



ICLG

The International Comparative Legal Guide to:

Corporate Investigations 2017

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A practical cross-border insight into corporate investigations

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United Arab Emirates

Morgan, Lewis & Bockius LLP

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1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

When deciding whether to conduct an internal investigation the company should take into consideration a number of factors including: (i) whether an investigation is required by any specific law; (ii) the scope and severity of the alleged misconduct; (iii) whether the alleged misconduct could be a potential violation of law and regulation; (iv) the potential for, or interest in, litigation by government regulators; and (v) the overall benefits and risk to the cooperation and the employees, the officers, directors and employees of such an investigation.

The legal framework governing fraud, bribery and corruption in the United Arab Emirates (the “UAE”) is governed by Federal Law No. 3 of 1987 as amended (the “UAE Penal Code”). Federal Law No. 35 of 1992 as amended (the “Penal Procedures Law”) prescribes the procedures under the UAE Penal Code. However, there are a number of other laws at Federal and Emirate level that may apply, and they also contain provisions dealing with foreign and domestic fraud. The UAE has ratified a number of international conventions aimed at combatting corruption and has more recently introduced Federal Law No.19 of 2016 on Combatting Commercial Fraud which sets out further penalties applicable to both corporate bodies and individuals who commit, or attempt to commit corporate fraud.

Federal Law No.4 of 2002 as amended (the “Anti-money Laundering Law”) and Cabinet Resolution No.38 of 2014 (the “Anti-money Laundering Regulations”) apply to organisations in the UAE regulated by the SCA and the UAE Central Bank. The UAE Central Bank and the SCA also issue circulars and mandatory procedures which apply to regulated entities.

The UAE Penal Code provides that corporate bodies, with the exception of governmental agencies and certain public entities, are responsible for any criminal act committed by their representatives, directors or agents. Individuals can also be subject to a range of penalties including fines, imprisonment and a bar on doing business and/or entering the UAE. Anyone directly harmed as the result of a crime is also entitled to pursue a civil action before the UAE Courts.

The UAE has a number of free trade zones governed by their own framework of regulations, for example the Dubai International Financial Centre (the “DIFC”). UAE criminal law applies in the DIFC but the civil and commercial laws of the UAE do not, as the DIFC has its own set of commercial laws based on the laws of England & Wales. This guide does not specifically deal with the jurisdiction or laws of the DIFC, or any other free trade zones which may have additional regulations which will apply within free zone entities.

1.2 What factors, in addition to statutory or regulatory requirements, should an entity consider before deciding to initiate an internal investigation in your jurisdiction?

Not all reports of employee misconduct within a company will necessitate an internal investigation conducted either by outside counsel or by management. Where the alleged misconduct involves an individual employee, and does not implicate potential violations of Federal or Emirate based laws, the in-house counsel, often in conjunction with the company’s internal audit department, will initially investigate the allegations and submit recommendations to management for the appropriate ‘next steps’. These next steps may include immediate remedial and personnel actions, and may also include voluntary disclosure to the authorities.

Within the UAE, the existence of documented evidence will be critical, so the collation of appropriate material and existence of witnesses to provide written statements will also be important, especially if the investigation gives rise to potential (and reportable) violation of the applicable laws and regulations.

1.3 How should an entity assess the credibility of a whistleblower’s complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Once allegations of fraudulent or unethical practice have arisen, it is advisable for the company to carry out some discreet checks and data scrutiny to find credible evidence that will back up the whistleblower’s complaint. If such evidence exists, the decision can then be taken to conduct a more thorough internal investigation.

There is no legal protection offered to whistle-blowers under UAE Law. Failure by an individual to notify the competent authorities about a crime of which they have knowledge is considered an offence under the UAE Penal Code. However, if the whistle-

blower's allegations are considered false and the allegations were made in bad faith, then the whistle-blower may face criminal charges as well as a civil claim from the party against whom the complaint is wrongly made. Despite this, with respect to a person involved in a bribe or as an intermediary there is some protection afforded if they immediately report the crime to the judicial or administrative authorities. In those circumstances, such a person can be exempted from punishment.

The limited protection offered to whistle-blowers, along with the potential penalties (both civil and criminal), often deters an individual from making a complaint that lacks credibility. For this reason, companies should always take a whistle-blower's complaint seriously and ensure that all reasonable steps are taken to assess its credibility. However, for companies with offices in other jurisdictions the existence of a fraud or bribery may give rise to a reportable violation in the US or the UK (in accordance with the FCPA or the UK Bribery Act). In those situations, it is common for whistle-blowers to report directly to the authorities in the US or the UK.

1.4 How does outside counsel determine who “the client” is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

In most cases, the company will engage external counsel to conduct the investigation and the company itself will be the “client” for the purpose of investigation. If during the course of the investigation any of the employees seek to be separately represented, then the company may assist and seek additional counsel. The company and external counsel would be responsible to manage any potential conflicts.

At the outset of the investigation, the company should establish a small and independent internal management team (comprising of senior individuals who have no involvement with the matters giving rise to the allegations or the individuals involved). Depending on the size of the investigation, the team will usually consist of one or more members of the legal team, the head of the relevant business unit, a representative from the IT department and a member of the human resources department. Communications between external advisors and the company should be limited to the internal investigation team in order to ensure confidentiality.

It must be noted that in a large number of corporate crime cases, the directors or senior directors (those managing the company's affairs) will be responsible for the alleged misconduct. In such circumstances, it is very often the parent company or shareholders who will enlist the assistance of external counsel and be the “client” to whom the findings will be reported.

2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

Pursuant to the UAE Penal Code, a party who takes the initiative to report to the authorities the existence of an offence before it is discovered by the Public Prosecutor, can be exempted from individual criminal liability. The Public Prosecutor, at their own discretion, may also dismiss a criminal complaint or abstain from prosecuting a briber or intermediary who informs the judicial or administrative authorities of the crime, or who confesses the crime before it is discovered.

Pursuant to UAE Central Bank and SCA regulations, directors or employees have knowledge of money laundering but fail to report will be committing a criminal offence.

In the UAE, early and consistent cooperation with the authorities may justify a less aggressive regulatory response and/or a mitigated penalty.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

When it becomes apparent during an investigation that a crime has been committed, pursuant to UAE Law, there is a legal obligation for the company and or the individual to inform the relevant authorities. Failure to notify the authorities is of itself an offence pursuant to the UAE Penal Code.

The main authorities involved in the prosecution, investigation and enforcement of fraud, bribery and corruption are the UAE police, the Public Prosecutor and the criminal Courts. Disclosure can either be made directly to the police in the Emirate in which the crime is committed, or directly to the Public Prosecutor. However, with some offences a report should also be made to the UAE Central Bank and the SCA. Importantly, all material submitted to the Authorities must be submitted in Arabic.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

A written report is not required by the authorities; however, where a company wishes to demonstrate a crime has been committed and to pursue criminal and/or a civil complaint against a ‘fraudster’, for example, a collation of relevant evidence will be necessary in order to file a complaint.

If, during the police investigation, the police or the Public Prosecutor require additional information, they have the right to request such information. Companies involved in litigation as a result of an investigation within the UAE, are not, however, under an ongoing duty of disclosure.

3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

During the investigation phase of any police or public prosecution investigation, individuals and companies must always co-operate with the authorities.

In addition, if certain offences have been committed, such as under the Anti-Money Laundering Law, then there is an obligation to inform the authorities of any such suspicious transactions. Cooperation with the authorities may justify a less aggressive regulatory response and/or a mitigated penalty; however, this is by no means guaranteed.

3.2 Do law enforcement entities in your jurisdiction prefer to maintain oversight of internal investigations? What level of involvement in an entity's internal investigation do they prefer?

Local authorities, once notified of alleged misconduct, will carry out their own independent investigation. This could take place in parallel to the internal investigation or, alternatively, the authorities may want to take control. The Public Prosecution is headed by the Attorney General, and directly or indirectly in charge of all criminal investigations. They are the only government body entitled to instigate criminal charges and subsequently prosecute.

3.3 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

It is not possible to limit the scope of a criminal investigation as the police have far-reaching investigative powers. The police have the power to collect all information and evidence necessary for the investigation of criminal offences. In terms of compelling disclosure, the UAE Penal Procedures Law gives the Public Prosecutor the power to order the accused to surrender anything that the Public Prosecutor deems is in the possession of the accused which should be seized. Usually, this will mean computer hard drives, physical files and passwords for online file sites must be handed over.

3.4 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

Federal Law No. (39) of 2006 on International Judicial Co-operation in Criminal Matters establishes a number of circumstances in which UAE state authorities can request assistance from judicial authorities.

Many global companies now implement standardised anti-bribery and anti-corruption policies (albeit with minor differences to comply with local laws) across each of their international offices. These policies recognise international best practice in dealing with investigations and responding to corruption allegations, in line with

local legislation, and legislation that possibly has extra-territorial reach. Global policies allow an organisation to adopt a coordinated and efficient approach should they face investigations in multiple jurisdictions.

4 The Investigation Process

4.1 What unique challenges do entities face when conducting an internal investigation in your jurisdiction?

One difficulty in conducting investigations in the UAE is the reluctance for individuals to cooperate. The limited protection offered to whistle-blowers, the strict penalties for false accusations or defamation and the risk of an individual losing their employment and residency visa (if their employment is terminated), can often make individuals hesitant to report allegations. Arabic is the language to use with respect to all Court proceedings, which will also extend to any public prosecutor and police interviews. This could mean that large amounts of evidence require translation in order to be submitted to the authorities or to Court with respect to a civil or criminal matter, and that individuals may feel intimidated when a translator is required.

4.2 What steps should typically be included in an investigation plan?

Once notified, the organisation should establish a small and independent internal management team (comprising senior individuals who have no involvement with the matters giving rise to the allegations or the individuals involved).

While there is no set structure to carrying out the investigation process and the methodology will depend on the facts, usual steps will include:

- testing the credibility of the complaint and assessing potential violations of law (in the event the allegation is proven) and establishing an Investigation Protocol to maintain confidentiality;
- gathering and preserving evidence;
- review of evidence;
- identification of key personnel and third parties critical to the investigation and initial interviews with each;
- consideration of evidence and identification of any potential disclosures required; and
- cooperation with the regulators and prosecuting agencies (if applicable).

4.3 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

Once the investigation has commenced, consideration should immediately be given to engaging specialists, including forensic consultants, IT experts and even public relations teams. Where investigations involve alleged bribery or corruption, factual discovery and legal analysis may need to be conducted quickly. This will almost always require the engagement of external legal counsel who will have the skills and experience to conduct a thorough and efficient investigation process.

5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

The concept of attorney-client privilege that exists in the UK or US is not recognised in the UAE. UAE Law does recognise the concept of “advocate-client” privilege, and appreciates that an advocate’s work product is privileged; however, this is not always applicable across the legal profession as an “advocate” is an Emirati local licensed to appear before the UAE Courts.

A licensed local Emirati advocate must not reveal any confidential information without the consent of his client, unless he has belief that his client intends to commit a crime. In addition, interrogating a licensed local Emirati advocate or searching his office is not allowed without the prior consent of the Public Prosecutor. However, this only applies to licensed local Emirati advocates who have the right to appear before the Courts of the UAE. Most legal professionals who work in the UAE tend to be categorised as “legal consultants” who are not afforded the same protection. Legal consultants include the majority of legal professionals who work at international law firms and who are not Emirati by birth. However, these legal consultants are also governed by their respective professional obligations depending on where they are admitted, which would include the duty of confidentiality.

In practice, it is very unlikely that the Public Prosecutor would oblige an attorney to breach confidentiality and the product of legal advice should not be provided readily to the authorities. Despite this, unless with respect to advice produced by a licensed Emirati advocate, theoretically the Public Prosecutor as part of a criminal investigation could direct the search and seizure of any documents which could assist the investigation of a criminal case.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

Confidentiality between the client and third parties engaged by outside counsel would be governed by the confidentiality terms under the agreement for services. There would also be an implied duty of confidentiality where a third party is instructed, however there are no special rules governing such a relationship and it is always prudent to ensure that the third party enters into an express confidentiality agreement.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

In-house counsel would be considered to be providing their services on an employment basis and there are no special protections addressing privilege. However, all employees have a duty of confidentiality to their employer and must not reveal secrets under the UAE labour law. As set out in question 5.1 above, privilege only attaches to work with respect to licensed Emirati advocates.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Marking documents “Privileged and Confidential” could go some way towards notifying any regulator that the parties intend the document to be privileged. However, working with a licensed local Emirati advocate (often under the instruction of an international law firm) may also help to protect confidential documents from disclosure.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

The results of an internal investigation will be kept confidential by the authorities. There is a possibility the internal investigation may be referenced in Court during the prosecution of a criminal case; however, documents used in criminal cases are not available to the public.

6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

The UAE does not have a specific “data protection law”. Certain federal laws recognise an individual’s right to privacy as well as protect companies confidential information. Such federal laws include criminal, civil, commercial and labour provisions.

An individual right to privacy is overarching and should be borne in mind when carrying out internal investigations. The UAE Penal Code prohibits publishing any information relating to the “secrets” of the private or family life of individuals, even if they are true.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Preserving all relevant evidence relating to the alleged offence will be crucial and will likely be requested by the authorities at some stage. Any gaps in data, either because it was lost, destroyed or is in the possession of a former employee, will impede the organisation from carrying out a full investigation into what happened and may prove detrimental to the company in any subsequent litigation. Although the UAE does not recognise in its laws or regulations the concept of a “preservation note”, companies should ensure that when they conduct an internal investigation all data is preserved.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

The factors that must be considered will depend on which jurisdictions are involved. Local legal advice should be sought in

each case. However, it should be noted that the UAE is not generally considered a jurisdiction with an adequate data protection regime with respect to EU law and caution should be used with transferring personal data to the UAE as part of an investigation.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

The types of documents deemed important for collection will depend on the allegations. Emails and other types of correspondence will usually be important in any form of investigation. If the alleged offence relates to corporate fraud such as embezzlement and money laundering, it will be vital to collate interim and annual financial reports, board of directors' reports, audit reports, balance sheets, cash flow statements, documents relating to the annual budget and profit and loss accounts.

The police have the power to collect all necessary information and evidence for investigation and indictment of criminal offences.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

The data review process can be assisted using a data management platform that allows for a proportionate and targeted review of documents uploaded on the company's systems – primarily emails and other forms of communications. eDiscovery is now assisted by complex technology that can be tailored to suit the type of investigation, including audio review, web-based review software and enhanced chat review. Predictive coding can be used to work with large-scale, multilingual corpuses. Such resources are often offered by external forensic teams.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

The data review process can be assisted using a data management platform which utilises predictive coding techniques. There is nothing prohibiting the use of such techniques. However, the Cyber Crime Law (Federal Law by Decree No. 5 of 2012) contains offences for the dissemination of any information obtained through "computer technology" without authorisation. In this situation, all forensic accountants and data reviewers must ensure they have the right to access, review and share (for example to external counsel) any of the data they extract and collate. If they fail to obtain, in writing, the appropriate authorisations, they may be held criminally liable for dissemination of confidential information.

7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Conducting interviews with employees (both current and former) is necessary in any internal investigation. There is no requirement to consult with authorities during an internal investigation.

Where the potential offence involves a transaction involving the proceeds of crime, then it is important to ensure that carrying out interviews would not amount to "tipping off" as set out in Federal Law No.(4) of 2002. Tipping off any person who was involved with a suspicious transaction that it is being scrutinised by authorities would amount to a criminal offence leading to fines and potentially imprisonment.

It is also important to note that covert recording in the UAE is a crime. Recording or copying any conversation conducted in private without the prior consent of the participants is regarded as an invasion of privacy under the UAE Penal Code. The person responsible for recording the conversation will be committing a crime and any evidence obtained through the recordings will not be admissible in Court.

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Under UAE labour law there is no specific requirement for employees to cooperate with their employer's internal investigations. However, there may be a term in the employee's employment contract that requires them to cooperate with an internal investigation and any failure to do so may be a disciplinary matter.

Failure for an individual to notify the competent authorities of a crime of which they have knowledge is a criminal offence under the UAE Penal Code. Moreover, any individual who, having knowledge of a crime, conceals any evidence of the crime, by delivering knowingly false information, shall be committing a criminal offence.

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

There is no requirement to provide legal representation to witnesses prior to internal interviews.

7.4 What are best practices for conducting witness interviews in your jurisdiction?

Interviews should be conducted by experienced interviewers and accurately recorded in a witness statement. The witness should sign his statement to confirm that the content of the statement is true and correct. Best practice in the UAE would be for the witness to sign each page of the statement and confirm that he is of sound mind and that the statement is made out of free will. Witness interviews should always be conducted with a minimum of three people in the room, so if required, the additional person can also affirm the nature of the interview and the answers provided by the witness.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

For internal investigations, you are not permitted to record the interviews, without obtaining the prior written consent of the witness. Although not required by law, you should consider the native language of the witness and provide a translator.

For any police interview, the language of the interview will always be Arabic, and translators must be requested by the witness. The

witness will be required to sign a statement at the end of the interview in Arabic, so they should always have it read for them in their native language.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

An organisation should take all reasonable steps to protect employees reporting suspected fraud or corruption. While there is limited statutory protection offered to whistle-blowers in the UAE, it is nevertheless advisable for organisations to have in place a comprehensive whistle-blowing policy which outlines the procedures a whistle-blower should follow in order to raise a complaint internally and the steps that the company will take to investigate such complaints. This will allow the organisation to protect the company's interests by ensuring that individuals are not treated detrimentally for raising suspicions of corporate fraud, while allowing the company to investigate such allegations before the competent authorities are notified.

During an investigation, information regarding the complaint and investigation should remain confidential and access should be limited to those individuals who require it (such as the internal investigation team). The identity of the whistle-blower should also be kept confidential and interviews conducted in private. The company should demonstrate that it will not tolerate any detriment to anyone reporting suspected corruption; and take action against individuals who threaten or cause action to any person reporting suspected fraud.

7.7 Is it ever appropriate to grant "immunity" or "amnesty" to employees during an internal investigation? If so, when?

It is not possible for an employer to grant "immunity" or "amnesty" to an employee if it arises that the employee has committed or been involved in the commission of a crime. The decision as to whether or not to prosecute individuals for criminal offences in the UAE is the sole decision of the Public Prosecutor and, in some cases, the Attorney General. However, it would be theoretically possible for an employer to agree not to bring a civil claim against that employee, such as by entering into a settlement agreement.

7.8 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

For Public Prosecutor interviews, see comments at question 7.5 above.

When conducting an internal investigation, a witness should sign their statement confirming that the content is a true reflection of the interview and their recollection of facts. A witness should therefore thoroughly review the statement to ensure that it is correct before signing. A witness may be required to give evidence in Court or again to the Public Prosecutor, and if the Company wish to rely on the witness statement in any subsequent proceeding, it should also be recorded that they are willing to do this. The statement should be witnessed by all the people in the room at the time of the interview.

7.9 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

There are no special requirements concerning witness interviews for internal investigations.

8 Investigation Report

8.1 Is it common practice in your jurisdiction to prepare a written investigation report at the end of an internal investigation? What are the pros and cons of producing the report in writing versus orally?

No. It is usual for companies to require for internal records, an outcome-based report only with a record of the outcome of the investigation.

8.2 How should the investigation report be structured and what topics should it address?

See above at question 8.1.

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