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The Contours of Conducting Internal Investigations in India

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1. An Introduction to the Legal Regime

Scams of the past decades, be it the Satyam or Harshad Mehta rip-offs or even the downfall of Jordan Belfort, are often followed by a question – could it have been avoided?

With the prominent increase in white collar offences, rigorous mechanisms for curbing such offences have got a kick start. In India, listed companies are required to comply with the disclosure obligations as mandated by law, i.e. the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (**"SEBI Disclosure Regulations"**), which have been amended from time to time to cater to the changing needs. This is in addition to the existing regulations for countering instances of insider trading,[1] frauds and similar practices in the securities market.[2]

To address the plethora of concerns pertaining to proper governance of a company, the Companies Act 2013 provides for certain steps towards mitigation of risks of corporate frauds and offences. These include:

a. Vigil mechanism for directors and employees to report genuine concerns to the Audit Committee along with adequate safeguards against victimisation of persons who use such mechanism and provisions for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases.[3]

b. Formulation of a Risk Management Policy for identification of elements of risk, if any, which in the opinion of the Board of Directors may threaten the existence of the company.[4]

c. Provision for class action suits by certain members or depositors or any class of them, who are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors.[5]

d. Reporting by auditors - of the fraud committed against the company by officers or other employees of the company.[6]

e. Appointment of independent directors in certain companies,[7] who are required to report the concerns pertaining to unethical behaviour, actual or suspected fraud or violation of the company's code of conduct or ethics policy, hold separate meetings at least once in every year to review the performance of non-independent directors and the Board as a whole.

I. The Keepers of Law

Irrespective of the recent inclination towards good corporate governance practices, offences and similar disruptions within an organization are inescapable. Therefore, several authorities have taken the lead in dealing with white collar crimes and offences related to a corporation. The Serious Fraud Investigation Office (**"SFIO"**) constituted under the Ministry of Corporate Affairs, is the pioneer in conducting investigations in cases of fraud in companies. More so, the Companies Act, 2013 envisages a procedure for investigation into affairs of a company. Notably, the SFIO would commence an investigation:

1. See, SEBI (Prohibition of Insider Trading) Regulations 1992
2. See, Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003
3. Companies Act 2013, s 177 (9), (10); The Companies (Meetings of Board and its Powers) Rules 2014, r 7; SEBI Disclosure Regulations, reg 22
4. Companies Act 2013, s 134(3)(n)
5. Companies Act 2013, s 245
6. Companies Act 2013, s 143(12), (15)
7. Companies Act 2013, s 149 (4), Schedule IV; Companies (Appointment and Qualification of Directors) Rules 2014

- on the report of the Registrar;[8]
- in matters involving public interest;
- on request by the State/Central Government or any department thereof;
- on a special resolution being passed by a company necessitating the fact that the affairs of the company required investigation.[9]

Under the Companies Act 2013, the Registrar of Companies is empowered to conduct inspection, inquiry and investigation into the affairs of the company, on a scrutiny of any document filed by a company or on receiving any information in this respect.[10] The Registrar may also appoint an inspector as and when required, for conducting such inquiry.

Additionally, there are several other regulators and authorities, statutorily empowered to conduct investigations, some of which are enlisted below:

- Securities and Exchange Board of India, which regulates the securities market.[11]
- Central Vigilance Commission under the Prevention of Corruption Act 1988[12]
- Enforcement Directorate for foreign exchange and money laundering offences[13]
- Central Bureau of Investigation[14]
- Income Tax department
- Reserve Bank of India
- Competition Commission of India, in respect of matters that are or possibly in contravention of the Competition Act 2002, i.e. anti-competitive.

Interestingly, important legislations like the Prevention of Corruption Act 1988 and Whistleblowers Protection Act 2011 address corruption and its reporting in state/union bodies,[15] keeping employees of private companies outside the purview of these mandates and obligations. Nevertheless, companies and/or the employees, as the case may be, would be subject to the provisions of the Indian Penal Code for cheating, criminal breach of trust, forgery, falsification of accounts, misappropriation of funds, cheating etc.

The Foreign Corrupt Practices Act 1977 (**"FCPA"**) of the USA has a wider applicability, which extends to both U.S. companies engaging in international business and their foreign counterparts. This would include U.S. companies doing business in India, which would be required to have in place risk assessment program thorough due diligence investigation, a well-designed compliance program, strong internal controls and continued focus on effective compliance. Notably, the UK Bribery Act 2010 extends to private citizens as well as public officers.

II. Understanding internal investigations

Apart from mandatory legal requirements for directors, auditors to disclose relevant facts and information pertaining to any allegation of any or more of the above, information pertaining to such concerns may be in the form of:

- internal complaints made by employees, or any other member of the organisation; or
- external complaints (those raised by stakeholder(s)); or

8. Companies Act 2013, section 208
9. Companies Act 2013, section 212
10. Companies Act 2013, s 206-229
11. SEBI Act 1992, s 11 (3) and 11-C
12. Also see, Central Vigilance Commission
13. See, Foreign Exchange Management Act, 1999 and Prevention of Money Laundering Act, 2002
14. See, Delhi Special Police Establishment Act 1946

15. The Supreme Court of India in *CBI v. Ramesh Gelli & Ors*, 2016 (3) SCC 788 held that employees of banks (including private banks) are considered as public servants for the purposes of the Prevention of Corruption Act 1988.

- complaints from whistleblowers[16] who may or may not be a part of the said organisation; or
- disclosures made during the audit; or
- *suo motu* cognizance of such offences taken by the company.

These complaints could be premised on any or more of the following instances:

- Misconduct
- Criminal offences (fraud, corruption, bribery, criminal breach of trust, cheating or theft) – including dishonest practices of directors, promoters, investors etc.
- Breach of confidentiality within the corporate entity
- Infringement of Company's rules, charter documents, codes & policies
- Manipulation/ tampering of official documents/financial records
- Misappropriation of accounts and funds, or misuse of assets of the company
- Illegal payments to vendors/contractors;
- Unethical business conduct;
- Falsification of transactions/ documents and forgery;
- Fund embezzlement;
- Money laundering;
- Insider trading and market abuse;
- Harassment;
- Health and safety issues

Such instances would undoubtedly result in opprobrium and financial losses to a company. On receipt or cognizance of such offences, the company is obliged to take notice of the same.

The subsequent portion of the paper throws light on the need for a company to ***Stay Alert! Stay Ahead!*** and how to go about it.

16. The Whistleblowers Protection Act 2011 establishes *"a mechanism to receive complaints relating to disclosure on any allegation of corruption or wilful misuse of power or wilful misuse of discretion against any public servant and to inquire or cause an inquiry into such disclosure and to provide adequate safeguards against victimisation of the person making such complaint and for matters connected therewith and incidental thereto."*

    However, this enactment does not extend to whistleblowers furnishing information in a private organization. Nevertheless, Clause 49 of the Listing Agreement makes it mandatory for listed companies to have a whistleblower mechanism in place.

2. Why conduct investigations?

Economic offences have taken a stride in today's market, more so, with the far-reaching developments in technology. In a recent survey conducted by PricewaterhouseCoopers, 51% of the Indians under survey perceived an increased risk of cybercrime over the past two years; and 61% of the economic crimes in India were found to have been committed by employees within an organisation.[17]

When there is a disruption in the normal course of events, there is always a requirement for a preliminary understanding of the situation detected or complained of – to assess if it amounts to any kind of violation of law or policy, and to what extent, or if a formal complaint is required. Internal investigations are the forerunners in nipping the evil at the bud before it is aggravated or there is an unanticipated reporting by whistleblowers with the authorities, and are effective vaccines against unwanted and embarrassing raids and searches by authorities. Most importantly, a timely internal investigation would also demonstrate good housekeeping action and therefore may operate as exclusion of the company from any kind of accusation that might have been raised against the company.

Additionally, internal investigations assist in ensuring:

- Check on the persons involved with the acts or omissions complained of;
- Detection of erring personnel in complaints received by third parties, i.e. in cases of allegations of breach of confidential information of a third party by the company;
- Establishment of an element of trust and confidence within the company as well as externally, that the company conducts its affairs in a reasonable and objective manner. The right quantum of objectivity and transparency would instill faith in the organisation itself.
- A discreet assessment of the affairs of the company for reasons, *inter alia*, reputation of the entity, retention of trust of concerned employees etc. Further, it is often perceived that a publicized form of investigation might also lead to evidence being tampered or further breaches of the norms by employees who might draw inspiration from the conduct of the employees under investigation.

Most importantly, such investigations lead in detection of the root cause of a complaint and preventing further detriment resulting from such conducts of employees, than to merely punish the concerned employees. Thus, such investigations would give way to *"lessons learnt"* from the allegations made, and ensure compliance with the applicable laws. All in all, the goodwill of the company would be sustained and emerge as a valued asset to the company.

17. 'Global Economic Crime Survey 2016: An India Perspective' (PricewaterhouseCoopers) <https://www.pwc.in/assets/pdfs/publications/2016/pwc-global-economic-crime-survey-2016-india-edition.pdf> accessed 10 August 2017

3. How to choose your investigation team

Auditors, human resources or compliance personnel, in-house counsel, external lawyers and forensic/accounting firms are often seen as suitable options for conducting investigations.

To minimize the possibility of bias that may be present in case of investigations by HR Managers or in-house counsels (who would be familiar with the functioning of the company and the employees and probably the incident under scrutiny), an independent external investigative team is preferable.

Besides the credibility that flows from engagement of external lawyers who would be well-equipped with similar exercises, such external lawyers are equipped to discuss and advise concerned officials of the company on the future course of action, as corrective measures. The key takeaway from the engagement of external counsel is the possible protection of ***client-attorney privilege*** as applicable in the relevant jurisdiction. The extent of privilege available in case of in-house counsel would be limited.

With the specific expertise that may be required during the investigation – ranging from data collection to server analysis, accounting irregularities and misstatements - engagement of appropriate experts (including forensic experts) gains paramount importance. Notably, to protect the communication with such experts as privileged, their engagement should be through the external counsel. Thus, such external lawyers along with the expert would constitute the investigation team. Needless to state, the existence of *client-attorney* privilege would, of course, depend on the factual scenario.

4. How privileged is the investigation?

Section 126 of the Evidence Act provides that:

> *Professional communications.—No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:*
>
> *Provided that nothing in this section shall protect from disclosure—*
>
> *Any such communication made in furtherance of any illegal purpose;*
>
> *Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.*
>
> *Explanation.— The obligation stated in this section continues after the employment has ceased.*

The objective behind such privileged communications is to promote a relationship of trust between the client and his attorney.[18] Thus, the company, as a client availing legal services of an attorney for conducting investigation within the company, would be entitled to the client-attorney privilege. Thus, the documents created during the investigation or the outcome of the investigation in the form of a report or otherwise would, in the general circumstances, be protected. The obligation of the external counsel to maintain confidentiality would not cease even on termination of the engagement of the external counsel. The scope of this privilege would also extend to the documents referred to by the external counsel unless preferred otherwise by the company itself. The extent of privilege differs across jurisdictions and plays a crucial role especially in cases where it involves the interplay of several laws.

I. Upjohn Warnings

These warnings are given to the employees, with whom a lawyer would communicate during the investigation. The employees are informed that the *attorney-client privilege* would be preserved between the company and its attorney when its attorney communicates with the company's employees, despite the rule that communications with third parties constitute a waiver of the *attorney-client privilege*. An Upjohn warning would entail details that such privilege would not extend to the employees per se and the external counsel represents only the company and not the employee individually. Additionally, a Legal Hold notice would also ensure preservation of relevant documents/information. Moreover, the company may, on its own accord, opt to waive such *client-attorney privilege* (for example, when it has to report the authorities of a fraud detected in the investigation, thereby disclosing the information received, including from the employee).

II. Privileged, but to what extent?

The next question under consideration is: *Whether everything prepared or used in an investigation amenable to privileged communication?*

18. *Upjohn Co. v United States*, 449 US 383, 389 (1981).

In a recent English case,[19] in the proceedings between the Serious Fraud Office (**"SFO"**) and Eurasian Natural Resources Corporation Limited (**"ENRC"**), ENRC unsuccessfully attempted to protect documents created during internal investigations into suspected bribery and corruption, claiming legal professional privilege. The court ascertained the following:

> *"51. Litigation privilege can protect communications between parties and their solicitors or third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation as long as, at the time of the communication:*
>
> *litigation is in progress or reasonably in contemplation (i.e. not necessarily more likely than not, but more than a "mere possibility" – there must be a "real prospect");*
>
> *it is made with the sole or dominant purpose of conducting the actual or anticipated litigation; and the actual or anticipated litigation is adversarial, not merely inquisitive, in nature."*

Thus, documents prepared on factual accounts of things rather than legal advice sought or provided – would not be protected under client-attorney privilege.

A similar approach had been adopted in *Re the RBS Rights Issue Litigation*[20] *where the company attempted to protect the interview notes from disclosure.*

Following the above principles, verbatim transcripts or summaries which do not provide any advice, would not be "privileged" (unless the employee is also a "client" having the authority to instruct the lawyers).

Even though some might suggest the company to dispense with detailed documentation of employee interviews/recording, it would be an impractical idea to do so, especially in major or complicated investigations.

On a related note, the Bombay High Court observed that:

"*Documents [which] have come into existence in anticipation of litigation for the purpose of seeking legal advice and for use in the anticipated litigation for the purpose of defence or for the purpose of prosecuting that litigation"* would be protected under the ambit of *"privileged communication."*[21]

The Bombay High Court relied on the test laid down by Barwick CJ in *Grant v. Downs*,[22] which is as follows:

> *"a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time or its production in reasonable prospect, should be privileged and excluded from inspection...*
>
> *...the fact that the person...had in mind other uses of the document will not preclude that document being accorded privilege, if it were produced with the requisite dominant purpose."*

Further, the investigation report should also clarify on who the client is and consequently, to whom the client-attorney privilege extends.

19. *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017*
20. *[2016] EWHC 3161*
21. *Larsen & Toubro Limited v. Prime Displays (P) Ltd., Abiz Business (P) Ltd. and Everest Media Ltd.* (2003) 105(1) BomLR 189
22. [1976] HCA 63

5. Guidelines for Conducting Investigations

In India, there are no statutory mandates or procedural directives for conducting internal investigations in a company, except for the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.[23]

Most of the corporates as on date, provide for a grievance mechanism, whistleblower policy or otherwise, which is usually inclusive of an investigation procedure and the internal code of conduct governing the entity. They generally require investigation by a committee, which may or may not include involvement of the Audit Committee. The nomenclature of such committees is not always consistent, e.g. some companies provide for Redressal Committee, while some others provide for Internal Complaints Committee.

Owing to the highly subjective nature of the investigations under consideration, there is no set mechanism or strict procedure which needs to be adhered to, for conducting such investigations. In this regard, broad guidelines (in aid of investigation subsequent to the formation of the team of investigations), which are to be read along with the internal policies of the concerned corporate entity, are as under:

Step 1: Collation of information

Prior to initiation of any investigation, necessary information and relevant documents need to be identified and assembled. Persons in possession of relevant information would also need to be identified and a legal hold notice should be served upon them to ensure that they are notified not to delete relevant data in their possession. This would enable in marking up the information that is missing or needs to be gathered in the course of investigation for the sake of completion and assessment of the issues in question.

Such information may be in the form of documents in hard copies or in electronic format in computer storage devices or online or devices like cell phones, laptops etc. Depending on the extent to or intensity with which data collection is required, data collection experts may also be engaged. This would also ensure ease in forensic imaging of data available, so that details pertaining to creation of a document, edits, subsequent access or destruction may be detected.

To avoid potential legal hassles and unwarranted obstructions, consent of the concerned employees should be taken before tracing the information in their possession (which may be dispensed with in the event of a written consent in the employment contract itself) especially in case of extraction of company's data from personal devices. To this end, custodian interviews may be conducted.

Step 2: Verification from the source and review of information

On receipt of a complaint or any information which might trigger consequences detrimental to the interests of the company, careful scrutiny of the source and relevant documents is of prime importance. Minute perusal of the documents is required – including but not limited to mails/ correspondence exchanged between the subjects of investigation with persons within the company or with third parties. This will enable a better understanding of the background and most importantly, if the information/complaint makes a case fit for investigation or, if it is just another case of the boy who cried wolf.

At this stage, sufficient confidence is required to be built in the informant/complainant (along with protection of his interests). The veracity of the information provided will have to be tested.

23. This enactment requires constitution of an Internal Complaints Committee in every organization with ten or more employees, and also details the procedure for complaints and subsequent enquiries and actions to be adopted on receipt of such a complaint.

Step 3: Structuring the scheme of investigation

Prior to the investigation, based on the information received (oral as well as documentary), broad terms for conducting an investigation have to be drawn up. This would have to consider the following concerns:

- Who has to be investigated – this would include the informant, if required, the person (s) against whom allegations have been levelled (the accused), the relevant witness (es) and any other person who might be aware of the matter being investigated. During the investigation, the need to interview additional persons may also arise, thus, the list of interviewees would only be tentative at this stage.
- The objective and scope of the investigation. This is prepared considering the nature of the information sought, sensitivity of the issues, and the manner in which the organization functions.
- The issues under consideration, the laws, policies that need to be examined.
- Materials required for conducting the investigation.

Upon review of the data, a tentative list of questions as well as topics on which clarity is required is usually prepared and become handy at the time of investigation; however, it should be flexible enough to attune it to the needs that may arise during the investigation (especially based on the responses received from the interviewees). The questions would have to be different for the informant, the witnesses and the accused. Accordingly, the sequence in which, the concerned persons need to be interviewed have to be determined.

Meanwhile, the location, language (translators may have to be engaged whenever necessary) and format of the investigation has to be finalized, for which the convenience of the concerned persons should be prioritized. As to the format of the investigation, it would greatly depend on the subject matter and purpose of the investigation, and preferably in-person, and only in unavoidable circumstances should they be over video-conference. Telephonic media would, by all means, be inadequate substitutes. Videography of the investigation may be done, which would, however, depend on the consent of the interviewees.

Step 4: Engagement of experts

Engagement of experts adds immense value to the investigation of matters pertaining to a company – for example, the role of experts in computer forensics gains significance where involvement of multiple parties is deciphered or where the source of the misconduct or the duration for which such irregularities have been undertaken - needs to be specifically traced by way of electronic discovery and digital evidence recovery. Similarly, in case of frauds in books of accounts/records and similar offences, assistance of accounting firms would enable a better understanding the documents under review and the nature and quantum of fraud or misappropriation. Likewise, for understanding technicalities, an expert in the concerned industry would have to be sought for.

Step 5: The Interview

Irrespective of the often clandestine nature of such investigations, it is always preferred to inform the interviewees of the investigation to help them prepare themselves and more importantly to ensure their presence. A broad introduction of the subject matter of the investigation and interviewers should also be conveyed to the persons concerned. The interviewees would have to be explained the Upjohn warning and the confidential nature of the investigation. Sufficient clarity ought to be placed on the table on the client-attorney privilege including the extent to which such privilege would apply, i.e. the privilege exists between the counsel and the company engaging the counsel, and that it does not extend to the individuals being interviewed or subjected

to the investigation.[24] Further, it should also be informed that the company would have the option to waive any such client-attorney privilege when it deems fit.

The extent to which notice of the interview ought to be given to the interviewee, often varies from case to case. In some cases, it may be preferable to give a short notice for the interview with basic details related to the interview. However, the same approach would not be applicable where the interviewees are expected to bring additional information along with them.

Additionally, instructions that making false statements during the interview or producing falsified documents could result in criminal prosecution should also be made.[25] This may not be in the nature of an actual Miranda warning, to avoid instilling fear and suspicion in the mind of the interviewees.

Background of the interviewees

An overview of the background of the persons under investigation may also have to be done to apprise oneself of any record which could be directly or indirectly related to the on-going investigation. Meanwhile, they would also have to be informed of the need for maintaining highest standards of confidentiality and requested to extend co-operation in the investigative process.

The right approach towards interviewees

Above all, best endeavors would have to be made for developing rapport and a zone of comfort and trust with interviewee(s). Best practices require the questions to be put forth as an *"interview"* and not as an *"interrogation"* to the subjects under investigation.

The investigation ought to be done in a non-intimidating manner, keeping the interviewees at ease. Further, it would not be prudent to expect admissions by the accused during the investigation. At no point, should the interviewer pre-judge or infer conclusions even before arriving at the outcome of the investigation.

Ensuring smooth functioning of the investigation

Persons under investigation have to be apprised of the precautions to be observed to ensure smooth functioning of the investigative process. This needs to be ensured along with the concerns of internal exchange of information or data, which might disrupt the investigation. At the time of initiation of the investigation, it is always advised to inform the concerned persons to not share or circulate any document, information or any data, in any form, which would be related to the investigation. Thus, preservation of all forms of records including electronic data, gains utmost importance, prior to as well as during the pendency of the investigation. For example, the Legal Hold is applicable for the period of conduct that would still be within the statute of limitations of a potential criminal case in the US. The statute of limitations for bribery under the FCPA is five years. Therefore, the beginning date for the Legal Hold would start with five years prior to the investigation or for the period in respect of which, the grievance has been complained of.

Ensuring confidentiality

Undoubtedly, the underlying essence of any investigation is confidentiality, which has to be ensured not just by the investigators/interviewers but also the persons subjected to investigation, so that the relations aren't strained and the smooth functioning of the corporate entity is not disrupted.

Further, such persons ought to be suggested that the proceedings of the investigation should not be discussed with fellow employees or parties (who may or may not be interested in the investigation).

24. See discussion under part 4.1 of this paper

25. Sehyung Daniel Lee, 'The Benefits of a Miranda-Type Approach to *Upjohn* Warnings' (30 April 2012) available at ‹http://apps.americanbar.org/litigation/committees/commercial/articles/spring2012-0412-benefits-miranda-warning-upjohn-warnings.html› accessed on 20 August 2017

If confidentiality is not maintained it could ignite disbelief and mistrust among the employees in the organization. Therefore, honest and unadulterated/untainted responses would not be obtained. Responses that are fabricated and rehearsed would, for obvious reasons, defeat the purpose of the investigation. Thus, to maintain confidence and credibility – confidentiality is manifestly indispensable. Further, absence of confidentiality could be a factor in undermining the reputation of persons under investigation and of the company, as a whole, even before the veracity of the complaint has been tested.

Legal representation on behalf of the interviewee

If the investigation is being conducted by an external counsel or panel, the interviewee might request for legal representation, which may also be adhered to. However, the situation would be different if the interview is being conducted by the Human Resources team (e.g. the HR Manager).

Anticipate the curiosity and cliffhangers

The persons being interviewed would have general questions like – what is the purpose of the investigation, are the responses being recorded, if he can seek help from a lawyer for protection of his interests, what would the outcome be, if he would be punished for his actions or what would the punishment be (especially if he has confessed). There may also be an enquiry into the consequences of choosing not the respond to all or few questions and who would be reported of the outcome of the investigation.

Further, there may be incorrect or fabricated responses – which would have to be countered with relevant facts and evidence (including documents and CCTV recordings). Appropriate questions would have to be prepared for incomplete responses as well.

Intervention by the company

For situations that have not been previously anticipated or fall outside the scope of the terms of reference or scheme of investigation, the investigator would ideally revert to the company for further instructions and directions. For example, there may be a case, where a conflict situation (i.e. conflict of interests between the interviewer and the interviewee) arises, which is detected in the course of the investigation.

There may also be circumstances where the need to interview an additional person may be required, which may not be known prior to the investigation and pops up in the course of the investigation.

Bourne Ultimatum

For a smooth conclusion of the investigation, a similar spirit has to be continued even on completion of the investigation as at the start of it, so that the comfort zone of the interviewees is not disrupted. It is always possible that if the investigation concludes on a spiteful note, it could lead to deleterious consequences including destruction of evidence by the accused or acts of vengeance against the informant or the company itself. Retaliatory measures would, by all means, undermine the success of the investigation.

Additionally, the need and significance of preservation of evidence along with assurance to maintain confidentiality even on conclusion of the investigation, has to be instilled in the interviewees. Additionally, they would have to be requested to immediately report any actual or perceived retaliation, or subsequent irregularities or offences.

Step 6: Drawing inferences and preparing the investigation report: The method should be founded upon the observation of trifles

On conclusion of the investigation, interview memos may have to be prepared, laying down the details of the interviews conducted. If prepared, such memos ought to be factual and not opinionated. However, contradictory statements and incomplete responses would usually be included along with the other significant events like the interviewee broke down or turned abusive, or remained silent. The demeanor of the witness plays an important role and should carefully be observed.

As *Agatha Christie* would say,

> *"Yes, it is very true, that. And it is just what some people will not do. They conceive a certain theory, and everything has to fit into that theory. If one little fact will not fit it, they throw it aside. But it is always the facts that will not fit in that are significant."*

Thus, the mis-fits have to be specially attended to, following which the missing links and connecting dots are to be deftly allied. This, obviously, does not have a defined format. Similarly, conflicting responses and behaviour would also have to be reconciled.

Above all, the investigation process must be tailor-made and sufficiently customized, to meet the requirements of the facts and circumstances of every case.

If it is deemed necessary and/or advisable to prepare an investigation report, some components to be included are as under:

- *Details of persons conducting investigation (also specifying the client engaging the services)*
- *Confirmation on conflict check, as done prior to the investigation*
- *Background to the investigation*
- *Precautions and internal controls, if any, adopted by the company*
- *Specify the date, time, duration, and location of the interview*
- *Names all persons who were interviewed. Also specify if any person could not be interviewed or kept anonymous, along with reasons.*
- *Person (s) present during the interview*
- *Methodology followed for conducting the investigation*
- *Evidence collected and relied on (specification on the evidence which could not be collected with reasons)*
- *Instructions given to the witness; disclaimers or additional information, e.g. indications of inclusion of the interviewers' opinions and assessment. Such explicit references and clarifications would ensure non- disclosure to third parties emanating from attorney-client privilege.*
- *Summarize the evidence - information conveyed by the witness, as well as the documentary evidence*
- *Specific conclusion(s) corresponding to each key issue*
- *Summary of findings with references to interview memos/narration – facts established and those which could not be established, including potential breach, if any.*
- *Supporting documents*
- *Subject to the scope of the investigation, corrective/remedial measures as may be advised may also be recorded.*

6. The sequel to internal investigations

The onus of the company does not end with the investigation conducted but to proceed with the subsequent steps as required by it under law. The purpose of such internal investigations is primarily to map out the existing set of facts and possible course of action, which may be statutorily required, pursuant to a fully-informed decision. Pursuant to the investigation, if an irregularity is detected, the company is clothed with the prime responsibility to balance its interests to avail minimal liability and preservation of goodwill, reputation, with that of its obligations to report the authorities of the outcome of the investigation – for which, it might have to waive the client-attorney privilege.

Post completion of such an investigation, suitable actions and corrective measures would have to be decided, which could be lodging complaints with appropriate authorities or termination/ suspension of erring employees or let them off with warnings or cessation of contracts, if the offence is by a third party. This would depend on the gravity of the offence committed, extent of involvement of the concerned persons, policies of the organization etc. This would be accompanied by requirement of show cause notices or charge-sheets inviting responses from the concerned employees.

On another level, the findings of the investigations may have to be disclosed to the concerned authorities. This would immensely depend on the nature of irregularity or offence detected, the designation of the concerned persons (the responsibility held by the concerned personnel), the potential exposure of the company and other personnel. Self-reporting to the concerned authorities, gains relevance especially in cases of serious frauds, corruptions or criminal acts.

The outcome of the investigation would enable the organization in deciding if the offence has to be reported, and the proper authority[26] before which such reporting has to be made. For example, the Reserve Bank of India has issued a Master Circular[27] which states:

"Public sector banks should report fraud cases involving amount of INR 300 lakh and above to CBI and those below INR 300 lakh to local police, as detailed below:

Cases to be referred to CBI

a. *Cases involving INR 300. lakh and above and up to INR 2500 lakh*

- *Where staff involvement is prima facie evident – CBI (Anti-Corruption Branch)*
- *Where staff involvement is prima facie not evident – CBI (Economic Offences Wing)*

b. *All cases involving more than INR 2500 lakh – Banking Security and Fraud Cell of the respective centres, which is specialised cell of the Economic Offences Wing of the CBI for major bank fraud cases.*

Cases to be referred to Local Police

Cases below INR 300 lakh – Local Police.

a. *Cases of financial frauds of the value of INR 1 lakh and above, which involve outsiders and bank staff, should be reported by the Regional Head of the bank concerned to a senior officer of the State CID/Economic Offences Wing of the State concerned.*

b. *Cases of frauds above INR 10,000/- but below INR 1 lakh should be reported to the local police station by the bank branch concerned.*

c. *All fraud cases of value below INR 10,000/- involving bank officials, should be referred to*

26. See, Part 1 of this Paper.

27. RBI Master Circular on *'Frauds – Classification and Reporting'* vide letter DBS.FrMC.BC.No.1/23.04.001/2013-14 dated 1 July 2013 available at https://rbidocs.rbi.org.in/rdocs/notification/PDFs/88BL010713FSL.pdf (accessed 7 August 2017)

the Regional Head of the bank, who would scrutinize each case and direct the bank branch concerned on whether it should be reported to the local police station for further legal action.

d. *The above instances are only indicative. In reality, the consequences could, by all means, be far-reaching. This explains the significance of the investigation and the need for utmost precision and caution to be exercised during the investigation.*

I. Post-investigation obligations under law

While the management of the company is primarily responsible for implementing policies, procedures and controls for prevention and detection of fraud, the onus of governance is also placed on the board of directors/audit committees for prevention and detection of fraud.

Directors of a company are vested with the fiduciary duty to act in good faith, the duty to act in the best interests of the company, its employees, the shareholders, and the community and for the protection of the environment, etc.[28] They are, thus, required to make necessary disclosures as and when required. Every listed entity shall make disclosures to stock exchanges of any events or information which, in the opinion of its board of directors of the listed company, is material.[29] Such events/information gathered pursuant to the investigation warrant a disclosure under law.

The board of directors of the listed entity shall authorize one or more Key Managerial Personnel for the purposes of determining materiality of an event or information and for the purpose of making corresponding disclosures to stock exchange(s).[30]

As per the SEBI Disclosure Regulations, all listed companies are required to ensure timely and accurate disclosure on all material matters including the financial situation, performance, ownership, and governance of the listed entity;[31] and preserve relevant documents.[32] Further, the board of directors is vested with the responsibility to monitor and manage potential conflicts of interest of management, members of the board of directors and shareholders, including misuse of corporate assets and abuse in related party transactions, and oversee the process of disclosure and communications.[33]

The listed entity is required to disclose all events and/or information, as soon as reasonably possible and not later than 24 hours from the occurrence of the event or information. In case the disclosure is made after 24 hours of occurrence of the event or information, the listed entity would have to provide an explanation for delay.[34] Moreover, every listed entity would have to disclose on its website all such events or information which has been disclosed to stock exchange(s), and such disclosures would have to be hosted on the website of the listed entity for a minimum period of five years.[35]

Chapter XI of the SEBI Disclosure Regulations prescribes the procedure for action in case of default. Regulation 98 deals with the liability for contravention of the Listing Regulations. In case of contravention of the Listing Regulations the stock exchange(s) can (a) impose fines; (b) suspend trading; (c) freeze the promoter/promoter group holding of designated securities, as may be applicable, in coordination with depositories. In case the listed entity fails to pay any fine imposed on it within the specified period, the stock exchange(s), may initiate action against the listed entity after sending the listed entity a notice in writing.

28. Companies Act 2013, s 166
29. SEBI Disclosure Regulations, reg 30; Schedule III of the SEBI Disclosure Regulations lays down an inclusive list of events/information, upon occurrence of which listed entity shall make disclosure to stock exchange(s).
30. SEBI Disclosure Regulations, reg 30(5)
31. SEBI Disclosure Regulations, reg 4(2)(e)
32. SEBI Disclosure Regulations, reg 9
33. SEBI Disclosure Regulations, reg 4(2)(f)(ii)
34. SEBI Disclosure Regulations, reg 30(6)
35. SEBI Disclosure Regulations, reg 30(8)

Additionally, under Clause 49 of the Listing Agreement, the CEO[36]/CFO[37] is required to certify to the Securities and Exchange Board of India that they have reviewed financial statements and the cash flow statement for the year and that to the best of their knowledge and belief:

- such financial statements do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading;
- no transactions entered by the company during the year which are fraudulent, illegal or violative of the company's code of conduct.

Accordingly, the undertaking should also state that they have informed the auditors and the audit committee about instances of significant fraud of which they have become aware and the involvement therein, of the management or an employee having a significant role in the company's internal control system over financial reporting.

36. The Managing Director or Manager appointed in terms of the Companies Act 2013

37. The whole-time Finance Director or any other person heading the finance function discharging that function

7. Conclusion

While this paper lays down some essentials of investigative practices, it is by no means complete and comprehensive. As any advisor will advise, there is no straightjacket formula insofar as an investigation is concerned. Every investigation is unique and has its own tailored procedure and analysis. The thrust is always on adhering to a complete and comprehensive procedure undertaken with a view to discover the requisite facts, keeping best practices in mind and with a view to give comfort to any regulatory authority, should the need arise.

About NDA

Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Palo Alto (Silicon Valley), Singapore, New Delhi, Munich and New York. We provide strategic legal, regulatory, and tax advice coupled with industry expertise in an integrated manner.

As a firm of specialists, we work with select clients in select verticals on very complex and innovative transactions and disputes.

Our forte includes innovation and strategic advice in futuristic areas of law such as those relating to Bitcoins (block chain), Internet of Things (IOT), Aviation, Artificial Intelligence, Privatization of Outer Space, Drones, Robotics, Virtual Reality, Med-Tech, Ed-Tech and Medical Devices and Nanotechnology.

We specialize in Globalization, International Tax, Fund Formation, Corporate & M&A, Private Equity & Venture Capital, Intellectual Property, International Litigation and Dispute Resolution; Employment and HR, Intellectual Property, International Commercial Law and Private Client. Our industry expertise spans Automobile, Funds, Financial Services, IT and Telecom, Pharma and Healthcare, Media and Entertainment, Real Estate, Infrastructure and Education. Our key clientele comprise marquee Fortune 500 corporations.

Our ability to innovate is endorsed through the numerous accolades gained over the years and we are also commended by industry peers for our inventive excellence that inspires others.

NDA was ranked the 'Most Innovative Asia Pacific Law Firm in 2016' by the *Financial Times - RSG Consulting Group* in its prestigious FT Innovative Lawyers Asia-Pacific 2016 Awards. While this recognition marks NDA's ingress as an innovator among the globe's best law firms, NDA has previously won the award for the 'Most Innovative Indian Law Firm' for two consecutive years in 2014 and 2015.

As a research-centric firm, we strongly believe in constant knowledge expansion enabled through our dynamic Knowledge Management ('KM') and Continuing Education ('CE') programs. Our constant output through Webinars, Nishith.TV and 'Hotlines' also serves as effective platforms for cross pollination of ideas and latest trends.

Our trust-based, non-hierarchical, democratically managed organization that leverages research and knowledge to deliver premium services, high value, and a unique employer proposition has been developed into a global case study and published by John Wiley & Sons, USA in a feature titled 'Management by Trust in a Democratic Enterprise: A Law Firm Shapes Organizational Behavior to Create Competitive Advantage' in the September 2009 issue of Global Business and Organizational Excellence (GBOE).

A brief below chronicles our firm's global acclaim for its achievements and prowess through the years.

- IDEX Legal Awards: In 2015, NDA won the "M&A Deal of the year", "Best Dispute Management lawyer", "Best Use of Innovation and Technology in a law firm" and "Best Dispute Management Firm<http://idexlegalawards.in/ArticlePage.aspx?aid=6>". Nishith Desai was also recognized as the 'Managing Partner of the Year' in 2014.
- Merger Market: has recognized NDA as the fastest growing M&A law firm in India for the year 2015.
- Legal 500 has ranked us in tier 1 for Investment Funds, Tax and Technology-Media-Telecom (TMT) practices (2011, 2012, 2013, 2014, 2017)

- International Financial Law Review (a Euromoney publication) in its IFLR1000 has placed Nishith Desai Associates in Tier 1 for Private Equity (2014, 2017). For three consecutive years, IFLR recognized us as the Indian "Firm of the Year" (2010-2013) for our Technology - Media - Telecom (TMT) practice.
- Chambers and Partners has ranked us # 1 for Tax and Technology-Media-Telecom (2014, 2015, 2017); #1 in Employment Law (2015 & 2017); # 1 in Tax, TMT and Private Equity (2013, 2017); and # 1 for Tax, TMT and Real Estate – FDI (2011).
- India Business Law Journal (IBLJ) has awarded Nishith Desai Associates for Private Equity, Structured Finance & Securitization, TMT, and Taxation in 2015 & 2014; for Employment Law in 2015
- Legal Era recognized Nishith Desai Associates as the Best Tax Law Firm of the Year (2013).

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Research @ NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

Research has offered us the way to create thought leadership in various areas of law and public policy. Through research, we discover new thinking, approaches, skills, reflections on jurisprudence, and ultimately deliver superior value to our clients.

Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our *"Hotlines"*. These *Hotlines* provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our *NDA Insights* dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction.

We regularly write extensive research papers and disseminate them through our website. Although we invest heavily in terms of associates' time and expenses in our research activities, we are happy to provide unlimited access to our research to our clients and the community for greater good.

Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with a much needed comparative base for rule making. Our *ThinkTank* discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

As we continue to grow through our research-based approach, we are now in the second phase of establishing a four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. The center will become the hub for research activities involving our own associates as well as legal and tax researchers from world over. It will also provide the platform to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear from you about any suggestions you may have on our research reports.

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