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FCPA Update

A Global Anti-Corruption Newsletter

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8 French Authorities Publish Guide on Anti-Corruption Internal Investigations

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Mining and Gaming Cases Round Out Q1 2023 FCPA Enforcement

There have been four FCPA corporate resolutions through Q1 in 2023, imposing a relatively modest $227 million in penalties. Last month, we covered Ericsson's guilty plea related to breaching its 2019 DPA,[1] which accounts for the vast majority of the penalty total ($207 million). In this article, we cover the other three resolutions: two standalone SEC enforcement actions and one DOJ declination. The penalty numbers are relatively small, but the cases highlight foundational aspects of FCPA risk, particularly the importance of due diligence and guardrails with respect to who a company works with or acquires. Notably, none of the FCPA actions thus far this year involves parallel actions brought by DOJ and the SEC. Excluding Ericsson's wide-reaching bribery scheme that was initially charged in 2019, the Q1 cases involve

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1. *See* Kara Brockmeyer, Bruce E. Yannett & Joseph Ptomey, "Ericsson Reaches FCPA-Related Settlement with DOJ," FCPA Update, Vol. 14, No. 8 (March 2023), https://www.debevoise.com/insights/publications/2023/03/fcpa-update-march-2023.

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wrongdoing in three countries but assistance from foreign counterparts in at least 10 states and territories.

Rio Tinto

On March 6, 2023, Rio Tinto plc ("Rio Tinto"), a global mining and metals company headquartered in Australia and the United Kingdom, agreed to pay $15 million to settle SEC charges that it violated the books and records and internal accounting controls provisions of the FCPA. The settlement resolves the SEC's long-running investigation into allegations of a bribery scheme involving a third-party consultant in Guinea.[2]

In reaching its resolution, the SEC considered Rio Tinto's efforts to cooperate with the investigation, alongside the steps it took to remediate wrongdoing such as prompt termination of employees involved in wrongdoing and enhancement of internal compliance and diligence measures. Without admitting to or denying any of the SEC's findings, Rio Tinto agreed to cease and desist from any future FCPA violations.[3]

The Rio Tinto Order

In March 2011, Rio Tinto executives hired a French investment banker as a consultant (the "Consultant") to help maintain mining rights in the iron-ore rich Simandou mountain region in Guinea.[4] The SEC found that the Consultant's reportedly close friendship with a senior Guinean government official ("Senior Official") was a key reason for his engagement.[5] According to the Order, the Consultant began working on behalf of Rio Tinto without a contract and after only a cursory background check.[6] He ultimately succeeded in securing the sought-after mining rights in a settlement with the Government of Guinea.

According to the Order, while negotiating his fees, the Consultant sent emails to an executive at Rio Tinto claiming, "I rendered a service that no investment bank could have rendered. You are the only witness of it, with the [Senior Official] himself."[7] And a few days later, the Consultant wrote, "the [Senior Official's] decision would probably have been different if I had not happened to be there."

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2. Order, *In re Rio Tinto plc*, Securities Exchange Act Release No. 97049 (Mar. 6, 2023), https://www.sec.gov/litigation/admin/2023/34-97049.pdf ["Rio Tinto Order"]; U.S. Sec. & Exch. Comm'n Press Release No. 2023-46, "SEC Charges Rio Tinto plc with Bribery Controls Failures" (Mar. 6, 2023), https://www.sec.gov/news/press-release/2023-46.
3. Rio Tinto Order §§ II, IV.
4. *Id.* ¶¶ 3, 5.
5. *Id.* ¶¶ 7-8.
6. *Id.* ¶ 9.
7. *Id.* ¶ 11.

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Rio Tinto executives internally debated how the Consultant should be paid over email. One executive reportedly wrote that "one big lump looks like a bribe and people will wonder where the money went," and Rio Tinto's CEO wrote that they should "think about the optics to [the Government of Guinea]."[8] The SEC further found that an executive stated over email that the Consultant provided "very unique and unreplicable services." According to the Order, Rio Tinto ultimately paid the Consultant $10.5 million in two installments.[9]

Once paid, the Consultant reportedly attempted to transfer $822,506 "to a Hong Kong company owned by a Guinean national with links to government officials" for the purpose of paying for campaign t-shirts – a transaction that was blocked by the consultant's bank.[10] After the Consultant said it would use a different account to make the payment, the SEC found that the Hong Kong company

> "The penalty numbers are relatively small, but the cases highlight foundational aspects of FCPA risk, particularly the importance of due diligence and guardrails with respect to who a company works with or acquires."

paid $200,000 to a Chinese company to make campaign t-shirts for the Senior Official's reelection campaign. The Order confirms that these t-shirts matched the description on the original invoice submitted to the bank. The SEC charged Rio Tinto with failing to accurately record payments to the consultant in its books and records and to devise a system of internal accounting controls to detect and prevent improper payments.

Flutter Entertainment, plc

Also on March 6, 2023, Flutter Entertainment, plc ("Flutter"), a global gaming and sports betting company based in Ireland, agreed to pay $4 million to the SEC to settle charges of violating the FCPA's books and records and internal accounting controls provisions. The underlying conduct relates to the use of Russian third-

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8. *Id.* ¶ 13.
9. *Id.* ¶ 14.
10. *Id.* ¶¶ 17-18.

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party consultants by The Stars Group, Inc. ("The Stars Group"), owner of gaming website PokerStars, which Flutter acquired in May 2020.[11]

In addition to paying the fine, Flutter agreed to cease and desist from any future FCPA violations.[12] In determining requirements for the settlement, the SEC accounted for Flutter's cooperation and remedial efforts in addition to its withdrawal of operations from Russia after its invasion of Ukraine.

The Flutter Order

The SEC's findings, which Flutter has neither admitted nor denied, relate to The Stars Group's employment of three third-party Russian consultants (the "Consultants"), and a Russian consulting company. According to the SEC's Order, The Stars Group inherited the Consultants from a company that it acquired in August 2014.[13] The Consultants were initially hired to lobby Russian government officials to legalize poker. Despite the fact that they were expected to have close contact with government officials, the SEC found that no due diligence had been conducted on any of the Consultants, and only two of the three had contracts, which were themselves described as "perfunctory documents" without anti-bribery or anti-corruption provisions.[14]

According to the Order, though The Stars Group continued to employ the Consultants after inheriting them in 2014, it did not conduct any due diligence on them until 2016, when the board undertook a review of whether the company had made any improper payments to foreign government officials.[15] The Stars Group disclosed its findings to the SEC and other authorities and adopted a new policy for hiring consultants that required risk-based due diligence, written contracts, and CEO or GC approvals. But according to the Order, The Stars Group, in violation of the updated policy, continued to make improper payments to the Consultants – conducting only public records database searches and after-the fact diligence – and only executed new contracts including anti-bribery and anti-corruption provisions with the consultants in 2017, which required submission of detailed invoices with supporting documents and monthly reports of services provided.

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11. Order, *In re Flutter Entertainment plc, as successor-in-interest to The Stars Group, Inc.*, Securities Exchange Act Release No. 97044 (Mar. 6, 2023) ¶ 3, https://www.sec.gov/litigation/admin/2023/34-97044.pdf ["Flutter Order"]; U.S. Sec. & Exch. Comm'n Press Release No. 3-21330, "SEC Charges Pokerstars Parent Company with FCPA Violations" (Mar. 6, 2023), https://www.sec.gov/enforce/34-97044-s.
12. Flutter Order ¶ 26.
13. *Id.* ¶¶ 4-5.
14. *Id.* ¶ 8.
15. *Id.* ¶¶ 9-11.

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According to the Order, the Consultant's invoices, which did not include the requisite detail, were summarily approved and paid, and monthly reports were not submitted.[16] For instance, the SEC found that in 2015, $57,000 paid to a consultant for the purposes of paying lawyers to draft legislation for the Russian Duma focused on the legalization of gambling, but reportedly there was no evidence of such services being rendered.[17] And the SEC found that six payments amounting to approximately $139,000 were paid to a consultant in part for reimbursement for New Year's gifts to individuals, including government officials.

The Stars Group also retained a consulting company to advise on "Russian gaming legislation and liaise with Russian government officials."[18] The SEC cited numerous red flags that were apparent upon its engagement. For example, the company was registered in Belize and maintained a payment account in Latvia – two jurisdictions unrelated to the contracted-for services, and payments made to the consulting company were initially described as a "success fee" for getting legislation in Russia approved.[19] Nevertheless, little due diligence was conducted, The Stars Group failed to monitor the relationship, and invoices containing little detail were approved without evidence that services were actually provided.[20]

Corsa Coal Corporation

On March 9, 2023, DOJ declined prosecution of Corsa Coal Corporation ("Corsa") for anti-bribery violations pursuant to its Corporate Enforcement and Voluntary Self-Disclosure Policy ("CEP Policy").[21] As part of the declination, Corsa agreed to disgorge $1.2 million, a portion of the profits it earned from its engagement in a bribery scheme to secure coal contracts based on the company's inability to pay the full disgorgement amount.

According to its Declination Letter, DOJ found that, between late 2016 and early 2020, Corsa employees and agents paid approximately $4.8 million to an Egypt-based intermediary, knowing that it would be used at least in part to bribe government officials to help Corsa obtain and maintain contracts to provide coal to the Egyptian state-owned Al Nasr Company for Coke and Chemicals ("Al Nasr").[22]

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16. *Id.* ¶¶ 12-14.
17. *Id.* ¶ 15.
18. *Id.* ¶ 17.
19. *Id.* ¶ 18.
20. *Id.* ¶ 19-21.
21. Declination Letter from the U.S. Dep't of Justice, Fraud Section to Brian E. Spears et al, Re: *Corsa Coal Corp.*, Declination (Mar. 8, 2023), https://www.justice.gov/criminal-fraud/file/1573526/download ["Declination Letter"].
22. *Id.* at 1.

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Applying its recently updated CEP Policy, DOJ declined to prosecute the company despite finding a violation of the FCPA. The Declination Letter explained that the decision not to prosecute Corsa was based on various elements of the CEP Policy, including Corsa's voluntary self-disclosure in a timely manner; Corsa's full, proactive, and ongoing cooperation (including providing all known relevant facts about the misconduct, including information about the individuals involved); the nature and seriousness of the offense; timely and appropriate remediation; and Corsa's agreement to disgorge profits earned from the bribery scheme.[23]

DOJ calculated that Corsa earned approximately $32.7 million in profits. However, Corsa demonstrated its inability to pay full disgorgement of the ill-gotten profits, providing DOJ with relevant information and documents and access to company personnel to respond to DOJ's inquiries. DOJ relied on its 2019 memo that outlines certain factors in evaluating whether a business organization has demonstrated an inability to pay an otherwise appropriate criminal fine.[24] Such factors include the organization's current financial condition; alternative sources of capital; collateral consequences; and victim restitution considerations. In light of DOJ's independent analysis of these factors and Corsa's cooperation, Corsa and DOJ agreed that Corsa would disgorge $1.2 million.

Takeaways

The three resolutions from March provide useful reminders for companies seeking to avoid FCPA scrutiny:

- **DOJ continues to apply its Corporate Enforcement Policy**. DOJ cited Corsa's self-disclosure, ongoing cooperation, and remediation efforts as key factors in its decision not to prosecute. This continues the DOJ trend of offering "carrots" to encourage corporate cooperation.[25] This is now the third declination with disgorgement in twelve months (and 17th since its inception), following what appeared to be a lull in the use of the resolution method.
- **Careful anti-corruption and anti-bribery due diligence of an acquisition target is a critical component of wise transaction planning.**[26] The Flutter Order highlights the risks associated with assuming successor liability,

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23. *Id.* at 2.

24. Memo from Assistant Attorney General (Brian A. Benczkowski), "Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Penalty" (Oct. 8, 2019), https://www.justice.gov/opa/speech/file/1207576/download.

25. *See* Kara Brockmeyer, Andrew M. Levine, David A. O'Neil & Bruce E. Yannett, "DOJ Offers New Incentives in Revised Corporate Enforcement Policy," Debevoise Update (Jan. 24, 2023), https://www.debevoise.com/insights/publications/2023/01/doj-offers-new-incentives-in-revised.

26. *See also* Andrew M. Levine, Philip Rohlik & Kamya B. Mehta, "Mitigating Anti-Corruption Risk in M&A Transactions: Successor Liability and Beyond" at 11-12, FCPA Update, Vol. 10, No. 5 (Dec. 2018), https://www.debevoise.com/insights/publications/2018/12/fcpa-update-december-2018.

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particularly in the context of higher-risk markets.[27] According to the SEC, both Flutter and The Stars Group failed to sufficiently evaluate the target's relationship with and reliance on third-party consultants, ultimately leading Flutter to be held liable for the actions of both The Stars Group's employees and the employees of The Stars Group's predecessor.

- **Neither Rio Tinto nor Flutter was ordered to pay disgorgement, suggesting neither profited from their alleged violative conduct**. Rio Tinto never developed its mining blocks and wrote off its investment, and Flutter wound down its Russia operations after Russia's invasion of Ukraine. This is a reminder that the FCPA is not applied only to lucrative activities, but also prohibits even "failed" attempts to bribe and "failed" schemes.
- **Companies must carefully screen and monitor their third-party agents and intermediaries**. Both Rio Tinto and Flutter reportedly failed to adequately investigate and react when faced with red flags regarding third-party consultants, including close connections with government officials, a lack of evidence that the consultants' services were completed, perfunctory or non-existent invoices, unusual payment terms, and ambiguous areas of expertise. It is best practice to carefully select and screen third-party intermediaries and conduct risk-based due diligence regarding their backgrounds, reputation, and experience. Companies also should ensure that appropriate contractual safeguards, including anti-corruption and anti-bribery provisions, are implemented before third-party agents begin working. Finally, employees should be empowered to investigate red flags, carefully monitor the relationship with and work of third-party intermediaries, and report concerns if and when they arise.

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27. *See* Kara Brockmeyer, Satish Kini, Andrew M. Levine, Robert Dura & Lily D. Vo, "How Offering Cookies and Chocolates Can Expand Your Business: Stericycle Settles Parallel U.S. and Brazilian Bribery Investigations" at 5-6, FCPA Update, Vol. 13, No. 10 (May 2022), https://www.debevoise.com/insights/publications/2022/05/fcpa-update-may-2022 (discussing entry into higher-risk markets).

French Authorities Publish Guide on Anti-Corruption Internal Investigations

On March 14, 2023, France's main anti-corruption authorities, the French Financial National Prosecutor (the "PNF") and the French Anti-Corruption Agency (the "AFA"), published a 38-page document providing best practices for companies conducting anti-corruption internal investigations in France (the "Guide").[1]

Although it has no normative value, the Guide is generally helpful for companies that have to conduct internal investigations as part of their mandatory French-style compliance programs and those who conduct internal investigations in anticipation of a potential French-style deferred prosecution agreement (the "CJIP").

We describe below what we consider to be the main aspects of the Guide. When relevant, we have also added some comparisons and comments from a U.S. perspective.

Background

Companies around the globe typically conduct anti-corruption internal investigations when their compliance systems flag potential corruption, or in the context of cooperation with enforcement authorities. That's no different in France.

The PNF is in charge of investigating and prosecuting corruption. In guidelines published in January 2023, the PNF indicated that it would more likely consider the resolution of a case through a CJIP when companies "have actively taken part or wish to take part in revealing the truth by means of an internal investigation." It also said that a "relevant internal investigation" would be viewed as a mitigating factor, carrying a maximum 20% reduction on the level of the fine.[2] See our previous article here.[3]

The AFA is in charge of enforcing the implementation of mandatory French-style anti-corruption compliance programs by the largest companies.[4] In guidelines published in 2021, the AFA recommends that companies conduct internal investigations when their compliance systems reveal potential corruption.[5]

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1. AFA and PNF, Anticorruption internal investigations, Practical Guide (Mar. 2023), available at https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-et-pnf-publient-guide-relatif-aux-enquetes-internes-anticorruption.
2. PNF, Guidelines on the implementation of the CJIP (Jan. 16, 2023), available at https://www.tribunal-de-paris.justice.fr/75/actualites-mensuelles-parquet-national-financier.
3. Debevoise in Depth, France's Revised Guidelines for Deferred Prosecution Agreements Promote Voluntary Self-Disclosure (Feb. 13, 2023), available at https://www.debevoise.com/insights/publications/2023/02/frances-revised-guidelines-for.
4. Companies based in France with at least 500 employees and annual turnover of more than €100 million.
5. AFA, Recommendations (Jan. 2021), available at https://www.agence-francaise-anticorruption.gouv.fr/fr/recommandations.

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French enforcement authorities thus make internal investigations an important feature for companies operating in France. These PNF and AFA guidelines did not however provide much guidance about how internal investigations should be conducted, and France does not have a specific statutory framework for the conduct of internal investigations.

The Guide therefore supplements these guidelines with a helpful summary of the legal requirements derived from existing case law, and additional insight into what the PNF and the AFA expect from companies conducting an internal investigation.

Internal Investigation Procedures and Charters

In its guidelines of 2021, the AFA recommended that companies formalize internal investigation procedures. The Guide now provides additional guidance about the content of these procedures, including, for example, the factors to consider for the opening of an internal investigation, the various investigative steps, the composition and role of the investigation team, the goal and scope of the investigation, the methodology and tools for the conduct of the investigation and the various options at the end of the investigation.

The Guide also recommends that companies make available to employees a so-called "charter" explaining their rights and duties during an internal investigation (as witnesses, experts or targeted individuals).

In the United States, as in France, the preferred practice is for companies to have documented internal investigation procedures, although such procedures vary considerably in their detail and scope. Often, a U.S. company's code of conduct or other compliance policies will provide employees with information about the company's reporting channels (including any hotlines or whistleblower channels) and may briefly describe the company's approach to investigations, although in less formal terms than a "charter" of rights and duties. The company also might have a more extensive investigations policy or similar description of investigative procedure that is designed for the use of the legal and compliance functions rather than for distribution to all employees.

Collection of Evidence and Admissibility

The Guide reminds companies that their procedures and charters should reflect the existing legal requirements applying to the conduct of internal investigations.

While France does not have a specific statutory framework for the conduct of internal investigations, French courts regularly provides dos and don'ts. Conducting internal investigations in compliance with requirements derived from case law is

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therefore essential in anticipation of potential subsequent court proceedings – in particular disciplinary proceedings before French labor courts. While evidence submitted by private parties is generally admissible before *criminal* courts irrespective of how it is collected, before *labor* or *civil* courts evidence must have been collected in a fair and legal manner.

The United States, like France, does not have a statutory framework for internal investigations. However, investigative best practices have developed based on the experiences of companies and their counsel, as well as guidance provided by U.S. enforcement agencies. For example, in March 2023, the U.S. Department of Justice issued a new version of its "Evaluation of Corporate Compliance Programs," a 21-page document that includes recommendations for how companies can implement an "effective investigations structure." With respect to the potential that evidence collected in the investigation may be presented in a subsequent criminal or civil proceeding, a panoply of complex evidentiary rules may apply, making it crucial that experienced counsel participate in any investigation that may lead to such proceedings. As a general matter, of course, it is prudent to maintain a clear record of all steps taken to preserve and collect data during the investigation as well as the chain of custody of any data that may be needed for subsequent court proceedings.

"The Guide is especially relevant to those companies that have to implement mandatory compliance programs under the supervision of the AFA or those that anticipate potential CJIP discussions with the PNF."

The Guide also touches upon some labor/data-protection requirements. For instance, companies may only collect employees' personal information after sending a notice explaining the purpose and scope of that collection. In the context of anti-corruption internal investigations, such a notice potentially may lead to evidence destruction. The Guide thus recommends that companies give such a notice to *all* employees by way of sending the above-mentioned internal investigation procedures or charter – explaining why and how the company may decide to collect employees' personal information.

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In the United States, companies are subject to fewer constraints on their collection and review of data for internal investigations. As a general matter, a company may collect data from all company systems as well as from company-owned and company-issued computers, phones, tablets and other devices and technology. It is also common in the United States for a company to inform employees that the company may have access to all data on company systems and company devices (which, of course, could extend to personal data that an employee has stored or transmitted on such systems or devices). At the outset of an internal investigation, the company, with assistance from counsel, should issue a data preservation notice to all potentially relevant employees and should take other steps in parallel to preserve data (e.g., by turning off auto-deletion of emails and other data after a certain period, imaging relevant data repositories, etc.). The issuance of a data preservation notice, of course, may prompt culpable employees to delete or alter data – and accordingly, depending on the circumstances, a company may choose to collect certain data before issuing the preservation notice or in parallel.

Interviews

The Guide also makes several suggestions about employee interviews, which may or may not be relevant depending on the circumstances: send the employee advance notice of the interview with key documents; obtain the employee's written approval for the recording of the interview; make the employee sign a French-style Upjohn warning before the interview; memorialize interviews either in the form of summaries or verbatim minutes; and have the employee review and sign the minutes and agree to their production in court.

These practices differ in certain key respects from the typical approach to employee interviews in the United States. Although interviews ordinarily are scheduled in advance, investigators may prefer not to share key documents beforehand, in part to reduce the risk of the employee preparing or rehearsing responses. When company counsel interviews an employee, it is essential to deliver an Upjohn warning at the outset, both to ensure that the employee understands that counsel represents the company and not the employee and to underscore that the company's attorney-client privilege applies to the interview. However, it is relatively rare for employee interviews conducted by counsel to be recorded or transcribed; rather, the interviewer ordinarily takes detailed notes, which are not reviewed by or otherwise shared with the interviewee (and which, if prepared by counsel, are subject to attorney work product protection in addition to being covered by attorney-client privilege, and which are not adopted by the witness as "statements").

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Attorney-Led Internal Investigations

Companies can sometimes decide to have outside counsel conduct internal investigations. In 2020, French Bar organizations published recommendations and best practices for attorneys involved in internal investigations.[6] Attorneys conducting interviews must, for instance, inform employees of their right to counsel if it appears that they have likely committed misconduct. For more about these recommendations, see our article here.[7]

Surprisingly, the Guide indicates that companies should use *different* attorneys for the conduct of an internal investigation and for their representation in any related criminal proceeding. That recommendation contradicts the position of French Bar organizations, which do not generally prohibit attorneys from acting in both capacities.[8] The PNF and AFA, unfortunately, have not explained the logic of their (non-binding) recommendation, and it remains to be seen if companies will actually follow it.

In the United States, it is not at all unusual for the same outside counsel to lead an internal investigation and to represent the company with respect to any related investigations or proceedings by government authorities, including criminal proceedings. Indeed, U.S. enforcement authorities often find it helpful to interact directly with the lawyers who conducted the internal investigation and therefore are most familiar with the facts and the evidence – and, if the internal investigation is still ongoing, the authorities will ask those lawyers to provide updates on the progress and findings of the internal investigation. Companies seeking to cooperate with the government generally will agree to provide such updates through their counsel.

The (Lack of) Protection of Communications

A French statute provides for protection against disclosure to third parties of *all* communications between clients and attorneys (other than in-house counsel). French courts and authorities, however, tend to take the view that the protection applies only to attorney-client communications made in connection with the client's *criminal defense* – i.e., when the client is already charged by enforcement authorities or has good reason to believe it will be in the near future.

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6. French Bar National Council (CNB), The French lawyer and internal investigations (June 12, 2020), available at https://www.cnb.avocat.fr/fr/actualites/un-guide-pour-accompagner-la-profession-en-matiere-denquetes-internes. *See also* Paris Bar's internal rules, Appendix XXIV Vademecum for the lawyer in charge of an internal investigation (Dec. 10, 2019), available at https://www.avocatparis.org/conseil-de-l-ordre/annexe-xxiv-vademecum-de-lavocat-charge-dune-enquete-interne-0.
7. Debevoise & Plimpton LLP, "New Edition of FCPA Resource Guide Offers Guidance and Raises Questions," FCPA Update, Vol. 11, No. 12 (July 2020), available at https://www.debevoise.com/insights/publications/2020/07/fcpa-update-july-2020.
8. French Bar National Council (CNB), The French lawyer and internal investigations at 17 (June 12, 2020), available at https://www.cnb.avocat.fr/fr/actualites/un-guide-pour-accompagner-la-profession-en-matiere-denquetes-internes. *See also* Paris Bar's internal rules, Appendix XXIV Vademecum for the lawyer in charge of an internal investigation, Article 9 (Dec. 10, 2019), available at https://www.avocatparis.org/conseil-de-l-ordre/annexe-xxiv-vademecum-de-lavocat-charge-dune-enquete-interne-0.

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Perhaps unsurprisingly (but unfortunately), the Guide indicates that, under existing case law, the protection should *not* apply to attorney-client communications made during the internal investigation (including its final report). For the PNF and AFA, internal investigations do not therefore amount to *defense* work (unless maybe when conducted at the direction of enforcement authorities, in parallel to their criminal investigation – but in that scenario, companies are usually in a cooperation mode, ready to share protected communications).

By contrast, French Bar organizations are reading the existing statute as protecting attorney-client communications much more broadly, including attorney-led investigations. In a white paper of July 2020, the national body governing French attorneys indicated that the protection should apply during internal investigations – because these investigations are key to companies' criminal defense as they seek to determine whether internal policies, regulations, or laws have been violated, and, as a result, are indispensable in remediating the misconduct and preparing a defense.[9]

The United States provides more extensive, robust protection to attorney-client communications and materials prepared by counsel in connection with an internal investigation. The attorney-client privilege shields all communications between attorney and client made for the purpose of providing or obtaining legal advice or assistance. Additionally, any notes, memoranda or other documents prepared by an attorney in anticipation of litigation are protected from discovery as attorney work product. Accordingly, nearly all communications and materials made and prepared in connection with an internal investigation led by company counsel will be protected by either or both attorney-client privilege and the work-product rule. Of course, *facts* are not privileged – and accordingly, government authorities ordinarily will seek, and companies in a cooperative posture will provide, extensive disclosure of the factual findings of an internal investigation. In rare circumstances, a company may go further and waive its attorney-client privilege in certain areas – for example, in order to disclose otherwise privileged communications directly relevant to the matters under investigation.

Cooperation with Enforcement Authorities

In its guidelines of January 2023, the PNF explained that the conduct of "relevant" internal investigations can help companies conclude a CJIP and obtain a maximum 20% reduction of the fine. An additional 30% reduction is available in case of "active cooperation." The PNF said that it expects companies to share their internal investigation report and other key documents such as interviews and electronic data.

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9. French Bar National Council (CNB), The French lawyer and internal investigations at 29 et seq. (June 12, 2020), available at https://www.cnb.avocat.fr/fr/actualites/un-guide-pour-accompagner-la-profession-en-matiere-denquetes-internes.

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The Guide reiterates that recommendation and how "decisive" it is when authorities are assessing the company's cooperation. The Guide also explains that "late" or "incomplete" information could be viewed as aggravating factors during the negotiation of a CJIP fine – which we understand would correspond to the maximum 30% increase for "obstruction to the investigation" mentioned in the PNF guidelines.

Conclusion

The Guide provides helpful indications about the legal requirements and best practices in the conduct of internal investigations in France. Companies operating in France may take it into account when reviewing and updating their internal investigation procedures. The Guide is especially relevant to those companies that have to implement mandatory compliance programs under the supervision of the AFA or those that anticipate potential CJIP discussions with the PNF. The Guide should, however, be read in conjunction with the recent AFA and PNF guidelines. For attorney-led investigations, it should also be read in conjunction with French Bar recommendations and best practices.

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