to summarise these best practices.

1. Addressing the requirements of an FCPA investigation

The first step in any FCPA investigation is to identify the objectives and scope of the investigation. It could be initiated as a result of an allegation or a suspicion or it could be a result of the findings from the internal reviews of the company. It is imperative for the organisation to determine the purpose for which the FCPA investigation has to be conducted. This will help draw up an investigation plan which meets the objectives of the investigation.

2. Preparing for the investigation

Even before the investigation has started, it is advisable to consult the legal team to strategise and plan the investigation work. Investigations initiated without

proper legal advice and planning often turn out to be counterproductive.

The next step is to understand the requirements of the investigation and resources needed to accomplish the investigation. Depending on the size and scale of the scope of the investigation, appropriate team, technology and resources should be mobilised. This could involve an internal or external team of investigations experts and the use of the appropriate technology platforms to collect and host the data.

The investigation team needs to understand the objectives of the investigation and estimate the steps required to reach a logical conclusion. Depending on how open-ended the allegation/violation is, the investigation team can determine the level of review which is to be conducted. For example, in case the

allegation/violation was with respect to a specific incident or a specific individual, the review should be focussed on the allegations and the individuals involved.

Modern day investigations involve reviewing data stored in electronic devices such as laptops, mobile phones, servers etc. It is important to identify and secure the data in a timely and legally admissible manner.

Another important aspect of an investigation is preserving attorney-client privilege. The purpose of the privilege is to enable organisations to protect themselves from the risk of dealing with sensitive and confidential data. Geographical and local regulations for applicability of privilege also need to be considered, as these differ in various jurisdictions.

The importance of an attorney-client privilege was evident in the recent legal dispute that arose during the foreign bribery probe into a multinational retail corporation. The company decided to cooperate with the justice department by allowing current and former employees to be interviewed subject to the condition that any information disclosed, if covered by legal privilege, would remain so. When the Justice Department tried to compel the general counsel of a subsidiary of the corporation to testify about statements made during the interviews before a grand jury, the company retorted that the sought information was privileged, and the Court ruled in the corporation's favour.

3. Conducting the investigation

Discussions with stakeholders

The investigation team should start by having preliminary discussions with the stakeholders to further understand the allegation/violation. This step is crucial in an FCPA investigation since it helps to understand certain elements which distinguish an FCPA investigation from any other investigation.

Some examples of provisions which are specific to FCPA include:

- FCPA criminalises bribes paid or offered only to a "foreign government official"
- FCPA mentions that the bribe must be made with the intent to "obtain or retain business"
- FCPA prohibits only the payment of a bribe and not receiving it

These are only a few examples to indicate how crucial these discussions are to understand whether there could be potential FCPA violations. The next step would be understanding the data available and how it can help achieve the final objective of the investigation.

Collection and review of electronic data and financial records

Once the data sets are identified, the investigation

team needs to secure and process the data in a legally admissible format. FCPA investigations can be multijurisdictional, hence having a globally acceptable process and platform for acquisition, processing and review of data is of prime importance. It is also crucial that all relevant data points are identified and secured, the review of the same may be conducted as and when necessary.

Review of electronic data is carried out using specific keywords relevant to the allegations. Framing of keywords becomes a critical path in any large-scale investigation. The keywords need to be specific and carefully drafted in order to have complete coverage of the allegations and at the same time, avoid false positives and generic terms which would lead to high volume of documents being reviewed. Furthermore, keywords are dynamic and would need to be amended as and when the case progresses. Technology platforms have evolved and can have advanced features to eliminate duplications, false positives and irrelevant hits.

Once the data is ready for review, the investigation team and the legal teams review the data and identify key issues. Issues may be further classified into various allegations, persons involved or severity of the issues.

Closing interviews

Based on the findings from the review of documents and financial records, the closing interviews are conducted with the personnel involved in the communication or transaction. The objective of these interviews is to gather more information and seek further clarification surrounding the issues noted and to determine the relevance and culpability of the people involved.

4. Closing the investigation

Generally, during the closure of the investigation, a report is prepared which should contain the following:

- Details of the allegations and background
- Scope of work
- Procedures performed including data gathered and personnel interviewed
- Findings from the investigation
- Conclusion on the findings with respect to the allegations

Often companies identify additional issues during the course of the investigation which could be other FCPA violations or other issues. In this instance, it is important to segregate these issues and deal with them accordingly. Depending on the nature and stage of an investigation, the company which is working with the legal teams needs to determine the disclosure of information to regulators and/or the remediation of the same before reporting.

BATTLE STRATEGIES FOR AN FCPA INVESTIGATION

The above protocols only broadly highlight the approach an organisation can follow during an FCPA investigation. However, each investigation is different and depending on the complexity of the investigation, the approach and work steps need to be tailored to meet the objectives of the investigation.

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