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Global Legal Group

The International Comparative Legal Guide to: Product Liability 2011

A practical cross-border insight
into product liability work

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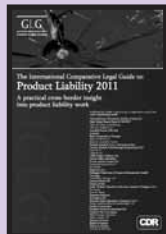
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EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Product Liability*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of product liability.

It is divided into two main sections:

15 general chapters. These are designed to provide readers with a comprehensive overview of key product liability issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in product liability laws and regulations in 31 jurisdictions.

All chapters are written by leading product liability lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Ian Dodds-Smith of Arnold & Porter (UK) LLP and Michael Spencer QC of Crown Office Chambers, for all their assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk

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Internal Product-Related Investigations with International Implications

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I. Introduction

Companies spend a significant amount of resources trying to ensure that their operations are consistent with relevant regulatory mandates. Manufacturing companies are subject to numerous rules and regulations relating to their product manufacturing, design, and marketing practices. These mandates are often multiplied for companies whose products are sold, manufactured, and designed in locations around the globe.

Regardless of the location of a company's manufacturing plant or distribution centre, complying with regulatory mandates requires comprehensive internal control processes. On occasion, these controls break down, and products enter the marketplace in a condition that is inconsistent with the letter or spirit of a regulatory mandate. This breakdown may result in an internal complaint, a regulatory inquiry, civil litigation, criminal proceeding, or a combination of these events. To respond to these public and private inquiries, a company must investigate the breakdown and learn what happened, how it happened, why it happened, and how to decrease the chance of it happening again.

A manufacturing company contemplating an internal product-related investigation must consider a host of issues, regardless of the triggering event for the investigation. Questions relating to the scope of the investigation, who will be involved in the investigation, how documents will be collected and preserved, and whether and how to report any findings (adverse or otherwise) to regulatory authorities, are present in every internal investigation, whether it was triggered by a regulatory inquiry, an internal auditing process, or a consumer complaint.

This chapter identifies several issues that companies should consider when contemplating and performing an internal product-related investigation, and it discusses these issues in an international context. This examination is not intended to provide a complete list of the issues that are relevant to a product-related investigation nor is it intended to provide a complete analysis of the issues that are discussed.

II. Organisation, Implementation, and Execution of an International Product-Related Investigation

Whether a company's investigation was triggered by a regulator's informal inquiry for more information relating to a manufacturing process, a formal inquiry regarding an alleged product defect, or an event requiring a complete product recall, with few exceptions, the "process" of investigating these issues is subject to several threshold issues that must be considered at the outset of any investigation.

Whether and When. The question of whether to conduct an internal investigation is almost always a function of the outcome a company hopes to achieve. For example, if a company is responding to an official regulatory inquiry, it will almost always opt for an internal investigation. The timing of such an investigation is normally dictated by the timing of the inquiry, which often means the investigation should begin immediately following the receipt of the inquiry.

On the other hand, if the company is attempting to determine the proper response to an internal rumour or allegation, it may opt for a less invasive investigative approach (e.g., isolated interviews and an oral report to the board of directors or senior management) during a time frame of the company's choosing.

Scope and Scale. It is important that the client and counsel define the scope of the investigation at the outset of the engagement. This definition should be reduced to writing and included in the engagement letter that covers the investigation.

The investigation scope should correspond to the severity and source of the allegations. There is a substantive difference between an investigation of anonymous internal allegations of product defects and a formal notice from government regulators that a particular product does not comply with relevant regulations. If the investigation is triggered by the latter instance, the scope of the investigation will normally mirror the regulatory inquiry. Defining the scope in response to an internal complaint or anonymous complaint is more difficult.

Furthermore, a company might wish to audit internal practices and procedures to correct any flawed or outdated practices. Regardless of the substantive nature of the inquiry, counsel and the company should clearly define the scope of the investigation and counsel should closely conform all activities to these parameters.

Proper definition of the scope and adherence to that definition helps to ensure that the results of the investigation will be protected from disclosure. If counsel provides advice on matters outside of the scope, attorney-client privilege, work product protection, or other protection may be compromised. Furthermore, adherence to the defined scope of the investigation decreases the likelihood of a successful challenge to the investigation results based on counsel acting as a business advisor rather than a lawyer.

Documenting the scope of the investigation in the engagement letter is preferred, but not absolutely necessary. Regardless of where this documentation occurs, the "scoping" document should state the following: (1) counsel has been hired to investigate certain allegations; (2) counsel is conducting an investigation to enable it to advise the company as to its legal rights and potential exposure; and (3) any and all communications relating to the investigation are protected by applicable privileges and intended to remain confidential.

Supervision by and Involvement of Management. Commonly, a committee of the company's board of directors (e.g., the Audit Committee or another subcommittee of the board consisting of independent directors) or its management (normally the general counsel's office) is responsible for supervising an investigation. It is usually a best practice to have non-management supervise an investigation. Numerous regulators have expressed a preference for outside board member supervision of investigations. And it is often difficult to determine at the outset of an inquiry whether senior management had any role in the alleged wrongdoing, which could conflict with senior management's role in an investigation of any alleged wrongdoing.

There may be occasions where it is appropriate to use senior management and in-house counsel to supervise an investigation. Where the alleged wrongdoing is isolated to a distinct part of the company (perhaps a foreign affiliate), occurred in the past, and during the tenure of a different management team, an investigation supervised by current senior management and in-house counsel may be entirely appropriate.

If the company chooses to use senior management to supervise an investigation, it should report its findings to the general counsel's office. This reporting structure will support the position that the investigation was intended to assist counsel in rendering legal advice, rather than business advice.

Internal Communication. Related to the issue of supervision is the issue of internal communication. What is the command structure for investigation counsel and members of its team to report interim findings, ask questions, and seek assistance? While the audit committee or a member of senior management will be at the apex of this structure, it will be important to identify at the outset of the investigation those individuals with whom investigative counsel can communicate with on a daily basis. Preferably, this person would be the general counsel or a senior member of the company's legal department. Regardless of who it is, it is critical that this person be given the time, resources, and institutional capital necessary to work with investigatory counsel on a daily basis.

Not only is it necessary for the company to identify someone on the ground who can interact with investigatory counsel on a daily basis, but, if the investigation is widespread over several company locations, it is necessary for the company to identify such a person in each location. This is particularly important for purposes of collecting documents, gathering electronic data, and interviewing witnesses.

Privilege Concerns. Vigilant protection of the privilege (be it the attorney-client privilege, the work product doctrine, or some other privilege) that attaches to the documentation, findings, and conclusions of any investigation is vital to any investigative plan. While the company may choose to disclose all or part of the investigation to regulators, that is the company's choice, not counsel's. Although an exhaustive discussion regarding privilege issues in investigations is beyond the scope of this chapter, it is worth mentioning several best practices that should be part of every prudent internal investigation.

Scope is Important. The scope of the engagement is critical to issues of privilege. If the company is investigating its own conduct without a contemporaneous or contemplated legal proceeding, counsel conducting the investigation should carefully scrutinise whether gathering documents and data, analysing that information, and providing conclusions to the company is under the guise of providing legal advice or business advice. This concern is more acute in product-related investigations, as legal exposure related to a product recall or defect generally has a close (and often inverse) relationship to a company's business performance.

Know the Law. How to establish and preserve the privilege is a fundamental part of investigation preparation. At the beginning of the investigation, the company and counsel should be well versed in the law relating to all applicable privileges in every jurisdiction touched by the investigation. Along with the knowledge of how to establish and preserve the privilege, counsel should also know the parameters of waiver law for each jurisdiction. For example, a split exists amongst the United States Courts of Appeals regarding "selective" waiver issues. Further divisions are found when comparing the privilege law of the United States with similar laws in other jurisdictions.

Treat Privileged Information Appropriately. This sounds basic, but privileged and protected information should be treated with care. Counsel should make all efforts to accord such information an appropriate level of confidentiality. Discussions in the presence of third parties that are not part of the attorney-client relationship are not deemed to be confidential. Further, keep confidential materials in a secure place and, if necessary, limit access to such information.

Structure the Investigation to Maintain Privilege. In addition to treating privileged information as confidential, it is important to conduct the investigation to maintain the privilege. For example, during document collection, documents should flow through counsel. Also, attorneys should conduct witness interviews and take the notes of those interviews. Finally, to the extent third-party experts are necessary, they should be engaged by and report to counsel conducting the investigation.

Employee Interviews. Employee interviews provide a challenging context for application and protection of the privilege. Not only do these scenarios possibly implicate conflict of interest issues, but they also involve discussions with individuals who are not clients of investigatory counsel.

This difficulty stems primarily from the fact that counsel representing a company in an investigation represents the corporate entity, not the employees of that entity. In the United States, counsel are advised to provide an *Upjohn* warning to employees prior to interviews. *Upjohn* warnings get their name from *Upjohn Co. v. United States*, 449 U.S. 383 (1983), where the Supreme Court held that the corporate attorney-client privilege applied to a broader group beyond the corporation's "control group". At their base, these warnings provide notice to the witness that counsel represents the corporation, that counsel does not represent the witness, that the interview is privileged, and that the company "owns" the privilege.

An exemplar *Upjohn* warning might look like the following:

I represent ACME Corporation and only ACME Corporation; I do not represent you. This interview is part of an investigation of the facts surrounding the marketing and development of product X, and the findings will be used to assist me in providing legal advice to ACME Corporation.

This interview and your communications with me are protected by the attorney-client privilege; however, that privilege belongs solely to ACME Corporation, not you. ACME Corporation alone may waive the privilege and disclose this discussion to third parties such as government regulators, without notifying you that it has decided to do so.

In order for the contents of this discussion to be subject to the attorney-client privilege, they must be kept in confidence. Therefore, with the exception of your own attorney, you may not disclose the contents of the substance of this interview with any third party, including other employees or any individual or entity outside of the company.

Given the fact-specific nature of internal investigations, the actual warning given varies widely among attorneys performing investigation interviews. Nonetheless, there are several best practices that can guide attorneys performing witness interviews.

First, counsel should provide an *Upjohn*-like warning to the witness before the interview takes place. Second, counsel should give the warning orally at the outset of the interview and should use a script to ensure accurate and consistent warnings are given. Finally, counsel should record through contemporaneous memoranda or handwritten notes that the warning has been given.

Employee Morale Issues. An internal investigation is inevitably a disruptive exercise for a company, regardless of the company's location. That disruption can take various forms, from an unpleasant working environment, to decreased productivity, to a feeling that lawyers are "violating" the company's privacy. Nearly all of this disruption has some relationship to employee morale.

The top priority of any internal investigation is the comprehensive analysis of the substantive issues of that inquiry, whether those issues were identified by regulators or by internal company personnel. But this does not mean that the company's business should needlessly suffer due to productivity and morale issues that can be managed. Indeed, such issues cannot only decrease productivity, but also impede the actual investigation, further justifying the effort necessary to eliminate or at least limit their presence from the outset of the investigation.

Examples of morale issues that might hinder the progress of an internal investigation include the following: competition and defensive behaviour between competing offices or business units; cultural differences between different international offices and similar differences between entities that were separate prior to a merger or acquisition; and the ever-present, often productivity-stifling, feeling of working under a microscope. These issues can be addressed at the outset of an engagement and during the investigation by a combination of the following:

- demonstrating a commitment to the investigation by the highest levels of management and communicating that commitment to the employees in an appropriate manner;
- providing updates about the investigation to affected employees as necessary and appropriate about the status of the investigation;
- informing those individuals who might be tempted to limit their cooperation with investigators that any such conduct will be considered improper and possibly actionable;
- appropriately involving managers in business units or offices that might be the source of uncooperative behaviour and empowering them with necessary authority (e.g., the discretion to inform their subordinates about investigation updates) and support (e.g., communicated backing by upper management or the board) to bring their reports into the fold; and
- making a clear statement (in every applicable cultural context) to the entire company and all employees that the effective resolution of the investigation is the company's top priority, is part of its mission, and is mandated by the company's ethical tradition.

Documentation of Results. Drafting a report summarising the investigation and setting forth the conclusions may seem a fundamental part of any investigative plan, but, like every other task in the investigation, there are risks and benefits to drafting a report.

Considerations that favour the creation of a comprehensive written report include the following: (1) it is the best way to convince regulators of the propriety of a company's actions; (2) it provides a roadmap for management to remedy wrongdoing; (3) it provides evidence that the company has looked into an issue and may forestall a more intrusive investigation by regulators; and (4) in the derivative litigation context, it may provide a basis for the board of directors to terminate or refuse to bring a lawsuit.

Considerations that militate against a comprehensive written report

are almost the mirror opposite of the reasons to create such a record: (1) it may chronicle all of the "bad" evidence of the company's wrongdoing; (2) it provides a roadmap for government regulators and civil litigants; (3) it may result in the loss of all privileges relating to the preparation of the report and open up the company's entire files to regulators and civil litigants; and (4) it could provide regulators and civil litigants with "admissions" by the company.

If the counsel and the company determine that the results will be reported in written form, the content of any report will be largely determined by the scope of the investigation and the directive provided by the regulator. There is no template for internal investigation reports, but some pieces to consider include the following:

- a section relating to the background of events that led to the investigation and a description of the investigation scope, including relevant communications with regulators;
- a description of the investigation methodology, including the documents and data reviewed (and the process by which such information was retrieved), and the witnesses that were interviewed;
- an executive summary of findings, conclusions, remedial recommendations, or action items;
- a separate section for each substantive issue of the investigation, including a chronology of relevant events, description of relevant people and entities, a discussion or relevant law or regulations, and discussion of the evidence supporting or disputing the issue; and
- a section of conclusions, which may include measures that should have been in place and a discussion of remedial measures that are suggested or have been undertaken as a result of the findings from the investigation. If any misconduct is found, this section may also include an analysis of the materiality of any such misconduct on the company's operations.

III. Data and Document Preservation, Collection, Production and Protection

No discussion of internal investigations would be complete without a section on data management. One of the most critical aspects of any internal investigation is the preservation and collection, review, and production of data and documents. Given that memories fade and witnesses crucial to the investigation may no longer be with the company, most often a company's data and documents are the key to determining whether the allegations or inquiries being made can be substantiated. Accordingly, careful consideration should be given at the outset of the investigation—as well as throughout the investigatory process—on how best to preserve, review, and protect essential data and documents, and to determine what information ultimately will need to be produced to investigators.

Preservation. Data and document preservation begins with organisation and planning. Initial discussions with management and information technology (IT) personnel should be conducted at the beginning of the investigation, and should focus on determining where potentially important data and documents are located, how they are stored, who has access to the data, and the policies and procedures in place related to how data is retained and, perhaps most importantly, how and when it is deleted or purged.

Particularly for companies who operate in multiple international jurisdictions, consideration must be given to how different retention requirements under local law may affect—or possibly constrain—a company's ability to preserve its data and documents. Due consideration should also be given to whether, and how, local privacy laws may affect a company's access to, and preservation

and collection of, data and documents. A company must understand, for example, whether specific procedures must be followed to comply with local privacy regulations prior to disseminating document preservation notices or collecting data or documents from company employees or their assigned electronic devices such as desktop computers.

Defining the scope of preservation, review, and production, at the beginning of the investigation is crucial. With the input and advice of in-house and outside counsel, the company should determine the parameters of the investigation, the relevant date range, and the identity of employees likely to possess potentially relevant documents and information.

The timely issuance of a litigation hold memorandum or document preservation notice is essential to ensure that critical data and documents are not destroyed and also, if necessary, to demonstrate to the government or its regulators the company's commitment to the investigatory process. The document preservation notice should be comprehensive enough for employees to understand the context of the investigation, the necessity and importance of compliance, and the potential penalties under United States or foreign law either to themselves or to the company for failure to comply.

Timing will be especially important when data, documents, and employees are located in foreign jurisdictions. And a company must be mindful of providing sufficient time for the translation and dissemination of the preservation notice, as well as local law requirements for obtaining informed consent or written permission from employees prior to document collection.

Finally, it is good practice to periodically remind all recipients of the preservation notice and the obligations under the notice to ensure continued compliance.

Collection, Review, and Production. Document collection, review, and production are often the most costly and time-consuming parts of internal investigations, especially when documents and data are located in several different countries. Understanding and defining the parameters of collection, review, and production are essential to managing costs and meeting regulators' expectations.

Document Collection. Once a preservation notice is in place, the company should define the scope and time frame for collection. Defining the collection parameters should be a collaborative process between IT personnel, in-house counsel, outside counsel hired to investigate the allegations, and employees with fundamental knowledge of the issues under investigation. The collection parameters should be reviewed regularly to determine whether the scope is sufficiently broad to capture all potentially relevant information.

Because companies do not want to waste time and resources collecting and reviewing documents that are tangential or irrelevant to the product under investigation, those closest to the investigation should systematically identify sources and locations of potentially relevant documents. The most likely sources include employee emails, shared folders, and hard drives, but may also include off-site locations that store paper documents, electronic data, or both. In addition, the company should determine whether potentially relevant data or information may be stored on personal laptops used for business purposes, cell phones, BlackBerries, and Personal Data Assistants. This is especially important for companies with employees in the field, such as sales representatives who may make sales call notes on computers or other personal devices and also may store hard copy documents in their homes or vehicles.

IT personnel are an integral part of the identification and collection process. They can provide assistance with the logistics of collection and should be consulted regularly. They often have the most knowledge about the methods in which a company's electronic data

is stored and the best way to preserve and collect that data. They can assist with identifying documents or data that may be protected by passwords or encryption, can help determine whether auto-deletion procedures are in place for electronic information and data, and can identify the existence and location of back-up media. However, where documents and electronic data are stored in foreign jurisdictions, particularly where language barriers or lack of bandwidth may impede data collection, it may be easier and more cost effective to have a local entity handle document collection.

Document Review. Before the review phase begins, the review management team should consider the scope and time frame of review. A thoughtful search and review methodology will help keep the review on track and on budget. If an inquiry from the government or a regulatory agency such as the Food and Drug Administration is threatened or imminent, it may be helpful (or necessary) to consult with the relevant regulatory agency about the scope, list of search terms, and protocol for document review. During the review, the review parameters should be examined regularly to determine whether the scope is sufficiently broad to capture all relevant information but also to ensure the scope is not overly broad as to cause the needless review of irrelevant materials.

In creating search terms to help identify relevant or key documents to the investigation, the review management team should seek input from the company employees and in-house counsel closest to the investigation. Prior to starting document review, the search terms should be examined and refined as necessary to avoid the over-identification of documents as potentially relevant. While this can be done after document review has started, changing search terms in mid-review can lead to confusion, added expense, and wasted time expended on the review of irrelevant documents.

For internal investigations involving employees located in multiple countries or relating to activities that occurred in multiple countries, the review management team will need to address search terms in both English and any applicable non-English language, and should have a plan for the review and coding of documents that contain both English and the relevant non-English language. Consideration should be given to differences in spelling, word choice, local dialects or slang, and how many search terms are needed. Careful thought also should be given on how to account for accent marks, non-English (i.e., Cyrillic, Chinese/Japanese) characters, and the appropriate document review platform needed to accommodate these issues. Particularly in reviews involving non-English language, it may be necessary to test reviewers' language competency, understanding of slang, colloquialisms, scientific or technical jargon. In addition, reviewers may need instruction on local custom and practice in the foreign jurisdiction to help identify potentially problematic conduct and documents.

It is important at the outset of the review to set review priorities and a schedule for production. Depending on the volume of potentially relevant data and documents collected, document review may be quick and targeted or may need to be conducted over a longer period of time. Regardless of the schedule, however, time should be built in for unexpected events. Flexibility will be necessary as priorities shift during review. Equally important, the company should document considerations of and decisions on the scope of analysis, data collection, and review, and the rationale for those decisions, should there be a need to explain their actions to the government or regulators.

Document Production. How and why documents are being reviewed will help to define whether, and how, documents will need to be produced. In an internal investigation undertaken by a company in which government or regulatory entities are not involved, documents will need to be available to those interviewing witnesses or otherwise investigating allegations, but a formal

document production likely will not be necessary. On the other hand, if a regulatory or government agency is involved or likely to become involved in the future, the company may choose to create a “production set” of documents. In that instance, consideration should be given to the proper format and method of production required by the regulatory or government agency, including whether metadata will need to be produced.

IV. Coordination of Regulatory Interests

Any investigation strategy, whether regulatory driven or internally driven for governance reasons, that involves multiple countries and jurisdiction must consider the regulatory implications in each jurisdiction.

It is not uncommon in the United States for a regulatory agency such as the Food and Drug Administration (FDA) to inquire about a product (leading to an internal investigation) and for the Department of Justice (DoJ) to begin a different, parallel inquiry shortly thereafter. These parallel proceedings can often be explained by the fact that the FDA’s (and other U.S. Administrative agencies) remedial tools are limited to fines and other civil penalties, and the DoJ’s remedies include criminal sanctions, including fines and possible incarceration. In such a scenario, it is critical to maintain regular contact with regulators and to coordinate actions and communications within the regulatory framework and interests of each regulatory entity pursuant to an overall plan.

Conducting an investigation with an international element complicates this burden. First, there may be additional parallel inquiries by foreign regulators that are or may be triggered by the activities that led to the inquiry or inquiries going on in the United States.

Second, there may be different rules or regulations in different countries regarding what triggers an obligation to notify a regulator of a product-related issue. It is critical that counsel be informed of any such variations early on in an investigation with an international reach.

Coordination does not necessarily mean notification. While a regulator’s inquiry about a certain product or manufacturing process may be sufficient to trigger an internal investigation, that inquiry alone may not be sufficient to justify notification to all other regulators of the inquiry. There are specific laws and regulations regarding notification, and it is important that counsel and the company understand and follow those laws, first to comply with the obligations contained in such directives, but also to limit the disclosure of sensitive information to those agencies, ministries, and/or self-regulatory organisations that are required by law to be apprised of such information.

V. To Self-Report or Not

The question of whether to self report is one that surfaces very early in the investigation and creates angst from that moment forward. Self-reporting is generally the start of a process that is followed by regular updates to regulators. Furthermore, a company that reports to one regulator generally reports to all regulators, as regulators within and across borders should be assumed to communicate with each other.

Often, companies and their investigation counsel are forced to balance these negatives against the normal benefit of self-reporting: leniency. Regulators in the United States usually respond in the affirmative to the question of whether prompt and complete self-reporting (even if such reporting requires waiver of the attorney-client privilege or work product protection) is in a company’s best

interest. Indeed, the DoJ’s operations manual states as follows:

In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target: (4) the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.

Principles of Federal Prosecution of Business Organisations, United States Department of Justice—United States Attorneys’ Manual, Title 9, ch. 9-28.300(A)(4) (August 2008).

This “culture of self-reporting” is the result not only of policies in the Justice Department and various administrative agencies, but of the likelihood that such action will lead to a situation that can be negotiated with regulators and without the need for formal action or a civil lawsuit or criminal proceeding. The attitude toward self reporting in non-US jurisdictions is inconsistent. Thus, counsel should be aware of the self-reporting culture (including the expectations of the regulators) in each jurisdiction that is implicated in an internal investigation. Below are brief descriptions of the culture of self-reporting in other jurisdictions besides the United States:

United Kingdom. Regulators in the United Kingdom appear to have an expectation of self-reporting similar to that found in the United States. Some agencies have clear obligations of self reporting in their regulations, and the failure to comply with such mandates not only makes leniency unlikely, but could expose a company to further regulatory liability. In addition, many agencies have procedures or past actions that imply a more ambiguous obligation to self-report. Regardless, there appears to be an existing and growing culture of self reporting of investigation findings in the United Kingdom.

France. Even though there are no specific statutory or regulatory mandates that a company self-report a breach of corporate laws, regulations, or practices, an analogous expectation of self reporting appears to exist in France.

Germany. Under German law, the duty to report regulatory violations, corporate law violations, or internal investigation findings relating to the same are normally contained in regulations or statutory provisions such as the Equipment and Product Safety Act. Notwithstanding the statutory requirements to self-report certain issues that may come up in an internal investigation or otherwise, the culture of self reporting in Germany is not well developed.

These few examples show an inconsistent view throughout the world regarding self-reporting. Companies conducting international internal investigations that might implicate an international destination would be wise to familiarise themselves with the law, regulations, culture, and current attitude in each such destination.

VI. Conclusions

The authors attempted to provide a snapshot of issues that are relevant in the planning and execution phases of an internal investigation; the list of issues presented is not exhaustive. Given the countless factual scenarios that lead to internal investigations, an exhaustive list is likely impossible.

Because of the resources that internal investigations consume, it is important for companies (from both a resource preservation perspective and an investigation success perspective) to familiarise themselves with proper practices in this area. Often these practices may be more of an art than a science. Thus, it is critical to

understand the process of any investigation and execute according to that process.

A big piece of the process puzzle is the preservation, collection, production, and protection of documents and electronic data. This area has undergone tremendous change in the last decade, and the relevant standards and best practices continue to evolve. Document and data management is a vital component to any thoughtful investigation plan.

A properly-scoped and well-organised investigation is the best way

to guard against creating exposure beyond the relevant inquiry, be it from a regulator or other source. Proper planning is even more important where the investigation touches different international jurisdictions.

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