

# French Authorities Publish Guide on Anti-Corruption Internal Investigations

14 April 2023

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”).<sup>1</sup>

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.

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## 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

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<sup>1</sup> AFA and PNF, Anticorruption internal investigations, Practical Guide (March 2023), available at <https://www.agence-francaise-anticorruption.gouv.fr/fr/lafa-et-pnf-publient-guide-relatif-aux-enquetes-internes-anticorruption>.

“relevant internal investigation” would be viewed as a mitigating factor, carrying a maximum 20% reduction on the level of the fine.<sup>2</sup> See our previous article [here](#).<sup>3</sup>

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

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.

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## 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).

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<sup>2</sup> PNF, Guidelines on the implementation of the CJIP (Jan. 16, 2023), available at <https://www.tribunalde-paris.justice.fr/75/actualites-mensuelles-parquet-national-financier>.

<sup>3</sup> 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>.

<sup>4</sup> Companies based in France with at least 500 employees and annual turnover of more than €100 million.

<sup>5</sup> AFA, Recommendations (Jan. 2021), available at <https://www.agence-francaise-anticorruption.gouv.fr/fr/recommandations>.

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.

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## 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 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, last month, 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 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.

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.

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## 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.<sup>6</sup> 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](#)<sup>7</sup>.

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.<sup>8</sup> 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

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<sup>6</sup> 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>.

<sup>7</sup> 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>.

<sup>8</sup> 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>.

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.

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## 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.

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.<sup>9</sup>

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

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<sup>9</sup> 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>.

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.

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## 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.

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.

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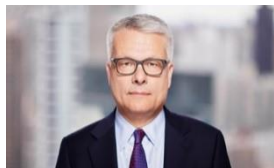
## Conclusion

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 AFA or those who 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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