WHITE PAPER

THE EXPERTS WEIGH IN: E-DISCOVERY STRATEGIES FOR INTERNATIONAL ANTI-BRIBERY INVESTIGATIONS

By Severin Ian Wirz

FTI CONSULTING™ | TECHNOLOGY

INTRODUCTION

Following surveys from past years that have explored various themes pertaining to e-discovery programs, FTI commissioned a 2012 survey on e-discovery issues in international investigations, with an emphasis on those conducted under the Foreign Corrupt Practices Act and other anti-bribery statutes. The Foreign Corrupt Practices Act, also known as the FCPA, is one of several laws that covers extraterritorial activity by companies outside of the United States. The law has become the subject of increasing attention in recent years as U.S. government agencies have been broadening enforcement against companies that engage in acts of bribery abroad.

Global companies have sought to end corrupt practices as well. They are enlisting the help of experts both to develop compliance mechanisms aimed at detecting and deterring bribery in their worldwide operations, as well as to coordinate cross-border investigations where potential problems arise.

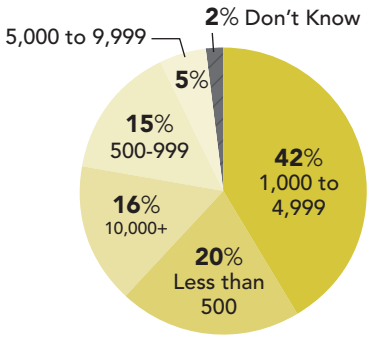
This report, which is based on the survey responses, allows leading experts in the field to share their thoughts on best practices when conducting electronic discovery during a multi-national investigation. As these investigations become increasingly commonplace, companies, law firms, and e-discovery service providers are working together to navigate the technological, legal, and cultural barriers of conducting an effective cross-border investigation. This report introduces some of the e-discovery strategies for investigations and covers a wide-range of topics, from corruption trends in Latin America to data privacy laws in Europe.

Given the increasing aggressiveness of international anti-bribery enforcement, the report puts an emphasis on the demands of anti-corruption investigations. However, the principles described below are applicable to all manner of cross-border investigations or litigation.

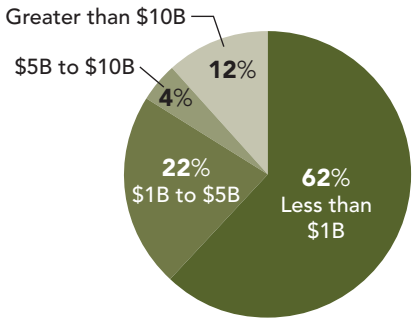
PARTICIPANTS

The survey had 114 respondents, and was comprised entirely of legal and accounting professionals who have handled e-discovery matters for either multinational investigations or cross-border litigation. Reflecting the central role played by lawyers in anti-bribery investigations, 76% of the respondents worked at law firms, 12% worked as in-house counsel, 4% worked for the government, and the remainder worked for various non-profit, education and consulting organizations. The respondents also tended to represent large organizations, with 63% working for organizations with greater than 1,000 employees and 16% working for companies with over 10,000 employees. Correspondingly, 38% of the respondents worked for companies that had revenues of more than $1 billion per year. Of that group, eight respondents agreed to in-depth telephone interviews to share their more nuanced opinions on the field.

Global Employees



2011 Revenue



THE FOREIGN CORRUPT PRACTICES ACT AND THE U.K. BRIBERY ACT

The Foreign Corrupt Practices Act was enacted in 1977 and prohibits companies from paying bribes to foreign officials and political figures for the purpose of obtaining or retaining business. The Act also requires corporations to maintain books and records in reasonable detail and to implement adequate internal accounting controls. The accounting provisions were included in order to prevent off-the-books accounts sometimes used to conceal bribes. The Justice Department is responsible for all criminal enforcement, and for civil enforcement in matters concerning domestic concerns and foreign companies and nationals. The Securities and Exchange Commission pursues civil enforcement against issuers of stock or securities in the U.S.

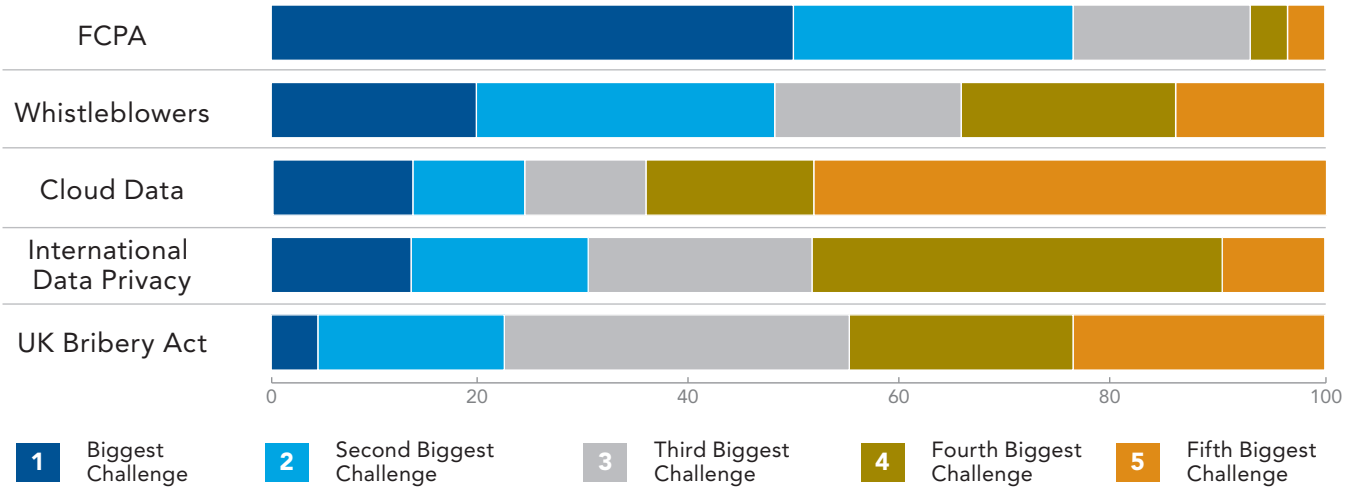
Although the FCPA was enacted more than thirty years ago, for many years enforcement actions by the DOJ and SEC under the law were relatively infrequent. In the last ten years, however, both agencies have shown renewed vigor in enforcing the law, and companies caught in foreign bribes have paid a steep price. Some of the largest penalties in the last few years have included the following:

- Siemens AG for $800 million in 2008
- KBR/Halliburton for $579 million in 2009
- BAE Systems plc for $400 million in 2010
- Alcatel-Lucent for $137 million in 2010
- Johnson & Johnson for $70 million in 2011

In 2010 alone, the Department of Justice imposed $1 billion in monetary penalties related to FCPA enforcement, according to a department news release.

Challenges Expected to Impact Investigations

Respondents were asked to predict which challenges would most significantly impact investigations over the next five years. 49% of those surveyed agreed that FCPA would be the biggest challenge.



Reflecting the belief that anti-bribery enforcement will only continue to rise, more than 50% of respondents in FTI's survey answered that the biggest challenge to international investigations over the next five years will be the FCPA.

"We're going to see continued vigorous enforcement," remarks Gary DiBianco, a partner at Skadden, Arps, Slate, Meagher & Flom LLP who works in London and has represented both U.S. and non-U.S. entities in FCPA matters. "Now that this has been a high profile topic for the last three to four years in the enforcement community" these investigations are going to continue, says Mr. DiBianco, "and companies and boards are very attuned to it."

A second major development in anti-bribery regulation came in 2010, when the United Kingdom enacted the Bribery Act. Many view the new law, which was intended to consolidate, clarify, and strengthen U.K. anti-bribery law, as even broader than the FCPA. The U.K. Act covers four categories: (i) offenses of bribing another person; (ii) offenses related to being bribed; (iii) bribery of foreign public officials; and (iv) failure of a commercial organization to prevent bribery. Among the differences between the UK Bribery Act and the FCPA is that the Bribery Act criminalizes bribery of private persons and companies, in addition to bribery of foreign public officials. In FTI's survey, close to 60% of respondents saw the UK Bribery Act as a top-three concern over the next five years, although fewer than 10% viewed it as their single most important concern, perhaps reflecting the fact that the law is relatively recent and has not been widely enforced yet.

INTERNATIONAL INVESTIGATIONS, ELECTRONIC DATA AND THE FOREIGN CORRUPT PRACTICES ACT

Universal among survey respondents who were interviewed was the observation that effective anti-bribery investigations require coordination among various global business units. "These investigations are inherently cross-border and that creates challenges" notes Kimberly Parker, a partner at Wilmer Cutler Pickering Hale and Dorr LLP and a member of the firm's Investigations and Criminal Litigation Practice Group. "It creates challenges in terms of access to witnesses and evidence and also in terms of data privacy regimes in other countries. And while those issues may be present in other investigations, they are the essence of an FCPA investigation."

In contrast to some areas of the world where the discovery process is relatively focused, U.S. discovery laws are quite broad, and courts can order the production of evidence from non-U.S. companies, foreign subsidiaries or foreign affiliates, even if the information is located outside of the United States. This obligation means companies may need forensic accountants to conduct independent analysis of financial records, outside counsel to review electronic data, and independent investigators to interview individual employees. In any such investigation, concerns that would normally accompany U.S. discovery, like privilege, preservation, and collection and review of documents, require additional consideration of foreign legal traditions and cultures. Language differences must be navigated. And in Europe, especially, data privacy laws create significant hurdles. Below is a look at some of the particular themes that surfaced in FTI's survey of international litigation and investigations, including anti-bribery probes.

DUE DILIGENCE IS ESSENTIAL

To effectively detect evidence of bribery, survey respondents indicated that global businesses must conduct due diligence in various jurisdictions. Effective detection and deterrence includes the review of foreign agents and subsidiaries, as well as thoroughly inspecting records of another company before a merger or acquisition.

"If you are not doing due diligence, you need to," says Bill Steinman of Steinman & Rodgers LLP, a boutique law firm specializing in the FCPA. "The vicarious liability provisions of the FCPA couldn't be more clear. These are the people under the FCPA that are going to get you in a lot of trouble."

When examining agents or other third parties, Mr. DiBianco notes, "It's appropriate to do due diligence on a risk continuum, because the third party is going to be representing you in relation to a government entity, or in a jurisdiction that has a perceived high risk of corruption."

Companies must balance their need for third-party agents to conduct business abroad with requirements under the FCPA to ensure that the agent is not susceptible to acts of foreign bribery. For larger companies, a proper compliance procedure will usually involve regular audits, vendor payment and approval controls, and other monitoring tools.

"If you're dealing with a medium to high-risk agent," Mr. DiBianco says, "the standards include understanding the agent's history, trying to benchmark the cost of the services provided, and ensuring the agent is willing to sign up to appropriate contractual terms that include anti-corruption warranties."

ACT QUICKLY

In an anti-bribery probe, the Department of Justice will not look kindly on companies that fail to secure relevant documents and data. If litigation is involved discovery schedules can be tightly organized, and the process of collecting and reviewing documents can become a race against the clock. Numerous concerns must be addressed right away.

Recognizing the problem and isolating the actors was also a common theme. "Assess who may have been involved in the allegation," says Veeral Gosalia, a Senior Managing Director in the FTI Technology segment. "Who may be committing the actual bribery? Developing a custodian list, or a list of employees from whom you will collect data."

Because of the criminal nature of bribery investigations and the potential for employees to either unintentionally or purposefully destroy documents, data preservation is "an important consideration at the outset of any investigation," says Steve Fagell, partner of Covington & Burling LLP's White Collar Defense & Investigations practice and also co-chair of the Anti-Corruption practice. "After identifying all of the individuals who may have knowledge of the issue under review, the steps taken to preserve data may depend on the company's IT capabilities, spoliation risk in the country at issue, and whether a regulator is in the picture."

"Spoliation," means the intentional or negligent failure to preserve relevant documents.

"I can't emphasize the necessity enough to enact quick preservation of data," says Gosalia. "I would say that many of the FCPA cases I've worked on I've found instances where employees intentionally or unintentionally destroyed documents that would have been helpful."

Jim Walden, co-chair of the White Collar Defense and Investigations Group at Gibson, Dunn & Crutcher LLP, says acting quickly means working with a company's senior IT staff to lock down data. "You have to identify the systems where the data is housed and either back it up or prevent automatic or manual overriding of the system at the server level." Some data may not be on servers, if employees use laptops or other devices while traveling. "Depending on the nature of the investigation, you might need to image an employee's laptop right away," to prevent intentional or unintentional destruction of data, Walden adds.

And if an investigation leads to China, companies should plan to conduct on-site document review. That's because local companies, which often have some kind of tie to the Chinese government, can invoke "state secrets" rules to prevent documents from being taken out of the country, Walden says.

Such occurrences necessitate a litigation procedure which can quickly account for cultural and legal differences in places that may be unaccustomed to the rigors of U.S.-style document-holds. These procedures may include communicating the document-hold in multiple languages, providing it an easily-accessible format and placing responsibility to ensure its compliance with a non-party.

DEALING WITH DATA PRIVACY

Among respondents to FTI's survey, 54% said data privacy was the number-one challenge to multinational discovery matters and 76% anticipate an increase in data privacy requirements around document review. As Mr. Fagell describes it, "data privacy issues often loom in the background of an FCPA investigation.

Data privacy laws regulate the use and discovery of employee records and are notably different from U.S.-style discovery practices. The EU Directive 95/46/EC regarding data protection establishes the principle that transfers of an employee's personal data to countries outside of the EU should only take place where the outside country ensures an adequate level of protection, which importantly doesn't include the United States. This directive covers not only the racial, ethnic, political, and religious characteristics of an employee, but also such seemingly generic information as the employee's name, title and position within a company, as well as e-mail sent and received from a work account.[i]

"Gathering data in the UK and Europe is very difficult, because the privacy rules are intense," says Mr. Walden. He says companies now commonly require relevant European employees to sign consent forms immediately upon beginning an investigation, "so there is no legal question about the company's ability to gather their information."

The privacy issue may even pertain to acts that have occurred in countries without data privacy laws, so long as the individuals who manage the documents are located in a jurisdiction where the data privacy laws do exist. "If the people who manage the business are located in France or Germany," comments Ms. Parker, "that's where many of the relevant documents are, even if the problem may have occurred somewhere else."

FOREIGN BLOCKING STATUTES

Survey respondents also raised concerns regarding foreign blocking statutes. These statutes generally prohibit production of documents and disclosure of information related to a particular topic or industry, and some were specifically enacted to thwart United States-style discovery. Paul Pelletier, member of Mintz Levin's Foreign Corrupt Practices Act practice group, notes that companies dealing with blocking statutes can work together with U.S. enforcement agencies to comply with blocking statutes. "[O]ne way to avoid implicating foreign blocking laws" notes Mr. Pelletier, is that "when the SEC or DOJ issues a subpoena or treaty request for the documents, the investigators simply might go to the foreign country and inspect the documents in the foreign country. The company may also choose to bring witnesses to the United States for purposes of being interviewed by government investigators."

PRIVILEGE & SECRECY LAWS

Secrecy laws, which most commonly protect the disclosure of bank customer and corporate data, are also common in some parts of the world. U.S. Courts have, for example, recognized Article 47 of the Swiss Bank Law, which prohibits disclosure of bank customer information. Some bank secrecy laws are not codified by statute but, instead, are construed to be "waivable privileges" held by bank customers. Despite these prohibitions, U.S. enforcement agencies may nonetheless demand companies provide bank records relevant to a bribery investigation.

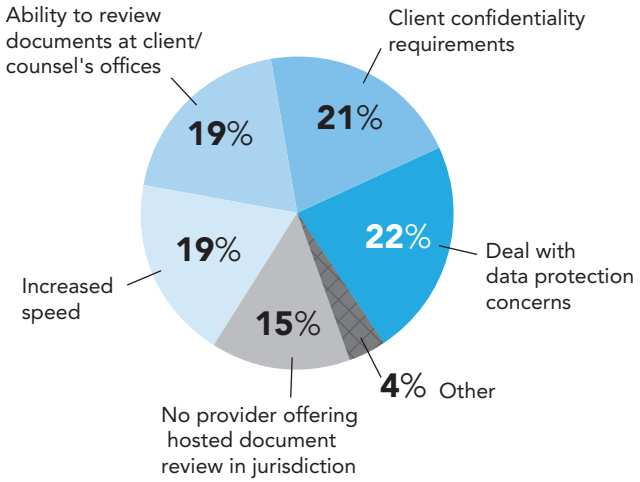
In China, again, the major issues are laws protecting government secrets. "Though we don't see data privacy issues, we do see companies raising state secrecy laws," says Mr. Gosalia. "if a company did a lot of work with the Chinese government, many of their documents are protected. We often find it difficult to transfer the documents outside of China for review. So we try to do it on site."

Most U.S. persons are also accustomed to fairly broad rules concerning the attorney-client privilege. In the U.S., that privilege, which belongs to the client, protects most communications between a client and his or her attorney. There is no similar concept in many other parts of the world. In Italy, for example, an in-house counsel's communications with lawyers in, for example, an Italian subsidiary, may be discoverable in U.S. litigation.

KNOWING WHEN YOU NEED HELP

Issues that appear to be local at first glance can swiftly grow international, because many companies house documents over a global network of servers. Without preparation, investigation costs can easily balloon out of control. Among respondents, 40% reported spending more than$500,000 on e-discovery for multinational matters, and 33% said that they did not even know how much they spent. Those companies that are proactive about finding solutions may save costs in the long run. "I can't emphasize enough how important it is for companies to start thinking about FCPA compliance *before* an investigation, not after," says FTI's Mr. Gosalia. An internal investigation and/or DOJ or SEC probe can be much more costly than implementing proper controls and compliance from the beginning. And if prosecutors do take an interest in a company, they will give credit in settlement negotiations to those that can show they had serious controls and compliance procedures in place.

Under what circumstances would you utilize a mobile processing/ review environment?

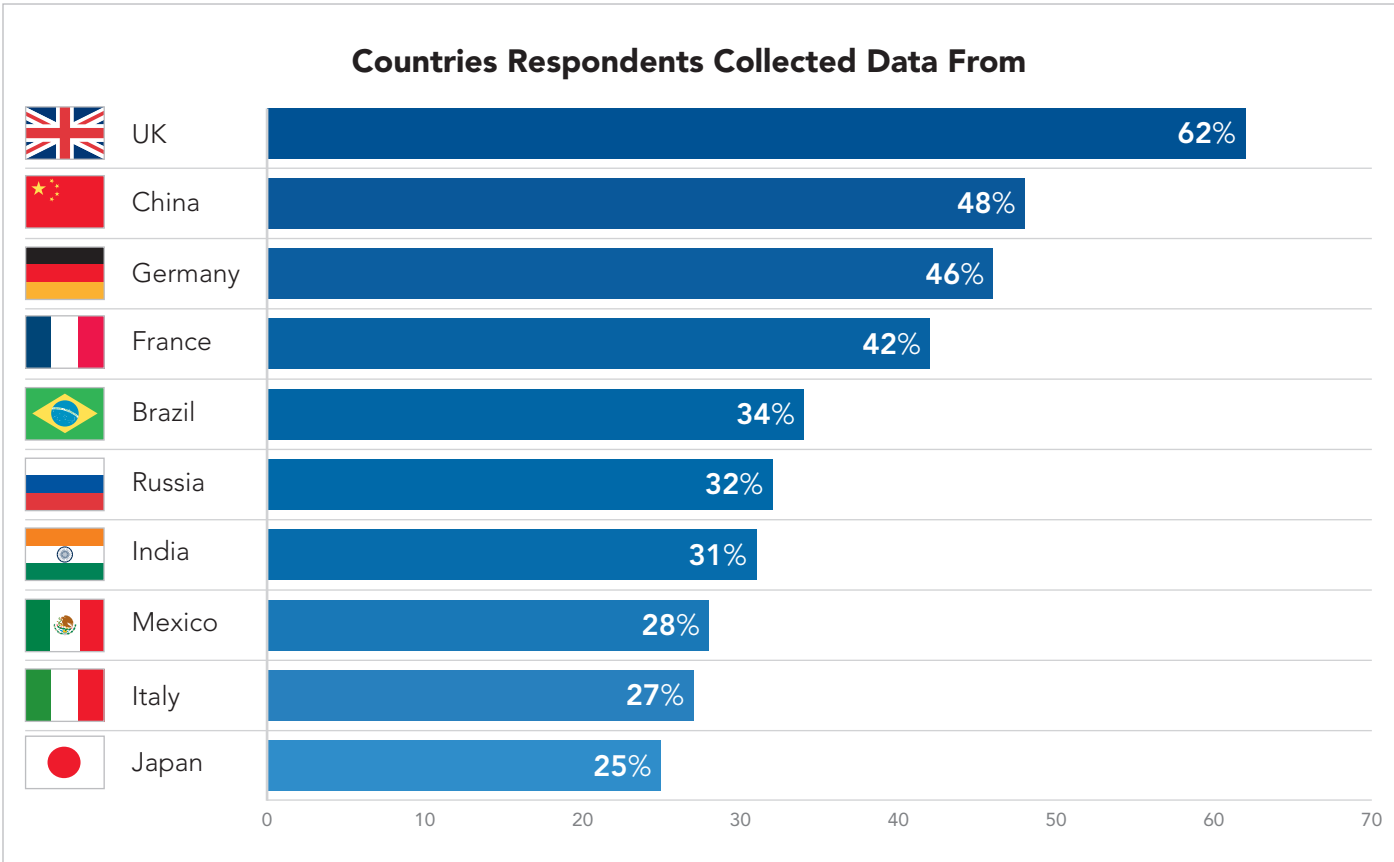


An e-discovery service provider or a law firm specialized in e-discovery matters can advise a company not only on forensic problems, but can help the company to work through the legal, organizational and technical requirements involved in securing and obtaining evidence outside of the United States. More than 80% of respondents answered that, in dealing with in-country data privacy requirements, they have partnered with in-house, local IT or legal departments to ensure that local collection, processing and review procedures were defensible. More than 60% indicated that, in the same context, they had partnered with a global service provider.

Some forward-thinking e-discovery service providers offer the latest technology in the field, such as mobile data-processing review environments, along with the manpower trained to use it. The advantage of mobile data-processing environments is that document reviewers may analyze documents at the location in which they are housed, thereby avoiding discovery issues posed by data privacy laws, blocking statutes, secrecy laws, and the like. For example, when questioned on the issue of mobile data processing, many respondents indicated they would use such an environment to deal with data protection concerns and client confidentiality requirements.

IN FOCUS: CORRUPTION IN ASIA AND LATIN AMERICA

As mentioned above, the extraterritorial reach of the FCPA and other anti-bribery laws has led to increased concern regarding allegations of improper conduct that takes place outside of the United States. As countries in Asia and Latin America become increasingly active players in the global marketplace, FTI's survey indicates a corresponding trend for companies having to increasingly conduct investigations in those parts of the world. In fact, five out of the top ten countries from which respondents collected data were countries in Asia or Latin America. A full 48% of respondents said they have had to collect data from China.



Although corruption can happen anywhere, FTI's survey indicates the need to pay close attention to those places in Latin America and Asia where companies are engaging in significant trade, and where a growing need to develop anti-bribery compliance measures and conduct internal investigations to curb illegal practices exists.

Please see our attached supplemental reports for region-specific observations on Latin America and Asia.

CONCLUSION

The 2012 survey conducted by FTI shows the complexity of issues that may arise during an international anti-bribery investigation. Although data privacy laws, blocking statutes, secrecy laws and ill-defined privilege rules may be of concern in any international litigation, they are a common feature of an FCPA investigation. "FCPA investigations by definition are cross-border, international investigations," Gary DiBianco reminds us "They're going to almost always involve evidence that's in several different places."

There is no single best method of conducting an international investigation, especially given the diversity of cultural and legal traditions around the world, respondents indicated. Moreover, "it's getting more complicated rather than less," says Jim Walden. Still, legal experts, as evidenced above, are able to articulate certain common approaches. These include:

- Swift preservation of data and identification of employees relevant to the probe.
- Securing servers and employee laptops or other devices where relevant data might reside that could be lost to intentional or unintentional destruction.
- Asking employees to sign consent forms allowing the company to collect information from them, an issue especially important in data-protective Europe.
- Considering mobile or on-site document review to deal the proliferation of privacy laws and, especially in China, "state secrets" laws that can land companies and outside firms in serious trouble for removing documents from the country.

What is also certain is that FCPA enforcement is not abating. "I think we're going to see more enforcement particularly in emerging markets where there are areas of economic opportunity but also compliance risk," says Mr. DiBianco.

Companies will also receive guidance from the Department of Justice, which intends to publish new compliance guidelines for the Foreign Corrupt Practices Act. These guidelines will further assist lawyers in helping their clients navigate the many challenges of conducting an effective international or anti-bribery investigation.

ABOUT THE AUTHOR

Severin Ian Wirz is an independent legal consultant and member of the New York State Bar. He is a former associate of Hughes Hubbard & Reed LLP, where he worked on matters pertaining to the Foreign Corrupt Practices Act, bankruptcy law, and international litigation. He is also the author of several articles on anti-bribery law and corporate social responsibility.

ABOUT FTI TECHNOLOGY

FTI Technology helps clients manage the risk and complexity of e-discovery. We collaborate with clients to develop and implement defensible e-discovery strategies with keen focus on the productivity of document review. Our complete range of offerings, from forensic data collection to managed document review services, provides unprecedented flexibility to address any discovery challenge with confidence. Our clients rely on our software, services and expertise to address matters ranging from internal investigations to large-scale litigation with global e-discovery requirements. For more information, please visit www.ftitechnology.com. For more information on FCPA investigations, please contact investigate@fticonsulting.com.

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[i] *See* Christian Zeunert, David Rosenthal, *Cross-border Discovery: Practical Considerations and Solutions for Multinationals*, 12 Sedona Conf. J. 145 (2011).

SUPPLEMENT

IN FOCUS: E-DISCOVERY IN LATIN AMERICA

By Severin Ian Wirz

As countries in Latin America become increasingly active players in the global marketplace, investigations in the region are correspondingly more frequent. The recent publicity surrounding Wal-Mart Stores Inc., regarding reports of improper payments in Mexico to speed up issuance of building permits, is one example from the Foreign Corrupt Practices Act (FCPA) arena.

PRIVACY CONCERNS IN LATIN AMERICA

Although privacy regimes in Latin America vary by country, some common themes emerge. They include:

- The existence of constitutional protections for individual privacy in most countries, which are stronger than statutory protections.
- A workplace culture of privacy in which it isn't clear that employees' work product is the property of the company.
- Strong employee protections that can make firing wrongdoers difficult.
- Difficulties in transferring documents out of the host country.

The right to privacy in most Latin American countries is written into constitutions, and so the expectation for employee privacy is higher than in the United States. In the U.S., everything – from an employee's work email, to data on a laptop or handheld device – is considered property of the company. Not so in Latin America.

"It's a very easy area to trip up on," says Douglas Tween, a New York-based partner at Baker & McKenzie LLP. "It means a company cannot image and collect and use what in the U.S. we consider business emails, without employee consent. It really makes it difficult and slow to conduct an internal investigation."

Good planning before an investigation arises is essential – and that means instituting employment practices requiring new hires to sign waivers allowing the company clear access to work product. Similarly, annual training in which employees are required to read the company's code of conduct is an opportunity to obtain waivers.

"Companies should implement active monitoring policies, so that employees accept that computers and emails are work tools, and they agree on data transfer out of their respective countries beforehand," says Carolina Pardo, a Baker & McKenzie partner based in Bogotá, Colombia.

Conducting interviews can be tricky as well. "In Brazilian law, an individual is not obliged to provide information or evidence that may harm him," says Eduardo Sampaio, a senior managing director at FTI Consulting Brasil. Employees in Brazil are even protected if they mislead investigators – "and you cannot take disciplinary action," adds Tween.

The concept of at-will employment is alien, and firing problem employees is a complicated matter.

Finally, if documents are identified that are relevant to U.S. authorities, counsel must ask the U.S. government to go through formal processes to obtain the documents. Brazil, for example, isn't a signatory to The Hague conventions governing international legal exchanges. Using mutual legal assistance treaties is slow and cumbersome. But the alternative is to violate privacy law, which can mean serious legal consequences for the company and its lawyers.

For all the reasons cited above, it is advised to hire local counsel and e-discovery specialists with experience in the country of investigation to ensure compliance with local laws.

CORRUPTION IN LATIN AMERICA

Corporate investigations are increasingly focused on finding or preventing incidents of bribery and corruption. In Latin America, corruption stems from a wide range of sources,

reflecting the diversity of cultures in the region. Aggressive efforts to sustain and expand growth of foreign direct investment, political instability, poverty and high unemployment all contribute to the problem. In some places, violence and drug-related crimes are also a major factor. And although most countries have developed strong black-letter law prohibiting corruption, these efforts often run contrary to established practices of patronage and cronyism that exist in the region.

In Mexico, the federal government has introduced several anti-bribery initiatives since 2000 aimed at curbing corruption. However, recent surveys indicate that graft has taken on institutionalized dimensions in some economic sectors.[i] Mexico also faces a rampant problem of petty corruption. These problems are also exacerbated by a robust narcotics trade, and in 2008 a major scandal shook the country when top federal anti-drug officials were caught accepting bribes from drug cartels in return for information. These problems can sometimes spill over into the private sector. "Sometimes the jurisdictions in which you operate are not the safest places in the world. Asking the wrong questions aren't entirely welcome," notes Bill Steinman of Steinman & Rodgers LLP, a boutique law firm in Washington, D.C., specializing in the FCPA.

The problem is not localized to Mexico either. In Argentina and Brazil, for example, both countries have established well-developed legal and institutional frameworks for dealing with corruption, but have failed to effectively enforce their laws. Reports indicate that bribery is frequent in Argentina among tax and customs officials, and common among the local levels of the judiciary in Brazil.[ii]

Complex Bureaucracy: A second major contributing factor to corruption in Latin America is the complexity of bureaucratic procedures and regulations. Companies may often face numerous bureaucratic obstacles regulating permits, licenses and registrations that sometimes allow for petty corruption to take root. Foreign companies who own property in Argentina, for example, have discovered that petty bribes are often used

among public administrators to acquire property and maintain property rights.[iii] Cutting corners to avoid regulations, however, may cause a company to get into trouble under the FCPA. In 2009, for example, Helmerich & Payne paid the DOJ a $1 million fine due to bribes some of its subsidiaries in Latin America had made to Venezuelan and Argentinean foreign customs officials to avoid the normal delays that occur in transporting drilling equipment.[iv]

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i *See* Business Anti-Corruption Portal, available at: http://www.business-anti-corruption.com/country-profiles/latin-america-the-caribbean/.

ii *See id.*

iii *Id.*

iv Press Release, U.S. Department of Justice, *Helmerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America*, (July 30, 2009).

SUPPLEMENT

IN FOCUS: E-DISCOVERY IN ASIA

By Severin Ian Wirz

Conducting an investigation in Asia presents unique challenges. The hurdles are not only cultural and linguistic – but technical and legal.

Culturally, the wide-spread practice of gift-giving in Asian business culture – coupled with the extensive state involvement in industries like health care – presents minefields for complying with the U.S. Foreign Corrupt Practices Act and the U.K. Bribery Act. Linguistically, it's essential that someone in full command of the native language assist in conducting interviews, to avoid misunderstandings and evasive answers.

The technical challenges revolve around displaying and searching Asian documents. Most e-discovery software was developed in the United States, where discovery has long been an integral part of litigation. It works well in English. But it can produce gibberish when asked to convert Asian characters. And it may not be compatible with unfamiliar software formats in use in Asia.

The legal challenges concern data privacy regimes, with China's "state secrets" law cited by many practitioners as the most nettlesome.

STATE SECRETS AND CHINESE SECURITY CONCERNS

While many Asian nations have data privacy laws, "China is the most difficult," says Jim Walden, co-chair of the White Collar Defense and Investigations Group at Gibson, Dunn & Crutcher LLP. "The enforcement of its laws is not always transparent."

Adds Andrew Dale, a Hong Kong-based commercial litigation partner at Orrick, Herrington & Sutcliffe LLP: "The state secrets law is very nebulous." Information that Chinese officials might consider a threat to social stability could be considered a state secret. "It's not like there is a prescribed list of what on an individual basis a state secret is, and that's what makes it so difficult," Mr. Dale remarks.

State secrets may apply even to privately owned companies if they are run, for example, by former government officials or do business with the government.

Therefore, without government approval, "legal entities in China will not grant access to their premises to external forensic accountants or external counsel to collect information absent a formal set of approvals," notes Gary DiBianco, a partner at Skadden, Arps, Slate, Meagher & Flom LLP.

For all of the above reasons, the best practice is to set up on-site data collection and review when conducting an investigation in China.

A specialist e-discovery service provider can collect and process data on site in China. If relevant information is found, a company then may be obliged to navigate between Chinese secrecy law and potential demands from U.S. prosecutors that it cooperate with any U.S. investigation. If cooperation means turning over relevant documents to the U.S., those documents can be gotten out of China only through a formal request of the U.S. authorities to the Chinese. "You take the data out of China and give it to the U.S. government, and you are creating major problems, not only for the company, but for the law firm" conducting the review, Mr. Walden says.

TECHNICAL CHALLENGES

WORKING WITH ASIAN CHARACTER SETS

Another hurdle for English-speakers is simply finding a way to read Asian documents and data. The typical American software solution is to use the Unicode standard for converting other language scripts into English. But Unicode won't work in Asia if, as is often the case, it was not used to encode the Asian-language source documents.

"The point of an e-discovery platform is the allow attorneys to make decisions about the relevance of documents. If they cannot read those documents in the first place, they cannot make any such decisions," says Richard Kershaw, a managing director of FTI Technology, who is based in Hong Kong.

He adds: "If you have data coming from non Unicode multi-byte Chinese documents, you either get character mismatch, which turns it into garbage, or you get squares or question marks, which means it is out of range."

DEALING WITH UNFAMILIAR SOFTWARE FORMATS

E-discovery software transforms various differently formatted documents into one common format – such as web pages or images - that can then be collectively searched. Examples of different formats include word processing, spreadsheets, email exchanges and accounting software. Western e-discovery software works well with common formats like Microsoft Word, Outlook and Excel, or accounting software like Quickbooks.

In Asia, however, a multitude of different and often unfamiliar software formats abound. A Japanese company may be using the Becky! email client. A Chinese subsidiary of a U.S. company may be using Quindi accounting software, with its Chinese-language interface. Many Asian companies have their own proprietary formats. The developer of typical e-discovery software may not even be aware of formats in use in Asia.

SOLUTIONS

An e-discovery service provider with experience in Asia is essential to success. FTI Technology, for example, uses a proprietary toolset to deal with the display and search problems. The software takes forensic images – a computerized bit-by-bit copy of the data on a very low level, so as to preserve the original encoding. Forensic imaging is a rigorous way of copying data from a computer system that meets the kind of high criminal standard demanded by a court. Then, once the data is carefully copied, it can be processed in a manner that makes it usable on an English-language e-discovery platform.

CULTURAL AND LANGUAGE BARRIERS

GIFTS AND FAVORS

Gift-giving and favors remain a major aspect of how business is conducted in China and other places in Asia. Many of these practices, such as the tradition that business people in China buy gifts for one another around the Moon Festival Celebration, are centuries-old. Gift-giving is also part of a larger social tradition in China known as guanxi, or making connections. But gift giving, if it is extravagant or involves cash payments, can subject companies to scrutiny under the anti-bribery Foreign Corrupt Practices Act (FCPA).

Veeral Gosalia, a senior managing director in the FTI technology segment, recalls working on a case in South Korea where an employee was alleged to be making so-called "rice cake" payments – named for the small gifts Koreans give traditionally during holidays - to facilitate contracts. Confronted with the issue, the employee responded that business had always been conducted in such manner. The problem: "Once employees become aware of the perceived wrongdoing of their actions by their U.S. corporate offices, they tend to go into 'everything's a secret' mode," Mr. Gosalia says.

At that point, it's essential to work with someone who speaks the local language and knows the culture. Investigators can't rely on employees' often tenuous grasp of English. Either the employee truly won't understand, or in some cases, he may exploit the language difference to be evasive.

"Conducting interviews in China is a completely different animal than in the Western context," says Andrew Dale. "The way people tend to think is a little bit different. Sometimes you need to come at it from different angles – one, to make sure you're understood; and two, to make sure the information you get is accurate."

FOREIGN OFFICIALS

The FCPA prohibits payments to "foreign officials" to win or retain business. But the layman's understanding of "foreign official" may not match the law's understanding. Companies should be aware that payments and gifts to employees of state-controlled enterprises carry corruption risk – and that risk is heightened in Asia, home to a number of state-led economies. Doctors, investment bakers, and factory owners in Asia may all surprisingly qualify as "foreign officials" under the FCPA. In 2008, for example, AGA Medical was charged with making corrupt payments to physicians at state-owned hospitals in China.

IN CONCLUSION: EXPERIENCE IS ESSENTIAL

Many of the pitfalls of conducting an investigation in Asia can be avoided with the right expertise. Interviews need to be conducted with the assistance of native language speakers. Legal advice – often from local counsel - needs to be obtained to avoid running afoul of data privacy and Chinese state secrets laws. Mobile review platforms that can be set up in the country of investigation are increasingly important, to ensure data isn't illegally exported. An e-discovery service provider with experience working in Asian languages and cultures – with the right software tool sets to ensure proper display and search of documents – will help ensure success.