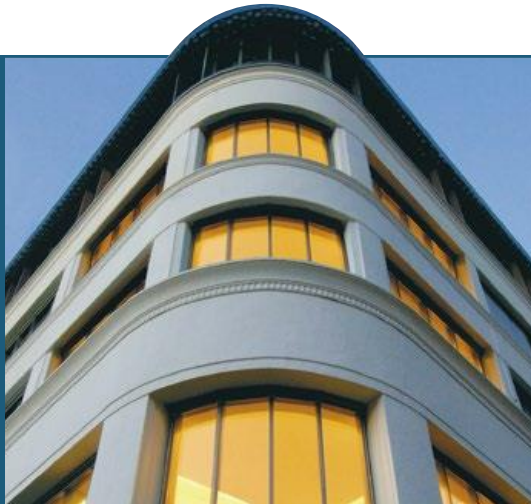


LALIVE



## Internal Investigations

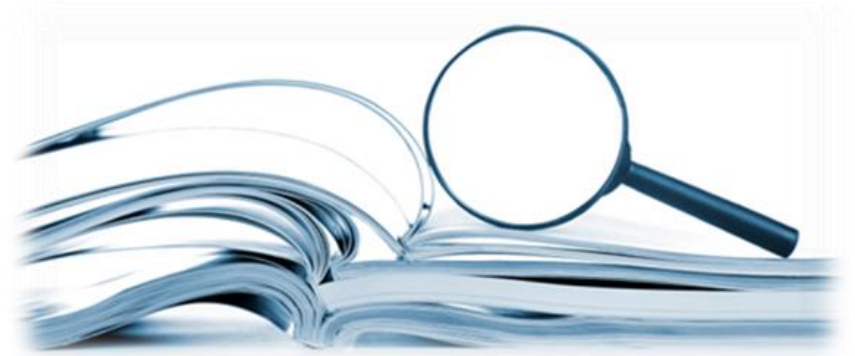
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Zurich, 25 April 2016

# Agenda

1. Introduction
2. Case Study
3. Cycle of an Internal Investigation
4. Legal Framework
5. Termination of an Internal Investigation



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

ACTIVIST SHAREHOLDER

## Deutsche Bank Girds for Investor Ire

A Deutsche Bank shareholder has called for a special audit to investigate the way the bank's executives have dealt with its legal issues, including the LIBOR rate fixing scandal.

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 including a summary of the main findings and potentially some recommendations to the company.*

# Triggers for Internal Investigations

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

- Regulatory or criminal governmental investigation
- Media interest and reports
- Whistle-blowers and informants
- Findings from internal/external audits and ordinary compliance reviews/operative controls
- Information from employees, local management, clients, agents or business partners
- Wrongdoings in peer companies

# Why Conduct an Internal Investigation?

- Legal, regulatory and compliance duties; possible remedial actions
- Cooperation in governmental investigation
- Law enforcement delegation to the appropriate legal entity
- Avoidance of operational and reputational risks

## Case Study

- Management change within a Swiss company
- (Foreign) holding company realized that the Swiss subsidiary systematically bribed foreign officials during several years in the past
- Necessity to understand and clarify what, where, how and when the wrongdoings happened and who was responsible for them

→ **Internal investigation**

# Cycle of an Internal Investigation





# Cycle of an Internal Investigation /2

## 1. Document Preservation

- Install legal hold
- No physical or electronical data destruction
- Inform the appropriate people to enforce the legal hold
- Regularly check implementation of legal hold

## 2. Comprehensive Document Collection

- Collect information and facts
- Track data origin and document the assessment method to determine the relevant electronic and physical documents
- Surveillance (observation, cameras, microphones, etc.)

# Cycle of an Internal Investigation /3

## 3. Document Review / Interviews

- Systematic review of e-mails and documents
- Interview of involved employees and possible third party witnesses

## 4. Report

- Draft report of main findings (based on facts)
- Legal analysis
- Potential 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/logbooks
  - Back-up and legacy systems
- **Interviews**



# Information Sources /2

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

# Investigations – 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

→ **To focus on main questions**



# Complexity of Internal Investigations

- Coordination of several players and appropriate timing in involving the right people
- Top management/Board of Directors decision-making required
- Appointment of 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 authority (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.)

# Legal framework



# Board of Directors/Top Management Duties





# Board of Directors/Top Management Duties

## /2

- **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 who "*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

## /3

- 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 BoD/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

## /4

- Regulated financial institutions
  - Duty to report to FINMA any incident that is of substantial importance to the supervision (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 the obligation to inform FINMA

# Employment Law



- Employer's duty of care and loyalty (Art. 321a para. 1 and 328 CO) including protection against third party infringements
- Limit: Legitimate interests of the employer
- In principle: Employee's duty to cooperate but not to self-incriminate (Art. 321d CO)
- Funding of legal counsel under certain circumstances
- Interest of the company vs. interest of employees

# Criminal Procedure Law

- In principle, not applicable in internal investigations, but best practices. 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.

# Investigations – Interviews



# Investigations – Interviews /2

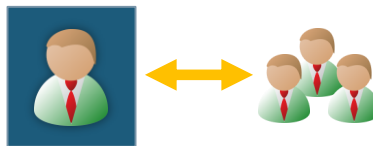
- Pre-Interview
  - Introduction of the interviewers and clarification of their role
  - Information on:
    - Interview background and objectives
    - Under certain circumstances: right to have an independent legal representative present during the interview
    - Right to have a translator during the interview
    - Employees' duty to provide all factual information relating to business matters
    - Employee's right to refuse to answer questions in case of self-incrimination
    - Documentation and confidentiality of the interview

→ **Following these rules may allow to use the interview as an evidence**



# Investigations – Interviews /3

- During the Interview
  - Avoidance of pressure, suggestive questions, closed questions, etc.
  - Recording the interview (indicating time, place and attendees of the interview)
  - Confrontation with the outcome of the document review



Case-by-Case  
Analysis

Weighing of  
Interests

Proportionality

# Data Protection

- The Swiss Federal Data Protection Act applies to the processing of data relating to natural persons and legal entities by Swiss authorities or private persons
- Any information relating to a natural or legal person that is (1) either identified or (2) identifiable (i.e. when it is possible find out the identity of the person/entity) is considered “personal data”.
- Swiss data protection law is strict and always has to be taken into consideration when conducting internal investigations
- This is of particular relevance in cross-border internal investigations

# Data Protection – Cross-border investigations

- Art. 271 Swiss Criminal Code prohibits unlawful activities on Swiss territory on behalf of a foreign state
  - Including evidence collection for foreign judicial and administrative proceedings
  
- Art. 273 Swiss Criminal Code prohibits the disclosure of manufacturing or trade secrets to a foreign governmental body or to private organizations
  - Can be relevant in case of trade secrets

# 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 voluntarily 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
- Data protection law

## Remedial Measures

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

# Questions



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