Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

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The Contours of Conducting Internal Investigations in India

February 2020

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- **Legal500:** Tier 1 for Tax, Investment Funds, Labour & Employment, TMT and Corporate M&A *2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013, 2012*
- **Chambers and Partners Asia Pacific:** Band 1 for Employment, Lifesciences, Tax and TMT *2020, 2019, 2018, 2017, 2016, 2015*
- **IFLR1000:** Tier 1 for Private Equity and Project Development: Telecommunications Networks. *2020, 2019, 2018, 2017, 2014*
- **AsiaLaw Asia-Pacific Guide 2020:** Tier 1 (Outstanding) for TMT, Labour & Employment, Private Equity, Regulatory and Tax
- **FT Innovative Lawyers Asia Pacific 2019 Awards:** NDA ranked 2nd in the Most Innovative Law Firm category (Asia-Pacific Headquartered)
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  Vikram Shroff, HR and Employment Law- Global Thought Leader
  Vaibhav Parikh, Data Practices - Thought Leader (India)
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- **Asia Mena Counsel's In-House Community Firms Survey 2018:** The only Indian Firm recognized for Life Sciences
- **IDEX Legal Awards 2015:** Nishith Desai Associates 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"

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1. An Introduction to the Legal Regime

Scams of the recent past, be it the Satyam scam or Nirav Modi-PNB rip-off or even the proceedings against IL&FS, are often followed by a question – could they be avoided?

With the prominent increase in white collar offences, rigorous mechanisms for curbing such offences have received 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[3] 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.[4]

b. Formulation of 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.[5]

c. 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.[6]

d. Reporting by auditors - of the fraud committed against the company by officers or other employees of the company.[7]

e. Appointment of independent directors in certain companies,[8] 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.

f. 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, etc.[9] They are, thus, required to make necessary disclosures as and when required, for example, 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.[10]

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 447 (explanation(i)): *"fraud in relation to affairs of a company or any body corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss"*
4. Companies Act 2013, s 177 (9), (10); The Companies (Meetings of Board and its Powers) Rules 2014, r 7; SEBI Disclosure Regulations, reg 22
5. Companies Act 2013, s 134(3)(n)
6. Companies Act 2013, s 245
7. Companies Act 2013, s 143(12), (15)
8. Companies Act 2013, s 149 (4), Schedule IV; Companies (Appointment and Qualification of Directors) Rules 2014
9. Companies Act 2013, s 166
10. 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

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**")[11] constituted under the Ministry of Corporate Affairs, is the pioneer in conducting investigations in cases of fraud in companies. Notably, the SFIO would commence an investigation:

- on the report of the Registrar;[12]
- 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.[13]

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.[14] 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.[15]
- Central Vigilance Commission under the Prevention of Corruption Act 1988[16]
- Enforcement Directorate for foreign exchange and money laundering offences[17]
- Central Bureau of Investigation[18]
- 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 2014 address corruption by public servants and its reporting in state/union bodies,[19] 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 1860 for offences such as cheating, criminal breach of trust, forgery, falsification of accounts, misappropriation of funds, cheating etc.

With the recent amendments to the Prevention of Corruption Act 1988, authorities are now empowered to prosecute commercial organizations *"if any person associated with such commercial organizations gives or promises to give any undue advantage to a public servant..."*[20]

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

11. Companies Act 2013, s 211
12. Companies Act 2013, section 208
13. Companies Act 2013, section 212
14. Companies Act 2013, s 206-229
15. SEBI Act 1992, s 11 (3) and 11-C
16. Also see, Central Vigilance Commission
17. See, Foreign Exchange Management Act, 1999 and Prevention of Money Laundering Act, 2002
18. See, Delhi Special Police Establishment Act 1946 and CBI Manual
19. 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.
20. The Prevention of Corruption Act 1988, s 9 (as amended by the Prevention of Corruption (Amendment) Act 2018)

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, 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
- complaints from whistleblowers[21] who may or may not be a part of the said organization; or
- disclosures made in the course of 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 including sexual 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.

21. The Whistleblowers Protection Act 2014 establishes *"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 requires 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 organization.[22]

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 in case of any 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 organization 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.

22. '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 or conflict of interest 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 envisaged under the Indian Evidence Act 1872.[23] The extent of privilege available in case of in-house counsel would be limited.

With the specific expertise that may be required in the course of 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.

23. See Part 4 of the paper for detailed discussions

4. How privileged is the investigation?

Section 126 of the Evidence Act 1872 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.[24] 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 in the course of 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 concept of 'privilege' has assumed unprecedented importance over the years especially with the rise in internal investigations involving cross-border issues. 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 in the course of 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?*

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

'Privilege' is a highly debated topic and has attracted diverging views with respect to the scope and kind of privilege as well as the professionals to whom it may be extended. Broadly, legal professional privilege available to certain communications exchanged between a lawyer and his client may be categorized into:

a. ***Litigation privilege:*** Communications between parties or their solicitors and third parties for obtaining information or advice in connection with existing or contemplated litigation are privileged, upon satisfaction of the following conditions:

   i. litigation must be in progress or in contemplation;

   ii. the communications must have been made for the sole or dominant purpose of conducting that litigation;

   iii. the litigation must be adversarial, not investigative or inquisitorial.[25]

b. ***Legal advice privilege:*** Such privilege extends to communications or other documents made confidentially for the purposes of legal advice, which could be non-litigious. Such purposes are to be construed broadly. Thus, such privilege would be attached to a document rendering legal advice from solicitor to client and to specific requests from the client for such advice. Legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.[26]

In a recent English case,[27] in the proceedings between the Serious Fraud Office ("**SFO**") and Eurasian Natural Resources Corporation Limited ("**ENRC**"), ENRC successfully obtained litigation privilege over documents created during internal investigations into suspected bribery and corruption, claiming legal professional privilege. The Court of Appeal extended litigation privilege to documents created by the solicitors including preparatory legal work, notes of the evidence given by individuals and materials generated by the forensic and accounting firm, instructed by the solicitors in the course of the internal investigation.[28] Further, legal advice given to head off, avoid, or even settle reasonably contemplated proceedings would receive the same level of litigation privilege as in cases of defending or resisting litigation.[29] However, internal communications etc., which dominantly discuss commercial proposals for the settlement of the dispute between the parties when litigation was in reasonable contemplation, would not be covered under litigation privilege.[30]

Such litigation privilege would also be applicable in situations where, even if litigation is not the dominant purpose of investigation at the vest inception, but subsequently became the dominant purpose.[31] Further, such privilege would also be attached to documents prepared by the solicitors which would ultimately be shown to the opposite party in the litigation.[32]

Further, communications between an employee of a corporation and its lawyers would not attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client, i.e. the corporation.[33] Even though some might suggest the company to dispense with detailed documentation of employee interviews/ recording, it may be an impractical idea to do so, especially in major or complicated investigations.

On a related note, the Bombay High Court observed that for extending the privilege to a

25. *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48 (*"Three Rivers No. 6"*) (paragraph 102)

26. *Three Rivers (No. 6)*

27. *Eurasian Natural Resources Corporation Ltd v. Director of the Serious Fraud Office* [2018] EWCA Civ 2006

28. ibid

29. ibid

30. *WH Holding Limited and West Ham United Football Club Limited v. E20 Stadium LLP* [2018] EWCA Civ 2652

31. *Three Rivers No. 6*

32. ibid

33. *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 5)* [2003] QB 1556

document, it has to be shown that the document came into existence in anticipation of litigation for being used in litigation.[34] It 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."*[35]

The Bombay High Court relied on the test laid down by Barwick CJ in *Grant v. Downs*,[36] 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 may also clarify on who the client is and consequently, to whom the client-attorney privilege extends.

The United States Court of Appeals in *In re: Kellogg Brown & Root, Inc*[37] confirmed the application of the attorney-client privilege to internal corporate investigations as set forth by the Supreme Court over thirty years ago *in Upjohn Co. v. United States*[38].The Supreme Court in *Upjohn* had stated that the privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice. The internal investigations are protected to the extent that they are made for the 'predominant purpose' of obtaining legal advice.[39] In *Kellogg Brown*, District Court first applying the 'but for' test held that the party invoking the privilege must show the communication would not have been made 'but for' the fact that legal advice was sought. Overruling this verdict, the Court of Appeals stated that so long as 'obtaining or providing legal advice' was one of the significant purposes of the internal investigation, attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated rather than simply an exercise of company discretion.

34. *Larsen & Toubro Limited v. Prime Displays (P) Ltd., Abiz Business (P) Ltd. and Everest Media Ltd.* (2003) 105(1) BomLR 189
35. ibid
36. [1976] HCA 63
37. D.C. Cir. June 27, 2014) (No. 14-5055)
38. 449 U.S. 383 (1981)
39. *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007)

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.[40]

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 investigations team), 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.

At the stage of collection of data and/or sharing the same with the forensic experts, the applicable data protection laws such as, the Information Technology Act 2000 and Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 are of relevance. The Indian data protection rules broadly protect two categories of data pertaining to individuals, 'personal data' and 'sensitive personal data'. Personal data relates to an individual, which either directly or indirectly in combination with other information, may be capable of identifying such a person. Personal data of an individual could include a person's name, contact details, address, identifier etc.[41] Sensitive personal data on the other hand consists of specific items of data, namely passwords, financial information, physical, physiological and mental health condition, sexual orientation, medical records and history, and biometric information.[42]

As such, there are no specific compliances under the Indian data protection rules for collection, handling or storage of an individual's personal data although in case of unauthorized sharing or misuse of such information causing harm to the individual, penalties may be applicable in the form of imprisonment and fine. On the other

40. 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.

41. Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, r 2(1)(i)

42. Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, r 3.

hand, there are certain compliances applicable to entities that collect, handle or store sensitive personal data of individuals, and organizations would need to adhere to such compliances when conducting internal investigations, such as, providing employee(s) with adequate notice and disclosure(s) that their sensitive personal data may be collected for the purpose of an organization-driven investigation.[43] Such compliances may not need to be complied with while furnishing employees' sensitive personal data as part of court or enforcement agencies' proceedings or investigations.

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 has to be built in the informant/complainant (along with protection of his interests). The veracity of the information provided will have to be tested.

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. In the course of 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 has to consider the nature of the information sought, sensitivity of the issues, and manner in which the organization functions.
- The issues under consideration, the laws, policies that have 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 becomes handy at the time of investigation; however, it should be flexible enough to attune it to the needs that may arise in the course of 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 have to be interviewed has 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

43. For further details, refer to our article available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/data-considerations-in-employee-investigations-in-india.html

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 Interviews

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.[44] 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 expect 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.[45] 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 ongoing 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 endeavours 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.

44. See discussion under part 4.1 of this paper

45. 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

Ensuring smooth functioning of the investigation

Persons under investigation have to be apprised of the precautions to be undertaken to ensure smooth functioning of the investigative process. This has 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 5 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).

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 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 of 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 prior to preparation of the investigation report, 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 given 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 has to 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 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.

Subsequent to 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 causenotices 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. Further, issues pertaining to destruction and/or retention of data post completion of investigation have also assumed significance.

The outcome of the investigation would enable the organization in deciding if the offence has to be reported, and the proper authority[46] before which such reporting has to be made. For example, the Reserve Bank of India has issued Master Directions which provide for guidelines for reporting frauds to police/CBI and that the following cases should invariably be referred to the state police or to the CBI as detailed below:[47]

Category of bank	Amount involved in the fraud	Agency to whom complaint should be lodged	Remarks
Private Sector/ Foreign Banks	₹10000 and above	State Police	If committed by staff
	₹ 0.1 million and above	State Police	If committed by outsiders on their own and/or with the connivance of bank staff/officers.
	₹ 10 million and above	In addition to State Police, SFIO, Ministry of Corporate Affairs, Government of India.	Details of the fraud are to be reported to SFIO.

46. See, part 1 of this paper

47. RBI Master Directions on Frauds – Classification and Reporting by commercial banks and select FIs dated 1 July 2016 (updated as on 3 July 2017 vide letter DBS.CO.CFMC. BC.No.1/23.04.001/2015-16 dated 1 July 2015

Public Sector Banks	Below ₹ 30 million 1. ₹ 10,000/- and above but below ₹ 0.1 million	State Police	If committed by staff.
	2. ₹ 0.1 million and above but below ₹ 30 million	To the State CID/ Economic Offences Wing of the State concerned	To be lodged by the Regional Head of the bank concerned
	₹ 30 million and above and up to ₹ 250 million	CBI	To be lodged with Anti Corruption Branch of CBI (where staff involvement is prima facie evident) Economic Offences Wing of CBI (where staff involvement is prima facie not evident)
	More than ₹ 250 million and up to ₹ 500 million	CBI	To be lodged with Banking Security and Fraud Cell (BSFC) of CBI (irrespective of the involvement of a public servant)
	More than ₹ 500 million	CBI	To be lodged with the Joint Director (Policy) CBI

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 in the course of the investigation.

I. Post-investigations 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.[48] 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, such as fraud/ defaults etc. by its directors or employees.[49] 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 purpose of determining materiality of an event or information and for the purpose of making corresponding disclosures to stock exchange(s).[50]

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

48. Companies Act 2013, s 166

49. 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).

50. SEBI Disclosure Regulations, reg 30(5)

entity;[51] and preserve relevant documents.[52] 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.[53]

The listed entity has 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, failing which the listed entity would have to provide an explanation for delay.[54] 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.[55]

The SEBI Disclosure Regulations also prescribe the procedure for action in case of default. In case of contravention of the SEBI Disclosure 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.[56] 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.[57]

Additionally, under Clause 49 of the Listing Agreement, the CEO[58]/CFO[59] 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 into 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.

51. SEBI Disclosure Regulations, reg 4(2)(e)
52. SEBI Disclosure Regulations, reg 9
53. SEBI Disclosure Regulations, reg 4(2)(f)(ii)
54. SEBI Disclosure Regulations, reg 30(6)
55. SEBI Disclosure Regulations, reg 30(8)
56. SEBI Disclosure Regulations, reg 98
57. SEBI Disclosure Regulations, reg 99

58. The Managing Director or Manager appointed in terms of the Companies Act 2013
59. The whole-time Finance Director or any other person heading the finance function discharging that function

7. Conclusion

In our experience in working with foreign counsels on FCPA, for example, in investigations involving companies incorporated under the US laws, Indian subsidiaries are involved as well. In this respect, the investigation gains a multi-jurisdictional dimension warranting sufficient emphasis on Indian laws as well.

In light of best practices suitable for a corporate, it is advisable to acknowledge a complaint or otherwise that may be brought to the notice of the company rather than wait for stringent actions of regulatory authorities. This paper lays down the essentials of investigations under-taken in corporates and by no means complete.

8. Frequently Asked Questions

Q1. How are internal investigations viewed by enforcement authorities in India?

Ans. Internal investigations are generally viewed from the perspective of best practices and good corporate governance. They gain significant relevance in cases of self-reporting.

Q2. Generally, under what circumstances are internal investigations conducted?

Ans. Internal investigations are conducted upon suo motu recognition by the company of the disruptions in the affairs of the company or complaints received or internal audit detecting a wrongdoing. Some of the circumstances which trigger such internal investigations are as below:

- 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

Q3. What kind of protection is available to whistleblowers who expose such wrongdoings?

Ans. Most of the listed companies in India have a whistleblower policy in place, required under clause 49 of the Listing Agreement. Further, the Codes of Conduct of most companies provide for reporting norms through a set internal mechanism. The Whistleblower Protection Act 2014 provides safeguards against victimization of the person making complaints relating to disclosure on any allegation of corruption or wilful misuse of power or wilful misuse of discretion against any public servant.

Q4. What are some of the challenges in cross-border investigations?

Ans. Some major challenges arising in cross-border internal investigations pertain to collation of relevant information from abroad. Some other challenges in cross-border investigations result from conflict of laws in the concerned jurisdictions as well as on the aspect of privilege. For example, for investigations in India, attorney–client privilege would not extend to communications exchanged between an in-house counsel and the company, even if it is protected in the US.

In case of the investigations by enforcement agencies, additional challenges are faces in matters concerning custody, or extradition of the accused from a foreign jurisdiction or obtaining information from a foreign government. In this context, the mutual legal assistance treaties, if any, signed by India and the concerned jurisdiction, gain significance. Alternatively, letters of rogatory or information requests may also be issued to the appropriate court or authority in the foreign jurisdiction, as provided under Section 166 A of the Code of Criminal Procedure 1973.

Q5. What is required to be done by the company towards preparation for the investigation?

Ans. Prior to the investigation, the company may consider the following:

a. Preliminary identification of persons to be interviewed (including the accused as well as witnesses)

b. Collection and preservation of relevant information, as deemed necessary.

c. Depending on the issues involved, the company will have to ascertain if an external counsel is required or the investigation may be conducted by the in-house counsel.

d. Decide on who will conduct the investigation

e. Consider the need and implementation of interim measures.

Q6. What difference does it make to engage an external counsel as compared to an in-house counsel?

Ans. Besides the credibility and expertise associated with an external counsel in handling investigations, the key factor behind engagement of external counsel is the client-attorney privilege as envisaged under the Indian Evidence Act 1872. Thus, the documents created in the course of the investigation or the outcome of the investigation in the form of a report or otherwise would, in the general circumstances, be protected.
Thus, in India, to make such documents or information protected by privilege, it is advisable that this process is carried out through an external counsel (who is an Advocate licensed to practice under Advocates Act 1961).

Q7. Do employees have to be formally (in writing) invited for an interview?

Ans. A formal written invitation is not mandatory, however, it is suggested as a good practice to intimate the employees in advance, in writing.

Q8. Can the employee who is to be interviewed be accompanied by a lawyer to the interview?

Ans. Yes.

Q9. Can any action be taken against an employee who refuses to participate in the investigation?

Ans. In case of such refusal, disciplinary actions in accordance with the policies of the company and the employment contract, may be initiated.

Q10. Can the interviewees avail client-attorney privilege in the investigation?

Ans. No. The employees are informed of such non-applicability by way of an Upjohn warning. 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.

Q11. What is an Upjohn warning?

Ans. These warnings are given to the employees to be interviewed. The employees are informed that the attorney-client privilege would be preserved between the company and its attorney only. Such a 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.

Q12. Is it mandatory to give such a warning prior to the investigation?

Ans. It is not mandatory to issue such warnings but as a matter of good practice, Upjohn warnings may be given.

Q13. Is such client-attorney privilege absolute?

Ans. The legal privilege would not extent to "any such communication made in furtherance of any illegal purpose". 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 as *"privileged communication."*

Q14. Do terms of reference or scope of investigation have to be set out before commencement of an internal investigation?

Ans. Companies are generally encouraged to do so. This would ensure a more synchronized investigation, especially during preparation of the investigation report.

Q15. Do notes from the interview have to be shared with the interviewee?

Ans. It may be done, in order to give a fair opportunity to an employee under investigation and avoid future hassles like objections raised by the employees interviewed.

Q16. Can such interviews be recorded?

Ans. Yes. As a matter of best practices, employees are informed or given notice, before being recorded. A prior written consent of the employees may also be taken. This would prevent claims of invasion of privacy, defamation etc. In any event, the employer must consider whether any audio or video recording is necessary.

Q17. Should an advance notice be given in case of any audio or video recording?

Ans. There is no such legal requirement to give an advance notice. A notice at the beginning of the interview suffices.

Q18. Do the employees have automatic entitlement a copy of the recording?

Ans. The employee does not have an automatic entitlement to a copy of the recording irrespective of consent. The employee may however try to obtain a copy through a court order / discovery process.

Q19. Can such recordings be used as evidence in court?

Ans. To avail attorney privilege, it is advisable that the recordings are done by an external counsel.

In India, tape recorded conversations would be admissible as evidence only if (a) the conversation is relevant to the matters in issue, (b) there is identification of the voice, and (c) the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. The burden of proving these aspects will lie upon the person who intends to produce the recorded conversation as evidence.

Q20. What needs to be done upon conclusion of an investigation?

Ans. Upon conclusion of an investigation, the company may require further investigation of the issue. Depending on the outcome of the investigation, the company may also be required to report the same to appropriate authorities. Nonetheless, listed companies are required to verify their disclosure obligations in accordance with the listing agreement signed with the respective stock exchange.Generally, a show cause notice is issued to the concerned employees subject to the outcome of the investigation. Upon receipt of the responses to such show cause notices, necessary steps may be adopted by the company.

Q21. What kind of corrective measures can be taken?

Ans. The nature and extent of measures would depend on the specific facts and circumstances and the outcome of the investigation. Some of the measures, which may be adopted are:

- Training of erring or defaulting employees
- Scrutinisation and rectification of documents
- Drafting a Manual
- Reformation of policies and guidelines
- Monitoring and Implementation of Policies
- Reshuffling departments/employees

Q22. Does the outcome of the internal investigation have to be self-reported?

Ans. In India, self-reporting is not very common. Very few laws like the Competition Act 2002 provide for a leniency programme, which provides for reduced penalties for applicants who make vital disclosures on cartels.

Q23. Does the investigation report have to be shared with the interviewees?

Ans. No. The investigation report is issued to the management (i.e. the company), which may be subsequently intimated to the employee by the management, including the consequence of the proceedings, and the action / punishment (if any), awarded to the concerned employee(s).

Q24. Are there restrictions on transferring data collected and used during the investigation?

Ans. Abundant caution has to be exercised especially when the data is either sensitive personal data or information, failing which violation of privacy and data protection may be triggered. For example, in light of the Information Technology Act, 2000 and Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, the company needs to exercise extreme caution when processing such personal information.

Q25. An example of a recent or ongoing high-profile corporate investigation in India.

Ans. ***The case of ICICI Bank:***
Pursuant to a notice issued by the Securities Exchange Board of India to ICICI Bank and its CEO, Ms. Chanda Kochhar, alleging violation of listing obligation and disclosure requirements, the Central Bureau of Investigation (CBI) launched a preliminary enquiry against several individuals and firms, officers within and outside the bank. The board of ICICI Bank ordered an independent enquiry, including forensic audit, into new whistleblower allegations against the CEO that there has been a violation of the Code of Conduct of the bank, its rules on conflict of interest and that Ms. Kochhar was part of quid pro quo dealings with certain bank borrowers (arising out of business dealings between members of the CEO's family and the Videocon group).

Q26. Are search warrants and dawn raids by enforcement authorities common in India?

Ans. Some enforcement authorities like the income tax authorities and the anti-trust regulator (i.e. Competition Commission of India) in India are empowered under the respective laws in this regard. The search and seizure, and dawn raids would have to be done in accordance with the prescribed laws, failing which such dawn raids and search and seizure can be challenged on grounds of illegality.

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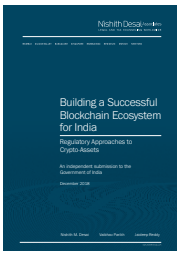

Building a Successful Blockchain Ecosystem for India

December 2018

NDA Insights

TITLE	TYPE	DATE
Delhi Tribunal: Hitachi Singapore's Liaison Office in India is a Permanent Establishment, Scope of Exclusion Under Singapore Treaty Restrictive	Tax	November 2019
CBDT issues clarification around availment of additional depreciation and MAT credit for companies availing lower rate of tax	Tax	October 2019
Bombay High Court quashes 197 order rejecting Mauritius tax treaty benefits	Tax	May 2019
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Changing landscape of confidentiality in international arbitration	Dispute	January2020
The Arbitration and Conciliation Amendment Act, 2019 – A new dawn or sinking into a morass?	Dispute	January2020
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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.

Our dedication to research has been instrumental in creating thought leadership in various areas of law and public policy. Through research, we develop intellectual capital and leverage it actively for both our clients and the development of our associates. We use research to discover new thinking, approaches, skills and reflections on jurisprudence, and ultimately deliver superior value to our clients. Over time, we have embedded a culture and built processes of learning through research that give us a robust edge in providing best quality advices and services to our clients, to our fraternity and to the community at large.

Every member of the firm is required to participate in research activities. The seeds of research are typically sown in hour-long continuing education sessions conducted every day as the first thing in the morning. Free interactions in these sessions help associates identify new legal, regulatory, technological and business trends that require intellectual investigation from the legal and tax perspectives. Then, one or few associates take up an emerging trend or issue under the guidance of seniors and put it through our "Anticipate-Prepare-Deliver" research model.

As the first step, they would conduct a capsule research, which involves a quick analysis of readily available secondary data. Often such basic research provides valuable insights and creates broader understanding of the issue for the involved associates, who in turn would disseminate it to other associates through tacit and explicit knowledge exchange processes. For us, knowledge sharing is as important an attribute as knowledge acquisition.

When the issue requires further investigation, we develop an extensive research paper. Often we collect our own primary data when we feel the issue demands going deep to the root or when we find gaps in secondary data. In some cases, we have even taken up multi-year research projects to investigate every aspect of the topic and build unparallel mastery. Our TMT practice, IP practice, Pharma & Healthcare/Med-Tech and Medical Device, practice and energy sector practice have emerged from such projects. Research in essence graduates to Knowledge, and finally to *Intellectual Property*.

Over the years, we have produced some outstanding research papers, articles, webinars and talks. Almost on daily basis, we analyze and offer our perspective on latest legal developments through our regular "Hotlines", which go out to our clients and fraternity. 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 Lab Reports 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 articles and disseminate them through our website. Our research has also contributed to public policy discourse, helped state and central governments in drafting statutes, and provided regulators with much needed comparative research for rule making. Our discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged. Although we invest heavily in terms of 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.

As we continue to grow through our research-based approach, we now have established an exclusive 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. **Imaginarium AliGunjan** is a platform for creative thinking; an apolitical eco-system that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

We would love to hear your suggestions on our research reports. Please feel free to contact us at **research@nishithdesai.com**

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