

GIR KNOW-HOW SECURITIES & RELATED INVESTIGATIONS

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# Korea

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NOVEMBER 2020

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## Regulatory environment

### 1 What are your country's primary securities or related law enforcement authorities?

The Financial Services Commission (FSC) sets and enforces financial and supervisory policy across all financial institutions and markets in Korea. The Securities and Futures Commission (SFC), established under the FSC, deals with matters related to unfair trading on the capital markets, as well as accounting and auditing. The Financial Supervisory Service (FSS) supervises, inspects and investigates financial institutions under the FSC's and/or the SFC's guidance and supervision.

Self-regulatory organisations, including the Korea Exchange (KRX), the Korea Financial Investment Association (KOFIA) and the Korean Institute of Certified Public Accountants (KICPA), also play a role in the regulatory and supervisory processes. Also, in case of foreign investment, the Bank of Korea (BOK) is involved in overseeing foreign exchange transactions.

The Fair Trade Commission (FTC) has the authority to review the terms of certain financial contracts and to bring actions related to anticompetitive activities, including manipulation.

### 2 What are the principal violations or legal issues that the securities or related law enforcement authorities investigate?

The FSC, the SFC, the FSS and other related law enforcement authorities mainly concern of following violations with regard to securities or market related law enforcement:

- fraud or unfair trading, including fraudulent or misleading information in public disclosures that are mainly prosecuted under article 178 of the Financial Investment Services and Capital Markets Act (Capital Markets Act);
- market-price manipulation, which is mainly prosecuted under article 176 of the Capital Markets Act;
- insider trading and use of material non-public information, which are mainly prosecuted under articles 172 and 174 of the Capital Markets Act, respectively; and
- failure to report on the status of specific securities owned by the executives or significant shareholders, which is mainly prosecuted under article 173 of the Capital Markets Act.

### 3 If there is more than one authority involved in a securities or related investigation, how is jurisdiction allocated? What is the interplay between the securities regulator and the public prosecutor?

One of the FSS's investigation departments usually conducts the initial investigation. The FSS's investigation of potential violations is typically triggered by (i) anonymous reports made to the FSS, (ii) reference from the KRX, (iii) request of investigation made by the Korea Financial Intelligence Unit (FIU) or the prosecutor, (iv) financial monitoring conducted on listed companies or reports and contracts filed by the listed companies, or (v) its own course of market monitoring.

The SFC then reviews the case and investigates further. If the SFC concludes that the suspect is innocent, the SFC can close the case without further action. If not, the SFC refers cases to the prosecutors for further investigation and/or prosecution. The FSS, the FSC and the SFC also support the prosecutors in investigating securities law violations by passing on all the information they gathered in the course of their investigations.

### 4 Do the securities or related law enforcement authorities have investigatory powers? Can they bring administrative, civil or criminal proceedings?

Yes. The FSC, the FSS and the SFC have a broad set of investigatory powers.

Also, according to the result of the investigation conducted by the FSC, the FSS and the SFC, the FSC may take administrative measures against financial institutions, including imposing a fine or administrative penalty, cancelling all or part of the licence or registration, suspending all or part of the business, a warning, etc.

With regard to the criminal proceedings, the FSC and/or SFC may not indict a suspect by themselves; however, they may file a criminal complaint to the Prosecutor General or refer case to the investigative authority.

### 5 Are regulatory or criminal securities and related investigations public? Under what circumstances?

Relevant authorities usually keep the substance of regulatory and criminal investigations confidential until the investigation is resolved, but the authority or the company under investigation may publicly disclose the fact there is an investigation pursuant to public disclosure rules or to manage market reaction.

## **6 Are regulatory or criminal securities and related investigations targeted at the company or the individuals involved, or both?**

Regulatory or criminal securities and related investigations may be targeted both at the company and the individuals directly involved.

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## **Investigation procedure**

### **7 How do the securities and related law enforcement authorities typically begin an investigation?**

Generally, a regulatory authority may begin an investigation based on information from various sources, such as whistleblowers, public complaints, media coverage, examinations or reviews of information by the regulatory authority or referrals from other governmental authorities and regulatory filings conducted by the companies.

When the FSC, the SFC or the FSS identifies potential non-compliance or wrongdoing, it will initiate an investigation, usually in the form of requesting information or documents from the companies and individuals implicated.

### **8 What level of suspicion of wrongdoing is required for the securities or related law enforcement authorities to begin an investigation?**

In general, the FSC and the FSS may exercise their investigatory powers if there are indications that suggest any wrongdoing. They are authorised to initiate investigations at any time as part of their regular supervisory activities.

Somewhat stricter, the prosecutors may initiate – mostly after a referral from the FSC and/or the FSS – a criminal investigation if there is an initial suspicion. This requires factual indications that a criminal offence was committed. Often, the prosecution will have received all of information that the FSS, the FSC or the SFC collected in the course of its investigation.

### **9 May the securities or related law enforcement authorities conduct dawn raids? Does this depend on the nature and seriousness of the allegations?**

Under the Capital Markets Act, the FSC has authority to conduct raids pursuant to a court-issued warrant. The FSC, however, has rarely exercised this power, leaving that to the prosecutors. The prosecutors may, in the course of a criminal investigation, conduct a dawn raid pursuant to a court-issued warrant. To obtain a search warrant, the prosecutor must apply to the relevant court, upon which the court will consider probable cause, the risk of destruction or tampering of evidence and the necessity of such evidence. To conduct raids before sunrise and after sunset, the warrant must specify that the raids can be conducted before sunrise and after sunset.

### **10 Must the findings of a company's internal review be reported to the securities or related law enforcement authorities? When and under what circumstances?**

As part of general compliance obligations, companies are advised to closely investigate cases of actual or potential wrongdoing in cooperation with the financial authorities. There is, however, no specific legal requirement for a company to hand over the report of an internal investigation report to the financial authorities. However, the financial authority may request that the companies submit internal investigation or other reviews as a reference to the investigation.

### **11 Are whistleblowers a frequent source of information for securities and related investigations?**

Korea's Act on the Protection of Public Interest Whistleblowers offers legal protection and financial incentives to whistleblowers who report wrongdoing in the private sector in the public interest. Whistleblowers are granted anonymity during investigation and court proceedings, in addition to police protection, if deemed necessary.

However, due to a recent incident where a whistleblower's identity was accidentally revealed whistleblowers are not a common source of information for securities and related investigations, at least at the time of writing.

## 12 Describe the typical phases of a securities or related investigation in your country.

Regulators such as FSC, SFC and FSS usually initiate investigations upon identifying signs of wrongdoing. Once the regulators identify potential wrongdoing or non-compliance, they typically send an information request (eg, voluntary production of documents) to the company or individuals involved. They may also summon and question individuals and request information from third parties, including other governmental authorities.

If the regulators discover what they deem to be a criminal offence, they can either lodge a criminal complaint with the Prosecutor General or refer the case to the prosecutors. In any event, regulators send over information they obtained in the course of their investigation. The prosecutor then conducts its own investigation and, if it concludes that there is enough evidence, it will bring charges.

## 13 What are the mechanisms by which a securities or related law enforcement authority may cooperate and coordinate with authorities outside your jurisdiction?

The FSC and the FSS use bilateral and multilateral agreements, such as memoranda of understanding (MOUs) or terms of reference (TORs) to share information with foreign authorities. They are also signatories to the International Organization of Securities Commissions Multilateral Memorandum of Understanding (IOSCO MMoU), which allows securities regulators from around the world to share information. Signatories allow the shared information to be used in civil or administrative proceedings, to pass the information on to self-regulatory organisations and criminal authorities, and to keep shared information confidential.

The prosecutors (through the Ministry of Justice and/or Ministry of Foreign Affairs) may also use mutual legal assistance treaties, the Council of Europe's Convention on Mutual Assistance in Criminal Matters and other informal channels to request evidence from foreign countries to facilitate cooperation in cross-border investigations.

## 14 Will a securities or related law enforcement authority take into account findings by a law enforcement authority outside your jurisdiction in the course of its investigation?

There is a lot of mutual sharing of information between the FSC/FSS and foreign regulators. The FSC, FSS and other domestic regulators may generally take into account and use a foreign regulator's findings. Similarly, the prosecutors may generally use the information the foreign authorities provide.

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## Document production

### 15 What can the securities and related law enforcement authorities require to be produced as part of an investigation? Do the powers of a regulator differ from those of the public prosecutor?

Under the Capital Markets Act, the FSC has broad powers to request a person or company suspected of securities law violations to submit relevant documents, account books, and other materials necessary for the investigation, as well as an affidavit describing factual circumstances involving the conduct at issue. When investigating violation of certain provisions in the Capital Markets Act relating to unfair trade (eg, insider trading and market price manipulation), the SFC may have designated FSC employees interview individuals, search businesses and/or seize evidence. The search and seizure requires a judge-issued warrant.

The prosecutors may seize or otherwise secure any documents or things, but only after obtaining a court order or a warrant to do so.

### 16 Will a litigation hold or will other instruction to preserve documentation need to be issued? When?

Korean law does not impose document-hold obligations on parties that may be facing litigation or prosecution. However, if the document is considered as an evidence and the accused companies or individual intentionally destroy the document, the prosecution may bring charges relating to destruction of evidence. Companies, however, often have document preservation policies, especially in the context of compliance and enforcement matters. Moreover, individuals who destroy evidence run the risk of committing a criminal offence if their conduct impedes criminal investigations.

## **17 Can the securities and related law enforcement authorities request the production of materials protected by attorney-client privilege or work-product doctrine? Can the securities and related law enforcement authorities use protected materials if it obtains them from third parties?**

Generally speaking, Korea does not recognise an attorney–client privilege or work–product doctrine, except in very limited circumstances. That said, lawyers are subject to a professional obligation to maintain confidentiality and may refuse to testify or provide documents containing confidential information if it falls within the scope of their professional duties. This protection does not necessarily extend to the client or its in-house counsel, and regulators may request and use these documents from the client companies and individuals.

## **18 How is confidential information or commercially sensitive information treated by the securities and related law enforcement authorities?**

Korean public officials, including financial regulators and prosecutors, are subject to a strict confidentiality obligation. For example, the State Public Officials Act provides that all public officials must keep confidential the information they learn in the course of carrying out their duties, not only during their tenure, but also after their retirement. Moreover, unauthorised disclosure of commercially sensitive information (eg, trade secrets) may qualify as a criminal offence.

## **19 Can the target of a document request exercise a right not to produce?**

The recipient of a regulator’s voluntary document production request may refuse to comply. However, such refusals can subject the recipient to fines and/or other sanctions, depending on the circumstances.

## **20 Do any data privacy, bank secrecy or other laws restrict the production of materials to a securities or related law enforcement authority in your jurisdiction? An authority outside your jurisdiction? May the company under investigation provide personal or bank customer data on a voluntary basis?**

Korean data privacy laws generally prohibit transfer of personal data and credit data (as defined by law) to a third party. However, production of the materials may be required when there is a formal court order, there is a court-issued warrant, or other laws specifically require it.

Foreign authorities’ requests or orders, including subpoenas from foreign courts, do not sufficiently constitute an exception to the data privacy laws, unless that foreign country has entered into a treaty suggesting otherwise. Foreign authorities usually have to rely on formal mechanisms of mutual legal assistance or the Hague Evidence Convention. Korean companies generally do not provide personal or bank customer data on a voluntary basis.

## **21 Are there any data privacy, bank secrecy or other laws that restrict where documents or other communications may be stored or reviewed for the investigation?**

There are internal regulations on storage of the documents or other forms of communication per each financial regulatory body (eg, FSC, FSS, etc). These rules provide guidelines on how the documents and evidence of communications must be stored or reviewed.

## **22 Are the securities and related law enforcement authorities able to obtain documents from outside the country?**

Financial regulators can informally and formally request documents from foreign authorities using various informal channels, bilateral and multilateral agreements, MOUs or TORs. Moreover, the FSC and the FSS, as signatories to the IOSCO MMoU, can also request foreign authorities to share important information, including documents.

The prosecutors (through the Ministry of Justice and/or Ministry of Foreign Affairs) may also use mutual legal assistance treaties, the Council of Europe’s Convention on Mutual Assistance in Criminal Matters, and other informal channels to request evidence (including documents) from foreign authorities.

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## Witness interviews

### 23 Will the securities and related law enforcement authorities conduct witness interviews? If so, will the interviews be on the record? Will the interviews be made public?

Korean financial regulators may conduct witness interviews. Under the Capital Markets Act, for example, the FSC and the SFC may summon and question a person of interest to ensure compliance with the act, and such powers are usually delegated to the FSS. Regulators may prepare interview minutes or otherwise record a witness interview. Interviews are not usually made public unless so required in subsequent court proceedings.

The prosecutors may also summon and question witnesses. Most of these witness interviews will be on the record. Interviews are not usually made public unless so required in subsequent court proceedings.

### 24 Can witnesses exercise a right not to testify? Will any adverse inference be drawn if they do so?

Financial regulators may initially request that witnesses voluntarily participate in interviews or submit factual affidavits. While an individual may decline to participate in a voluntary interview, it may be a factor when financial regulators decide to refer the investigation to the prosecutors. Also, under certain circumstances, a witness may practically be compelled to provide a testimony but the witness may exercise his or her right not to incriminate himself or herself.

In a formal criminal proceeding, witnesses may refuse testimony only under a narrow set of circumstances, such as a close family relationship to the alleged offender or statutory confidentiality obligations of certain professionals (eg, lawyers, accountants, doctors). Witnesses may also refuse to answer questions if, by doing so, they would incriminate themselves. No adverse inferences may be drawn from the alleged offender's decision to invoke his or her right not to testify.

### 25 Do witnesses receive separate counsel? Who provides counsel for witnesses?

Generally speaking, corporate executives and employees summoned to testify receive separate counsel owing to potential conflict of interests, at least in high-profile cases. In practice, the company will often suggest suitable counsel, but the witness ultimately has the final call. The company usually pays or reimburses the legal fees, unless the witness is eventually found liable.

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## Advocacy

### 26 Can the target of a securities or related investigation challenge the investigation in court while the investigation is ongoing?

No. The target cannot challenge the administrative investigation in court while the investigation is ongoing. However, the court has authority to revoke or overturn investigative authorities' final disposition if it is based on unlawful or improper investigation.

### 27 What opportunity will there be to respond to a securities or related law enforcement authority's theories or allegations prior to the authority bringing charges?

Before the FSC determines whether to bring charges, the FSS provides notice to the accused, which includes: (i) title of the charge; (ii) facts that constitute the basis for the charge, details of charge, and legal theory; and (iii) a standard statement that the accused may opine or provide testimony on the matter and the applicable process. According to the notice, the accused can state its opinion and/or position to the FSS in writing.

Further, in a case in which the Committee for Deliberation on Investigation of Capital Market (Deliberation Committee), which is an advisory organisation to the SFC determining whether to lodge a criminal complaint, the accused may choose to appear before the Deliberation Committee to state his or her position.

Also, during the course of the investigation, the accused usually has a number of opportunities to respond to the FSS in writing or in person. These opportunities may be used to effectively respond to the accusation.

## **28 What form does the advocacy with a securities or related law enforcement authority typically take?**

Advocacy with securities law enforcement authorities typically takes written form, including but not limited to affidavits or opinion letters. As noted above, the accused may also appear before the FSC or the Deliberation Committee to state his or her position.

## **29 Are statements or advocacy positions taken by an investigated party during the investigation process deemed admissions and binding in future proceedings? Would such statements be made public?**

No. Although the FSC or the FSS typically hands over all related materials when referring the matter to the prosecutors, statements or advocacy positions taken by an investigated party during the investigation are not deemed admissions or otherwise binding in future proceedings unless otherwise qualified under the Criminal Procedure Act. Accordingly, the prosecutors generally interrogate the accused with same questions and materials as the FSC or the FSS, or both.

The investigated party's statements or positions are not generally made public, but the court may introduce or incorporate such statements or positions as evidence in the final criminal judgment, which may be public.

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## **Timing**

### **30 What is the limitation period for charges for securities and related violations?**

The limitation period for securities and related violation charges may differ based on the gravity of the violations. Under the Capital Markets Act, the same act can be punished very differently according to the amount of the profit earned from the violation.

For violations punishable by fines, the limitation period is five years and, depending on the magnitude of the possible punishment designed for that violation, the limitation period can be up to 15 years.

### **31 When does the limitation period begin to run?**

The limitation period begins to run when the act that constitutes the violation is committed. If the violation includes an accomplice, the limitation period begins to run when all acts of the accomplice are done.

### **32 What can suspend the running of the limitation period? Can the securities and related law enforcement authorities request a tolling agreement?**

The limitation period may be suspended for a number of grounds. For example, if the prosecution files a charge with the court or if the suspect flees the country for the purpose of avoiding criminal penalties, the limitation period is suspended. Korean securities and law enforcement authorities do not have power to enter into tolling agreement.

### **33 How long does a securities or related investigation typically take?**

It varies, but it typically takes more than a year. For example, in an unfair trading case, the FSS handles preliminary investigation, and, once done, the Deliberation Committee decides whether to refer to the prosecutors. The prosecutors then conduct their own investigation.

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## **Resolution**

### **34 What is the process for closing an investigation if the investigation does not reveal a violation of securities or related laws? Will the securities or related law enforcement authorities provide written confirmation that the investigation is closed without action?**

If the investigation does not reveal a violation of securities or related laws, the financial regulators, such as the FSS, simply do not take additional measures.

The prosecutor's office generally provides a written notice to the financial regulator that it will not prosecute.

### **35 How will the resolution or settlement process be initiated?**

There is no explicit resolution or settlement process set forth in the Capital Markets Act or other relevant laws. Unless provided otherwise, the investigation usually takes its due course and is resolved accordingly. However, during the course of the investigation, the accused may provide reasonable explanations regarding the accusation and the FSS may decide not to further investigate at its discretion.

### **36 Who decides whether to proceed with charges and what charges to select?**

In a typical investigation, the FSS submits a report to the FSC that sets forth facts, alleged illegal activity, and the FSS's recommendation regarding the charges. The Deliberation Committee deliberates the case and decides whether to file a criminal complaint with the Prosecutor's Office or refer the case to the prosecutors or both. If applicable, it also decides whether to impose administrative fines, issue warnings, or take corrective measures.

### **37 What factors would a securities or related law enforcement authority consider in selecting charges and the severity of any penalty or fine?**

The securities or related law enforcement authorities, including the FSC and the SFC, and ultimately the court, have discretion in selecting the charge and the severity of penalty or fine pursuant to applicable laws. In exercising such discretion, they consider many factors, including intent and magnitude of the violation, whether the violation was voluntarily reported to the authorities, whether the violation has been remedied, precedents involving similar violations and associated penalties, and the future impact that such charges and penalties might have on the market in the future. The factors to be considered may vary from case to case.

### **38 What remedies can the securities or related law enforcement authorities consider? How are penalties calculated?**

The FSC or the SFC may consider a wide array of remedies, including but not limited to filing a criminal complaint with the Prosecutor's Office, imposing administrative fines, taking corrective measures, issuing warnings, and ordering removal from office for those involved in illegal practices.

Criminal penalties are calculated according to the Capital Markets Act and other related laws, it usually linked to the amount of the benefit the accused has earned or the loss the accused has avoided.

### **39 Do illegal profits have to be disgorged, and if so, how are they determined?**

The Capital Markets Act provides that, when found guilty of violations such as using material non-public information, market manipulation, and unfair trading, illegally acquired property shall be confiscated and, when the property cannot be confiscated, the equivalent value thereof will be collected according to the criminal trial procedure.

However, in cases in which the court cannot determine the amount of ill-gotten gains from violations of the Capital Markets Act, the court may not confiscate the illegal profits.

### **40 Can criminal charges be brought against companies in your jurisdiction for violations of securities and related laws?**

The Capital Markets Act provides that, when company executives or employees are found guilty of violations, companies can be criminally prosecuted and punished by fine for negligence in supervision.

### **41 Will the securities and related law enforcement authorities provide a reduced penalty for cooperation? What standard will the authorities use when taking into account any cooperation?**

Cooperation can lead to a reduced penalty or, in some cases, avoidance of a criminal complaint altogether. This is particularly true when (i) the investigated party is not a primary suspect, has no record of securities law violations, and voluntarily reports criminal activity; or (ii) the investigated party is not a primary suspect and provides critically important information with respect to unfair trading allegations.

**42 Are deferred prosecution agreements or non-prosecution agreements permitted?**

No. They are not permitted.

**43 Will a court need to approve the settlement agreement with a securities or related law enforcement authority?**

Settlement agreements with the FSC, the SFC, the FSS or the prosecutors are not permitted in Korea.

**44 If a settlement occurs, will an admission to certain facts or wrongdoing be required?**

Settlement agreements with the FSC, the SFC, the FSS or the prosecutors are not permitted in Korea.

**45 Can the findings or decisions of the securities or related law enforcement authorities be administratively appealed? Appealed to a court?**

An investigated party who is dissatisfied with an FSC or SFC disposition may file an objection with the FSC within 30 days of the disposition. Also, an investigated party can appeal to court within 90 days of the disposition.

**46 If a decision can be administratively or judicially appealed, what are the consequences of an adverse decision on appeal? What are the consequences of a positive decision on appeal?**

If an investigated party objects to the FSC or the SFC, the adverse decision on appeal binds the FSC or the SFC, and the case may be remanded or dismissed.

On the other hand, if the investigated party appeals to the administrative court and gets an adverse decision on appeal, that decision is usually to revoke the FSC's or SFC's decision, and the case is usually remanded for further proceedings. The FSC or the SFC is bound to the court's decision and may not come to the same decision as the previous one.

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## Collateral consequences

**47 What are some of the collateral consequences of a resolution or settlement with a securities or related law enforcement authority?**

There is no explicit resolution or settlement process set forth in the Capital Markets Act or other relevant laws.

**48 What are some of the collateral consequences of a conviction or the imposition of liability by a court?**

The implicit collateral consequences can be a few, but, most noticeably, the violators may not qualify for large shareholder requirements for the financial services companies or be appointed as the executives of those companies for a certain time period.

**49 Can private securities or related legal claims proceed parallel to investigations by securities and related law enforcement authorities?**

A person harmed by unfair trading activities (eg, use of material non-public information) may bring a civil action for damages against the perpetrator. However, it is not practical to proceed with the civil actions in parallel with investigations by financial regulators, such as the FSS. This is because US-type discovery is not permitted in civil lawsuits in Korea, and the plaintiff may face difficulties in acquiring the evidence necessary to establish liability until the FSS and the FSC conclude their investigation.

**50 What effect will findings by an authority in another jurisdiction have in private proceedings?**

There is no particular restriction on admission of evidence in private proceedings. Any foreign authority's adverse findings can be submitted to the court, which may take the adverse finding into consideration in the plaintiff's favour.

## **51 Can private plaintiffs obtain access to the files or documents the securities or related law enforcement authorities collected during the investigation?**

Private plaintiffs do not have access to the files or documents collected by the FSS or related authorities. Public authorities, including the FSC, the FSS and the prosecutor's office, may decline to disclose information pertaining to audit, supervision, regulation and investigation of crime or prosecution under the Official Information Disclosure Act. However, a private plaintiff may ask the court for the order to submit the related documents to the extent permitted under relevant laws.

Disclaimer: This article was written as a collaborative project between Yulchon and Kobre & Kim. Yulchon contributed summaries of Korean law. Kobre & Kim contributed thoughts on strategy in securities and investigations matters.

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Before joining Kobre & Kim, Mr Lee was a DOJ prosecutor (as an assistant US Attorney). While serving in that capacity, Mr Lee focused on white-collar criminal cases involving investment fraud, healthcare fraud, defence contractor fraud, and multijurisdictional asset forfeiture and tracing. Earlier in his career, he was a trial attorney for the US Department of Defense, litigating major crimes for the Pacific region, including Korea, Japan, Hawaii and Guam.

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We regularly handle sensitive investigations related to bribery, corruption, money laundering and accounting and securities fraud, focusing on the core of the problem and providing clients with strategies and solutions aimed at mitigating risk and protecting business interests.

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