

LALIVE



## Internal Investigations Legal pitfalls and cross-border issues

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# Introduction

## Panama Papers: Fifa ethics lawyer Juan Pedro Damiani under internal investigation

BUSINESS

## SunEdison Internal Investigation Finds No Material Misstatements or Fraud

BoE begins internal investigation over forex manipulation claims

Treasury Management Systems | Retail Banking Systems

LEGAL/REGULATORY | WHITE COLLAR WATCH

## The Mounting Costs of Internal Investigations

INFO. TECHNOLOGY | BRAZIL

## Siemens fires CEO after internal investigation

## Petrobras Names Law Firms Aiding Corruption Investigation

Brazilian Oil Company Has Been Mired in Corruption Scandals for Months

### MITSUBISHI ADMITS TO IMPROPER FUEL EFFICIENCY CLAIMS

"During our internal investigation, we found the testing method which was different from the one required by the Japanese law has been applied to other models manufactured by Mitsubishi for the Japanese domestic market," the company said in a statement.

BUSINESS

## Petrofac Launches Investigation Into Bribery and Corruption Allegations

Internal inquiry comes after allegations of bribery and corruption related to some oil deals and contracts

## Definition

*An internal investigation is a systematic, in-depth analysis of facts launched by a corporate entity and often conducted by external counsel or advisors of the company (independence). The investigation is usually closed by a report and recommendations to the company.*

To distinguish from

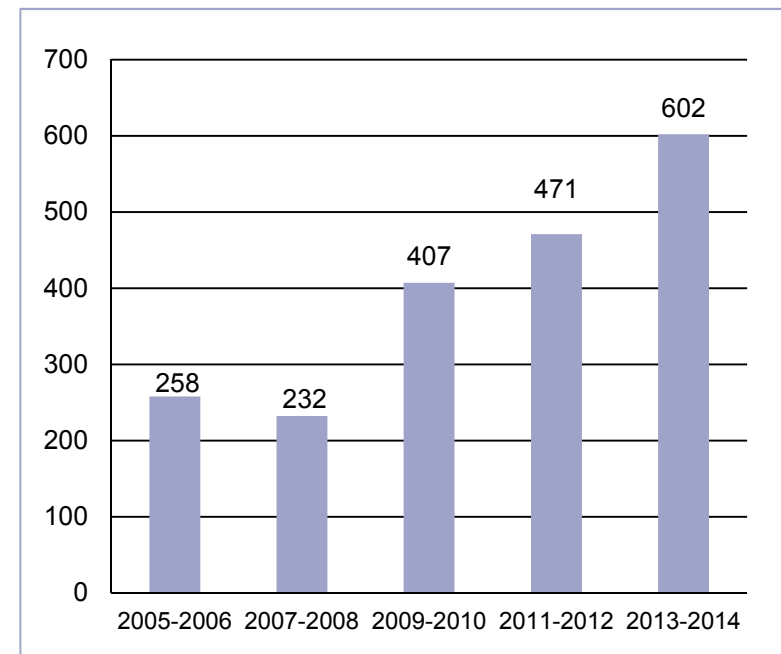
- Internal audit
- Regular compliance review

## Increase of Internal Investigations

- 55% of 400 surveyed US businesses conducted at least one internal investigation in 2013 (incl. engagement of external counsel or advisor)

(Survey of Norton Rose Fulbright, 10th Annual Litigation Trends Survey, 2014)

- For the last 10 years, significant increase of Swiss media reports on internal investigations
- Increase of
  - compliance regulations
  - government investigations in regulatory and criminal law matters
  - media reports on corporate compliance issues



(Source: swissdox.ch, media reporting)

## Triggers for internal investigations

Suspected breach of regulatory duties, criminal law or internal compliance rules:

- Regulatory or criminal government investigation
- Media interest and reports
- Whistle-blowers and informants (Since summer 2015: web-based reporting platform operated by fedpol allowing to file information on corruption anonymously)
- Findings from internal/external audit and ordinary compliance review/operative controls
- Information from employees, local management, clients, agents or business partners
- Wrongdoings in peer companies

# Scope

- What should be investigated?
  - Timing?
  - Geographical scope?
  - Legal and regulatory assessment?
  - Reporting of results?
- How should the case be investigated?
  - Comprehensive vs. risk based approach
  - But: Scope must capture the relevant facts
- Independence: external counsel or advisor
  - No instructions by the client
  - Unfettered access to information
  - No budget constraints





# Cycle of an Internal Investigation

- **Document Preservation**

- Install legal hold
- No physical or electronic data destruction
- Inform the appropriate people to enforce the legal hold
- Check regularly implementation of legal hold

- **Comprehensive Document Collection**

- Collect information and facts
- Track data origin and assessment method of electronic and physical documents
- Surveillance (observation, cameras, microphones, etc.)

## Cycle of an Internal Investigation /2

- **Document Review/Interviews**
  - Systematic review of e-mails and documents
  - Interview of employees involved and possible third party witnesses
- **Report**
  - Draft report of main findings (based on facts)
  - Legal analysis
  - Recommendations on further steps to be implemented

# Information Sources

- **Hardcopy documents**
  - Archives (centralized, local, national and international)
  - Desk files
- **Electronic documents**
  - E-mails
  - Data servers, local data storage
  - Telephone recordings and journals/logbook
  - Back-up and legacy systems
- **Interviews**

## Information Sources /2

- **Structured Data**
  - Price movements
  - Customer structures
  - Payment transactions
- **Others**
  - Entrance control
  - Minutes of meetings
  - Etc.

# Handling Electronic Data

- Forensic tools
  - Data integrity
  - Use in court if necessary
  - Advanced searches allowed
- E-mail accounts
  - Private vs. business e-mails
- Fair amount of data
  - Keywords
  - Focus on main questions

# Complexity of internal investigations

- Coordination of several players and appropriate timing for involving the right people
- Top management/Board of Directors decision-making required
- Appoint an independent law firm to ensure attorney-client privilege (Switzerland does not grant legal privilege to in-house counsel/compliance officers) and to avoid conflicts of interest
- Full access to electronic and physical documents and personnel
- Coordination with the supervisory authorities (i.e. Finma, Swissmedic, etc.), law enforcement authorities, tax authorities and government agencies of foreign countries. As a rule, however, there is no statutory obligation to share the results of an investigation with regulators/prosecutors
- Necessity to bring on board other external professionals (i.e. forensic specialists, auditors, etc.)

## Securing information in multiple jurisdictions

- Different levels of data protection regulations (e.g., stringent regulations in the EU and Switzerland)
- Restrictions in the transfer of employee data to any country with insufficient data privacy protections – US privacy protections may be considered insufficient
- Employee notice and consent required when collecting or transferring documents, possibly duty to notify data protection authorities of any collection or transfer, which can affect the confidentiality of the investigation

## Securing information in multiple jurisdictions /2

- Labor law: may affect the ability to conduct interviews with relevant employees; may guarantee or allow employees access to counsel during the course of the investigation; may allow employees to decline to be interviewed without disciplinary consequences; may restrict the use of information gathered during the interview
- Varying degrees of attorney-client privilege in different countries. Consider arrangement with lead authority to honour privilege, even where another jurisdiction does not
- Additional challenges: language; cultural differences; foreign jurisdictions and companies being investigated may not understand why they are subject to foreign law (e.g. bribery and corruption); different legal systems; disclosure obligations, etc.



## Cooperation with (U.S.) Authorities

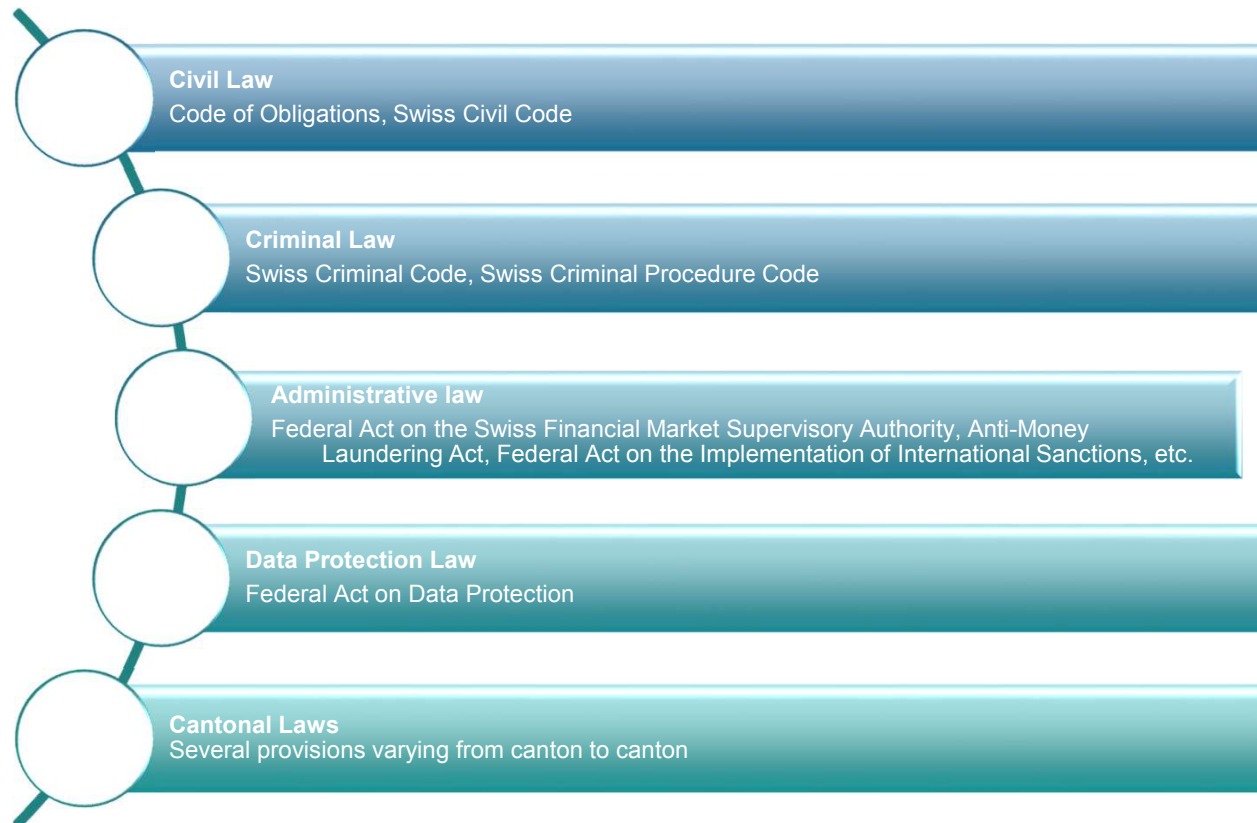
- Cooperation and self-disclosure are key:

*“When a company has voluntarily self-disclosed misconduct in an FCPA matter in accordance with the standards set forth above; has fully cooperated in a manner consistent with the DAG Memo on Individual Accountability and the USAM Principles; has met the additional stringent requirements of the pilot program; and has timely and appropriately remediated, the company qualifies for the full range of potential mitigation credit. In such cases, if a criminal resolution is warranted, the Fraud Section's FCPA Unit:*

- *may accord up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought; and*
- *generally should not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.”*

*Where those same conditions are met, the Fraud Section's FCPA Unit will consider a declination of prosecution.”*

# Legal framework in Switzerland



## Board of Directors/Top Management duties

- **Duty of care and loyalty** of the members of the Board of Directors and third parties engaged in managing the company's business who "*must perform their duties with all due diligence and safeguard the interests of the company in good faith*" (Art. 717 para 1 CO)
- **Overall supervision** of the Board of Directors which "*has the following non-transferable and inalienable duties [...]: overall supervision of the persons entrusted with managing the company, in particular with regard to compliance with the law, articles of association, operational regulations and directives*" (Art. 716a para 1 N 5 CO)

## Board of Directors/Top Management duties /2

- Swiss Federal Tribunal Decision 4C.358/2005: “*the Board of Directors is obliged to take all necessary measures to clarify any wrongful or careless company management, if necessary by involving external experts*” (consideration 5.2.1)
- Omission (Art. 11 Swiss Criminal Code) can have criminal consequences for Board of Directors/Top Management and for the company itself (Art. 102 Swiss Criminal Code, under which a fine up to 5 million CHF can be imposed)

## Board of Directors/Top Management duties /3

- Regulated financial institutions
  - Duty to report to FINMA any incident that is of substantial importance to the supervisory authority (Article 29 Federal Act on the Swiss Financial Market Supervisory Authority)
  - In case of concrete evidence or suspicion: implicit duty to investigate in order to fulfill to the obligation to inform FINMA

## Employment Law

- Employer's duty of care and loyalty (Article 321a para 1 and 328 CO), including protection against third party infringements
- Limit: legitimate interests of the employer
- Employee's duty to cooperate and to provide all factual information relating to business matters but right to refuse to answer questions in case of self-incrimination (Article 321d CO)
- Funding of legal counsel under certain circumstances
- Interest of the company vs. interest of employees

## Data protection law

- The Data Protection Act (DPA) is applicable to all personal data processed in Switzerland
- Restrictions in the transfer of employee data to any country with insufficient data privacy protections (explicit waiver required)
- Quid if data was already transferred in violation of the DPA prior to the investigation?

## Criminal Procedure Law

- In principle not applicable in internal investigations but best practices and evidence collected in breach of Article 140 Swiss Code of Criminal Procedure (CCP) cannot serve as evidence.
- Article 140 prohibits the following:
  - Coercion
  - Use of violence
  - Threats
  - Promises
  - Deceptions
  - Means to diminish a person's cogitation or free will



## Defence rights under the CPP

- Right to be informed
- Right to silence; no self-incrimination
- Right to a defence lawyer, translator
- Etc.



Case-by-Case  
Analysis

Weighing of  
Interests

Proportionality

## Report

- May affect the interests of the parties involved (basis for disciplinary measures, civil claims, reports to national and international regulatory and criminal enforcement authorities)
- Carefully consider what to disclose to parties outside the company

## Limits of Internal Investigations

- Interviews with external witnesses are purely on a voluntary basis
- No enforcement measures (i.e. to arrest a person, seize documents, data, privately owned devices, view personal bank accounts, etc.)
- Resources (time consuming and know-how)
- Independence/conflicts of interests

## Remedial Measures

- Self-reporting to the criminal enforcement and tax authorities (“cooperation bonus”)
- Disciplinary measures against employees
- Improvement of compliance procedures:
  - Implementation of policies
  - Training
  - Preparation of compliance audits and reports
- Appropriate internal and external communication

## Questions



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