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M&A ACADEMY: CONDUCTING COMPLIANCE INVESTIGATIONS IN CHINA AND THE REGULATORY ENVIRONMENT

K. Lesli Ligorner
Todd Liao
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Compliance Investigations in China

Anti-Corruption Investigations – FCPA, UKBA and China anti-corruption campaign

Revenue Recognition investigations

Employment Investigations

- Fraud
- Embezzlement
- Conflict of interests
- IP theft

Antitrust Investigations

Other Regulatory Investigations

- Cybersecurity and Data Protection
- Export Control
- Customs
- Tax
- Product registrations (CFDA)

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The China Risk Factors

- High risk country on corruption and continued FCPA enforcement focus
- The “New Normal” under President Xi’s anti-corruption campaign and inconsistent local enforcement practices
- “The Enemy Within” - the devil gets wicked
- 2018 - Three antitrust regulators (MOFCOM, NDRC and SAIC) merged into one

When should you conduct an internal investigation?

The source of compliance red flags:

- Internal or external whistleblower reports
- Employee exit interviews
- Findings in audits and due diligence
- Improper requests from employees or third parties
- Government investigations or inquiries

Whether an internal investigation is needed and the allocation of resources:

- Did you turn a blind eye to a red flag vs. leaving no stone unturned
- The “China risk factor” vs. false alarm with ulterior motives
- Risk-based approach and outside counsel opinion

Are you TRULY ready for an internal investigation?

- We have a global code of conduct in English which applies to all of our subsidiaries, including those in China.
- What do you mean my Employee Handbook in China is not legally binding even if we translated into Chinese, posted on our website and sent it to all employees by e-mail?
- We don't have a privacy policy tailored for China. We never asked our employees to sign a privacy consent form.
- We don't have a specific policy about using WeChat in China. I am told that everyone in China uses WeChat, and a strict "No WeChat policy" is impossible.
- We don't have a conflict of interest policy, and we didn't think one is needed. We do not require our senior management to sign conflict of interest disclosure letter on an annual basis.
- We require all of our employees to conduct online Code of Conduct training, and that's about the breadth of the compliance trainings we do.

Key Issues in Managing Compliance Investigations in China

Attorney-Client Privilege Issues

- Why does it matter?
- Is the concept of “privilege” recognized under PRC law?
- Understood by local employees and local counsels?
- Use of (internal and external) auditors and other vendors in the investigation
- The China Joint Venture dilemma – how much can / should you disclose to your Chinese partner while protecting privilege?
- Disclosure to U.S. and Chinese regulators and waiver of privilege

Key Issues in Managing Compliance Investigations in China

Data Collection, Storage, Transfer and Review

- Should you send a litigation hold memo before collection?
- How far should I go? Server e-mail, laptop hard disk, cell phone short messages, WeChat contacts and messages.
- Notarization of data collection process
- Can the employees refuse to cooperate? What can / should the company do if they do refuse to cooperate?
- Should the data be hosted locally? Can I transfer the data collected in China to the U.S. for further review? What about sending a copy to the U.S. or having someone from the U.S. to remotely access the data stored in China?
- What is state secret review and when is it required / recommended?
- What is cybersecurity assessment and when is it required / recommended?
- Review of documents in Chinese and other languages
- Doing a thorough document review vs. keeping costs under control

Key Issues in Managing Compliance Investigations in China

Interviews

- Timing of the interviews
- Order of the interviews
- Who should conduct the interviews and the language of the interviews?
 - Flying lawyers in from abroad
 - Local Chinese lawyers
 - Dual qualified lawyers
- Who else can / should attend the interview?
 - In-house counsel?
 - Executive from China or APAC?

Key Issues in Managing Compliance Investigations in China

Employment Considerations

- PRC Employment Law 101
- Evidence of wrongdoing vs. evidence to sustain a termination
- Unilateral termination vs mutual termination agreement
 - Can / should the company pay severance to terminated employees to avoid labor arbitration and lawsuits?
 - “Skeletons in the closet”
 - Risks of litigating this issue in public forum
 - Whistleblower concerns
- Can a mutual termination agreement include:
 - Confidentiality and Non-Disparagement Clause?
 - Prohibition against Disclosure to Authorities?

Key Issues in Managing Compliance Investigations in China

Self-reporting and Disclosure Obligations – US vs. China

- Is there an express obligation to self-report under Chinese law?
- Is self-reporting recommended in China?
 - Leniency – legend vs empirical data
 - Predictability on process and outcome
 - Control over process, scope
 - Protection of privilege
- Are there any exceptions to the general rule?

Are you TRULY ready for an internal investigation?

Issues to consider:

- Legally binding and applicable work rules/Code of Conduct
 - Inclusion of conflict of interest policy and mandatory disclosure requirements
 - Mandatory trainings
- Applicable monitoring policy and data collection consent forms
- Social media policy within BYOD policy
- Expense reimbursement policy and regular audit of expenses

Q&A

Biography



K. Lesli Ligorner
Partner

Shanghai

T +86.21.8022.8777

lesli.ligorner@morganlewis.com

K. Lesli Ligorner serves clients on a wide range of labor and employment matters involving hiring and termination, establishment and enforcement of company policies, the Foreign Corrupt Practices Act (FCPA) and local anticorruption compliance, and discrimination and harassment policies, training, and investigations.

She also advises on global mobility and immigration, employment and anticorruption due diligence in mergers and acquisitions, leaves of absence, wage and hour laws, intellectual property protection, and unionization and collective bargaining.

For three consecutive years, Lesli was listed as one of the “Attorneys Who Matter” in the labor and employment category by the Ethisphere Institute,. She has also been listed in *Chambers Global* and was named “Lawyer of the Year” for Labour & Employment by *China Law & Practice* and *AsiaMoney Women in Business Law*.

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Biography



Todd Liao
Partner

Shanghai

T +86.21.8022.8799

Todd.Liao@morganlewis.com

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Todd Liao works with clients on a wide range of financial transactions and legal issues involving China. He frequently works with multinational corporations on cross-border mergers and acquisitions, foreign direct investment and investment financing, disposal of Sino-foreign joint ventures and assets, and the structuring of complex commercial transactions. Todd also handles intellectual property (IP) work, specifically assisting clients with managing their trademark portfolios. He is admitted to practice in New York only.

In addition, Todd counsels on matters related to the US Foreign Corrupt Practices Act (FCPA) practice in China and throughout the Asia-Pacific region. He advises multinational corporations regarding compliance with the FCPA and other regulatory compliance matters including policies and practices, gifts, travel and entertainment policies and violations, third-party due diligence issues, managing and conducting investigations of alleged FCPA violations, whistleblower investigations, and employee disciplinary actions. He also conducts FCPA training in multiple languages and regularly presents at industry conferences.

He is fluent in Mandarin Chinese, English, Shanghainese, and Cantonese.

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