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INTERNAL INVESTIGATIONS: AN OVERVIEW OF THE NUTS AND BOLTS AND KEY CONSIDERATIONS IN CONDUCTING EFFECTIVE INVESTIGATIONS

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In today's highly regulated environment, corporations, directors, officers, and even in-house lawyers increasingly find themselves at risk for the potential wrongdoing of company employees. Where in the past, liability was limited to civil claims against the corporation for *respondeat superior,* wrongdoing by employees now often triggers regulatory inquiries and even criminal prosecutions.

In response to the risks posed by the criminalization of business conduct, and largely spurred by the enactment of the Sarbanes-Oxley Act,[1] public corporations – and their Audit Committees – find themselves increasingly relying on internal investigations as both a way to ferret out potential wrongdoing and to insulate themselves and their directors and officers from liability. Section 301 of Sarbanes-Oxley requires an audit committee "to establish procedures for the receipt, retention and treatment of complaints . . . regarding accounting, internal accounting controls or auditing matters."[2] Internal investigations frequently provide the vehicle by which audit committees satisfy this obligation.

The "carrot" available for such self-policing is evident: The *United States Sentencing Guidelines*, for example, have long recognized that an effective program to prevent and detect violations of law, coupled with self-reporting and cooperation, can mitigate fines for corporate wrongdoing.[3] Several federal agencies also offer amnesty in exchange for voluntary disclosure of violations.[4]

At the same time, failing to conduct investigations and establish compliance programs can constitute a breach of fiduciary duty. In *In re Caremark Int'l, Inc. Deriv. Lit.*, [5] for example, the Delaware Chancery Court underscored the importance of establishing an effective compliance program, as defined by the *Federal Sentencing Guidelines*, noting that directors have an obligation to do so as part of their duty of care. The internal investigation, therefore, has become an essential part of even the most basic corporate governance process.

But internal investigations are fraught with peril if not conducted properly. If poorly planned and executed, they can be expensive – indeed, a waste of corporate resources. They can become tools of internal corporate political battles if the investigator is not sufficiently independent. They can be runaway trains bound for a wreck if the scope is not properly tailored and the investigator believes it must find wrongdoing to justify the engagement. And, even if the scope is properly defined and lines of authority are clearly drawn, the investigation can put the corporation's legal privileges at risk if it does not take the necessary steps to safeguard them.

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[1] The Public Company Accounting Reform and Investor Protection Act of 2002 is commonly referred to as the "Sarbanes-Oxley Act," Pub. L. No. 107-204, 116 Stat. 745 (2002) ("Sarbanes-Oxley Act").
[2] Sarbanes-Oxley Act § 301, 15 U.S.C. § 78j-1.
[3] U.S. SENTENCING GUIDELINES MANUAL § 8 (2005). Section 8B2.1 defines an effective program as one that utilizes "monitoring and auditing to detect criminal conduct," and Section 8C2.5 references the "internal investigation" as a part of such a compliance program.
[4] *See* U.S. Department of Justice, Antitrust Division, Corporate Leniency Policy (Aug. 10, 1993), *available at* http://www.usdoj.gov/atr/public/guidelines/lencorp.htm.
[5] 698 A.2d 959 (De. Ch. 1996).

Therefore, I offer both inside and outside counsel the following suggested guidelines and list of considerations to review at each stage of the internal investigation to help ensure the investigation is structured and effected to meet the corporation's needs, while being mindful of the pitfalls that may arise. Please note that this overview is not a full explication of every question that inside and outside counsel must consider. Depending upon the client's industry and unique political and public relations considerations, counsel and client will necessarily have to address additional factors. In addition, volumes have and can be written about each of the topics listed below. Still, this basic overview should help counsel identify questions that need to be addressed at each stage to help the client get the most from its internal investigation dollar.

The following outline is designed to help counsel consider the following questions:

1. **Is an internal investigation necessary?**
2. **Who is the client?**
3. **Who should conduct the investigation?**
4. **How should the scope of the investigation be defined and refined?**
5. **What type of preparation will make the investigation more effective?**
6. **What are key considerations for document retention, collection, and review?**
7. **What do I need to think about when conducting interviews?**
8. **What should the final report include?**

I. THE PROS AND CONS OF CONDUCTING AN INTERNAL INVESTIGATION

In many instances, the decision as to whether an internal investigation should be conducted is not really a discretionary one. Under Sarbanes-Oxley, Audit Committees and company management are required to address whistle-blower complaints and other indicia of potential wrongdoing or face liability.[6] Similarly, under Delaware and other states' corporate law, a failure to address "red flags" may be found to constitute a breach of fiduciary duty.[7]

Certain external actions will also likely trigger the need for an investigation. For example, a regulatory or grand jury subpoena, civil lawsuit, or even a demand letter may signal potential wrongdoing or, at the very least, the need to assess exposure and respond to the inquiry or demand. An internal investigation – even limited in scope to the specific claims asserted or subjects of the subpoena – will help the corporation determine the appropriate response.

[6] Sarbanes-Oxley Act § 201, 15 U.S.C. § 78j-1.
[7] *See Caremark*, 698 A.2d at 968-970.

Internal investigations, however, need not just be reactive. When there are major regulatory or statutory changes that affect an industry, or even new industry norms that are set, a corporation may want to conduct an investigation to determine whether its existing policies and procedures (or any changes it has made or training it has implemented in response to the new legal landscape) yield compliant conduct. Similarly, a court decision that finds (or even a newspaper article that exposes) corruption or illegal conduct in the corporation's industry or even in a competitor may warrant a proactive investigation to make sure that employees are not engaging in similar behavior. For example, the recent concerns raised about corporate stock option practices have led many companies to conduct investigations to address and rectify practices that may cause civil or regulatory exposure. Similarly, in the pharmaceutical industry, the well-publicized prosecution of the Warner-Lambert Company, for off-label promotion of Neurontin in violation of the Food Drug and Cosmetic Act, 21 U.S.C. §§ 331(a), 331(d), and 355(a), has likely led several companies to review and investigate the effectiveness of their promotional practices.

Conducting a proper internal investigation can provide numerous benefits. First and foremost, it can help a company to identify and stop an employee's improper conduct (or a systemic breakdown in controls) – thereby limiting potential legal exposure. An investigation can also reduce risks and exposure associated with potential shareholder derivative claims and limit the personal liability of officers and directors. An investigation may also put the company in a position to potentially avoid prosecution by cooperating with the government before the government discovers or investigates the conduct. Finally, should prosecutors decide that the company has engaged in wrongdoing, an internal investigation can help demonstrate an effective compliance program to obtain leniency under the *United States Sentencing Guidelines*.[8]

At the same time, an investigation can itself create difficulties for a company that must be managed with foresight and proper counsel. Investigations, particularly those involving outside counsel, can be costly. They can distract executives from other business objectives. They can create public relations complications with investors and customers. They may trigger disclosure obligations, and create potential liability to officers, directors, and the company for insider trading and Regulation FD non-compliance if appropriate steps are not taken. Finally, they may reveal wrongdoing that otherwise might not be discovered by prosecutors or civil plaintiffs.

Many of these concerns are, unfortunately, a fact of doing business in a post-Sarbanes-Oxley world. However, we strongly recommend that any company planning an internal investigation immediately consult corporate and securities counsel to determine what filings, if any, need to be made and to make

[8] *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2005); *see also* U.S. ATTORNEY'S MANUAL, tit. 9, CRIMINAL RESOURCE MANUAL, art. 162, Federal Prosecution of Business Organizations, § VI.A-B ("In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.").

sure that officers and directors are aware of any restrictions on trading that relate to the conduct or pendency of the investigation.

II. THE CLIENT

The identity of the client in an internal investigation is not obvious and may even be subject to change as the investigation unfolds. If the alleged activity involves senior management, true independence (and the requirements of Sarbanes-Oxley) will preclude the company from overseeing an independent investigation. Rather, it is likely that the company's Audit Committee or a committee of disinterested directors will need to serve as the client. If accounting and financial reporting issues are the focus, the Audit Committee may itself be tainted, since it likely has played a role in blessing the financial statements that will be under scrutiny.

To ensure the credibility and value of an independent investigation, it is critical that disinterested parties with adequate authority be in a position to commission and direct the investigation. That precept holds true throughout the investigation. Thus, if the investigation begins to reveal facts or circumstances that implicate senior management or members of the Audit Committee, the "client" needs to be redefined to make sure that subjects of the investigation are not in a position to interfere with (or even be in a position where they may be perceived to potentially interfere with) the investigation.

III. THE INTERNAL INVESTIGATION TEAM

Not every allegation of infraction warrants a call to outside counsel. At times, the alleged infraction is such that senior management is not implicated and the company's counsel can oversee, direct, or even conduct an investigation into alleged misconduct.

However, in many instances, it makes sense for the company to retain independent counsel to conduct the investigation. For example, if the chief executive officer is implicated, the general counsel who reports to the CEO may feel, or be, constrained in investigating the conduct, and certainly, there is an appearance of bias. In other cases, an independent investigator with little or no prior dealings with the company can give additional credibility to the review – credibility that may be essential to convince regulators that the problem has been thoroughly investigated or addressed. Finally, at times, outside counsel is required because in-house counsel lacks the specific legal subject-matter expertise necessary to conduct the investigation.

The company may face significant potential liability as a result of the alleged conduct. If so, it is critical that the company retain *counsel*, as opposed to forensic accountants or private investigators, to conduct the investigation. Counsel can provide the company with attorney work product and attorney-client privilege protection. Admittedly, in many instances, prosecutors and government regulators may prod

corporations to waive such privileges as part of their "cooperation" in subsequent government investigations and, indeed, may condition any recommendation that "substantial assistance" was provided on the granting of such a waiver.[9] However, unless and until the corporation determines that such a waiver is in its best interests, the corporation is best served with holding the keys to the disclosure of the results of the investigation and its analysis of its legal exposure. Having counsel conduct the investigation is really the only way to establish and protect this work from meddling third parties, who will likely seek this information for an advantage in civil disputes involving the company.

As for selection of counsel and members of the investigative team, the following are some factors to consider:

a. *Regular outside counsel v. independent counsel selected for the investigation.* As is the case with weighing whether in-house counsel can oversee the investigation, this choice will largely be influenced by the degree to which an independent counsel is needed to impress upon potential audiences that the investigation is unfettered by prior involvement with the company or an interest in maintaining the regular outside counsel relationship.

b. *Experience with internal investigations*. Internal investigations involve a variety of privilege and unusual corporate governance issues that often do not arise in civil litigation. In addition, internal investigations often move at a rapid pace and are subject to heightened scrutiny by regulators and prosecutors. Having counsel who have extensive experience with internal investigations will increase the likelihood that the investigation's results will be given the weight and credibility that will allow the corporation to move forward. Experienced counsel will also likely have a ready Rolodex of attorneys (both regular and temporary attorneys for document review), forensic accountants, database management experts, and potential counsel for individuals that can quickly be organized and brought in to deal with the high-stress environments in which investigations are often conducted.

c. *Credibility with regulators.* It is often helpful to select counsel who has a history of dealing with the same regulators or prosecutors who likely will address (or already have addressed) the type of potential exposure that the company may face as a result of the alleged wrongdoing.

[9] *See, e.g.,* Larry D. Thompson, Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations*, *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (last visited July 20, 2006) ("One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel."); *see also* SEC Exchange Act Release No. 18929 (Oct. 13, 2004) (refusing to seek penalties against company as a result of the company's "extensive cooperation with the Commission's investigation" and because the company "promptly provided the staff with the internal investigative reports and the supporting information and waived the attorney-client privilege and work product protection with respect to its internal investigations").

d. *Industry knowledge*. Many industries have unwritten rules that are as important in day-to-day dealings as the written rules. In addition, for certain specialized industries, the law that governs business conduct springs from numerous sources that are not readily apparent or assembled and that interact in ways that are not intuitive. As part of an investigative team, counsel should identify and retain (if not already affiliated with counsel's firm) counsel with knowledge of the particular regulatory framework that governs the industry.

e. *Relevant expertise*. Counsel will likely want to retain experts with industry, accounting, or other expertise to aid in the investigation and understand the more technical aspects that may obscure wrongdoing (or explain why apparent wrongdoing is completely justified). The expert should be retained by counsel and, to help ensure that the nonlawyer expert's work is covered by attorney-client and work product privileges, the engagement letter should indicate that the expert is being retained to assist counsel in providing legal advice to the company (or Audit Committee) in anticipation of potential litigation (assuming that is the case). Note that some courts have found the privilege to apply where the company, rather than counsel, retains the expert.[10] However, if possible, the better and more easily supportable approach is to have counsel retain the expert.[11]

f. *Information Technology expertise*. Much of the information that the investigating attorney will need to review will be in electronic form – e-mails, metadata, Excel, and Word documents, etc. Moreover, regulators, prosecutors, and the plaintiffs' class action bar will carefully scrutinize document preservation and collection efforts for any sign of spoliation or obstruction. To minimize the likelihood of such claims and to ensure that the investigating attorney has access to all key information, it is critical that an IT expert be part of the investigative team. This IT expert will need to coordinate with the company's IT personnel as soon as the investigating attorney is retained to make sure data is properly identified, preserved, and collected.

g. *Capability to respond quickly*. Often investigations – particularly where a governmental subpoena or civil complaint has been served – must proceed immediately. Consequently, it is critical that any firm retained has the necessary resources available to act promptly so that the company will be sure to act in ways that will safeguard its legal posture.

h. *Budget*. Not every investigation requires the top legal talent money can buy. In deciding upon an investigative team, a budget should be prepared in light of perceived risks imposed by the alleged improper conduct. While new issues will often surface that may require an increase in the budget, an investigation should be commensurate with the liability faced.

[10] *See Neighborhood Dev. Collaborative v. Murphy*, 233 F.R.D. 436, 438-442 (D. Md. 2005).
[11] *See United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961).

i. *Insurance.* Both the triggering event (i.e., SEC subpoena, whistle-blower letter) and the commencement of an internal investigation may constitute reporting events under applicable insurance policies and, depending on the policy, may provide a basis for coverage subject to the policy's terms. One such term may be a requirement that counsel be selected from the carrier's approved list of counsel.

j. *Flexibility*. As the investigation unfolds, unforeseen issues or facts may develop that require an adjustment to the team. For example, an internal investigation conducted by a general counsel would require a shift to involve outside counsel if facts arose suggesting that the CEO – to whom the general counsel reported – may have been involved in or had knowledge of (but did not disclose) the alleged wrongdoing.

IV. DEFINING THE SCOPE AND PURPOSE OF THE INVESTIGATION

So, the triggering event (a whistle-blower's complaint, an SEC subpoena, etc.) has occurred, the client has been determined, and the investigative team has been assembled. Now what? To maximize the chance of a cost-effective and successful internal investigation, the client and investigative team should meet to discuss how counsel plans to proceed and should consider what can be done to streamline the process and bring counsel up to speed.

The Scope of the Investigation. What exactly does the client want the lawyers to do? Investigate the alleged improper conduct of a single employee? Review the conduct of a particular department to determine whether the alleged improper practice (i.e., kickbacks) is a part of a widespread pattern or course of business at the company? Test compliance mechanisms and internal controls to determine why regular audits and controls did not identify the potential for wrongdoing? Propose remedial measures?

Often an investigation will start with a more narrow goal or set of goals and then may expand to include remedial measures or other (more systemic) testing, depending on what is discovered in the initial phases. In determining a proposed scope for the investigation, the client and counsel should be mindful of the regulatory, prosecutorial, and shareholder derivative context. If these external forces are involved or looming and if a finding of potential wrongdoing appears likely, it is often wise to broaden the scope for two reasons. First, active efforts to identify and implement remedial measures will carry significant weight with regulators, who, after all, want to ensure that the company will conduct its business in a way that serves the public's interests and complies with applicable laws. Second, the scope of the attorney-client and work product privileges that the company will be able to assert will be coextensive with the scope of the investigation. Since the attorney-client privilege is based on providing legal advice, the investigation should be structured and defined in a way that makes clear that all investigative efforts are linked to the legal services that the lawyers provide (as opposed to merely fact-finding or business recommendations).

Formal Engagement Letter. To ensure that the attorney-client and work product privileges apply, the engagement of the investigation counsel should be formalized in a letter. The letter should, of course, not only identify the scope of the matter that is under investigation, but also indicate that the lawyer (or firm) is being retained to conduct the confidential investigation for the purpose of advising the client of its legal rights and options. Moreover, if possible, the engagement letter should indicate that the lawyer is being retained in anticipation of potential litigation to trigger the work product privilege.

Making Appropriate Disclosures. As noted above, the commencement of an internal investigation (and/or the event that triggered the investigation) may be material events that require disclosure under the federal securities laws and that could give rise to certain insider trading liability if insiders with knowledge of the investigation buy or sell company stock while information about the existence, progress or findings of the investigation are not public. Experienced corporate and securities counsel should be asked to advise the company, its directors, and officers about these obligations and risks at the beginning and at important milestones of the investigation.

Insurance. In addition, the investigation and/or the event that led to the investigation may be reportable events under the company's insurance policies. If so, the company will want to take all necessary steps to ensure it can avail itself of insurance coverage.

Coordinating with Human Resources and Employment Counsel, as Appropriate. To the extent that the conduct of particular employees is implicated and there might have been a violation of company policy (or law) that would warrant discipline, the company should consider retaining or informing employment counsel so that there can be coordination, to the extent feasible and consistent with the investigating attorney's independence. At the very least, there should be communication to ensure that neither employment counsel nor the investigating attorney take steps that would jeopardize the effectiveness of the other.

V. PREPARING FOR AND PLANNING THE INVESTIGATION

Preserving Electronic Information. Although document collection and preservation are discussed in detail in Section VI, one cannot overstate the importance of identifying and preserving *at the very earliest stage of the investigation* electronic data that may otherwise be destroyed in the ordinary course of business. Spoliation of evidence has become a routine charge in civil litigation and, as many recent highly publicized white-collar criminal prosecutions make clear, often the government's easiest charge to prove is obstruction of justice – the result of files being altered or destroyed before counsel intervenes to protect the company and its employees. By taking prompt steps to secure electronic data, the company can avoid having to defend such claims and, should it ultimately decide to cooperate with regulators, can make sure that it can provide the evidence that the government will want or need to prove its case.

The Overview. The client, often through the general counsel or regular outside counsel, should give the investigating lawyers an overview of the issues that have been raised to trigger the investigation. The overview should identify key documents (i.e., any whistle-blower letter, the results of any preliminary inquiry done by in-house counsel, relevant correspondence or memos, and subpoenas). In addition, the overview should identify individuals with likely knowledge of the alleged conduct, as well as those responsible for supervising the alleged wrongdoer(s). Often an organizational chart and roster of relevant departments will be invaluable tools to plan interviews.

Homework and Preparation. After this overview (and, if possible, even earlier – as soon as the investigating attorney learns the basic allegation of wrongdoing), the investigating counsel should spend some time learning about the industry, company, and issues involved. For example, recent annual reports and Form 10-K will put the alleged misconduct into context. The attorney should read recent case decisions involving the company and the issue under investigation. If the issue involves a recent development in a regulated industry, the lawyer should reach out to any partners in his/her firm with industry or substantive legal knowledge to get an overview of the context, identify key regulations and statutes, and find relevant treatises or articles on the subject. Finally, if the client can identify relevant policies or procedures it has in place (including internal audit plans and findings related to the business segment in which the misconduct allegedly occurred), the attorney should review these materials to better understand the internal formal expectations that the client had expressed relating to the behavior under investigation. This background homework will allow the investigating attorney to hit the ground running and make planning for the investigation with the client more informed, productive, and realistic.

The Initial Planning Meeting. As soon as possible after the investigating attorney has been retained and given an overview and an opportunity to do some homework, the client and the investigating attorney should meet to discuss the goals for the investigation. It is critical that the attorney understand what the client hopes to accomplish. Will the attorney be asked to present a report to a regulator? Will a written report be needed to respond to a demand by a shareholder seeking to commence a derivative action? Although the goal may change depending on the results of the investigation and other events beyond the client's control that may occur while the investigation proceeds, the investigating attorney can make better informed strategic decisions (i.e., forgoing detailed notes if the attorney-client privilege will be waived) if he/she knows what will likely happen with the work product that will be created.

The client and investigating attorney should also discuss an investigative plan. The plan should include:

- initial budget estimates;
- an overview of the steps the investigating attorney plans to take;
- a preliminary schedule and deadlines;
- a discussion of potential experts to be retained;
- plans for preserving and collecting documents; and

- a discussion of witnesses to be interviewed.

Although the investigating attorney should have broad latitude in determining how best to conduct the investigation, this meeting should be a dialogue. After all, the client is in a much better position at the outset to identify the likely sources of useful documents and the individuals who will have relevant information. The client, or its designee, should provide an overview of how documents are kept and stored and discuss the process for retrieving those documents. The client should appoint a contact (often the general counsel) whom the investigating attorney should consult to schedule interviews, facilitate document production, etc.

Periodic meetings, updates, and revisions to the investigative plan. It is likely that as the investigation unfolds, the client and investigating attorney will need to revise the schedule and the plan. There will be delays in document collection. Witnesses will have to reschedule interviews because of pressing business matters.

The client contact and investigating attorney should plan to talk periodically (usually weekly) about the mechanics and progress of the investigation so that the client (i.e., Audit Committee) will understand why certain inevitable delays have occurred.

More substantively, information may surface that may lead the investigating attorney to recommend that the scope of the investigation be altered or a new phase be added. For example, a certain type of transaction may be identified that appears to routinely lack appropriate authorization. Or some witnesses may inform the investigator that a similar issue to the one under investigation may be found in a different division of the company.[12]

If this occurs, the investigating attorney should promptly raise the issue with the client contact and, if significant enough, should seek to meet or report to the entire client (i.e., the Audit Committee or Special Committee) to make a formal recommendation about the change in scope. If authorized, a revised engagement letter should be prepared to make sure that the new work is covered so that the attorney-client and work product privileges are preserved. In addition, the client and attorney should discuss revisions to the schedule and the budget so that everyone's expectations match.

VI. DOCUMENT PRESERVATION, COLLECTION, AND REVIEW

Document Preservation. When a company determines that an internal investigation is warranted and further indicates in its engagement letter that the investigating attorney is being retained *in anticipation of*

[12] Investigatory attorneys should be mindful of obligations under Sarbanes-Oxley Section 307 to report up to the general counsel or, if necessary, to the Audit Committee, "evidence of a material violation" of securities law or breaches of fiduciary duty uncovered in the course of the investigation.

litigation, in most instances, a duty to preserve documents relating to the investigation and alleged wrongdoing will be triggered. Sarbanes-Oxley, for example, has expansive document retention requirements, prohibiting alteration, destruction, concealment, or falsification of documents with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of a federal agency or department *or in relation to or in contemplation of any such matter*.[13] Given the broad scope of government regulation of business in today's world, it is likely that almost any matter under investigation will put the company and its employees at risk of a Sarbanes-Oxley violation if inadequate steps are taken to preserve documents.

Therefore, as soon as the investigating attorney is engaged (or, even better, as soon as the whistle-blower's letter, subpoena, or demand letter is received), steps should be taken to preserve hard copy and electronic documents relating to the subject of the triggering event. Most public corporations have developed procedures for "litigation holds" that can be used pending further refinement once the investigating attorney is engaged. Among the steps that should be taken are the following:

- The IT Department should be contacted and directed to suspend automated deletion processes and, instead, preserve e-mails and backup tapes for relevant employees during the period that relates to the allegations.
- Similarly, the Records Department (or those managing off-site storage) should be advised to preserve documents for relevant employees.
- Hard drives and network drives of relevant employees should be imaged (being sure, of course, not to violate any employee privacy laws).
- A memo should be distributed to those likely to possess relevant documents that they should preserve (and not alter) both hard copy and electronic documents relating to the subject matter of the investigation. The memo should expressly indicate that the duty to preserve relevant documents applies to documents in the office or out of the office (home computer, laptop, etc.), as well as documents that may be stored on portable media (flash drives, CDs, floppy disks) or PDAs/BlackBerry devices.

In addition, after the investigating attorney gets involved, he/she should immediately arrange for the IT expert he/she is using to contact the company's IT personnel to sort through the many challenges that could result in an incomplete record. For example, outside directors whose e-mails may be relevant to an inquiry often do not store their e-mails on the company's server. Steps must therefore be taken promptly to make sure that the outside directors' data are captured before being erased in the ordinary course.

Document Collection. The investigating attorney should establish a clear protocol for the collection of documents that all who are engaged in the process should follow. Based on background research and discussions with the client and industry experts, the investigating attorney will likely be able to identify the

[13] *See* Sarbanes-Oxley Act § 802, 15 U.S.C. § 7245; 18 U.S.C. § 1519.

types of documents that are likely to contain information relevant to the investigation. For example, travel and expense reports and sales call notes may be important in antitrust and kickback-related investigations; tapes of telephone conversations with brokers will likely be important in insider trading matters. After identifying the types of documents needed, the investigating attorney should solicit the client contact's recommendations about where relevant documents may be found. In addition, it may make sense to devote the first round of witness interviews (particularly of lower level employees) to document identification and collection.

Once identified, documents should be collected and identified in ways that will track the source and office location of the documents. Before collecting the documents, the investigating attorney should spend some time thinking about what information about the documents may need to be searched at a later date. If documents are being scanned and loaded into a discovery database, the investigating attorney will likely be able to create certain fields to track this information, but will need to work with a copying/scanning vendor to capture and record this information before beginning. Here, good planning is essential.

Before committing to a protocol, it is often useful to consult document database companies or litigation support consultants – either within a law firm or for hire. These experts should be able to identify and recommend best practices, and should be able to make suggestions that are separately tailored to hard copy documents (for which data will have to be supplied) and electronic data (for which metadata already exists). Such IT experts should also work with company IT personnel to make sure "forensic" copies of documents are made – that is, copies that do not alter, but rather preserve the existing metadata on electronic files.

Note that documents can be scanned and stored in a variety of formats: TIFF, PDF, and JPG are the most common. Different document management systems use different formats and each has its own advantages and disadvantages. The investigating attorney should consult with IT experts to determine which format and system will best meet his/her needs and budget. Also, if the client may later need to produce the documents to a regulator, it is often useful to make sure that the documents are scanned and stored in a format that the regulator prefers and contain metadata that the regulator requires to avoid additional expense in the future.

Document Review. If the document population is large, the investigating attorney will likely rely on a team of temporary attorneys to do an initial review of the documents to help defray costs. Here again, it is essential that the investigating attorney plan the contours of the process as soon as possible. If documents have been loaded onto a database, the choice and clarity of the "tags" that reviewers will use to identify whether the documents relate to key witnesses or issues – or are privileged – will be critical to efficiency and effectiveness of the review process. A regular member of the investigative attorney's team should be available to train reviewers and answer questions as they arise to make sure all important

information is captured. In addition, the investigative attorney must be sure to conduct quality control checks.

VII. THE INTERVIEWS

Typically, the attorney will conduct employee interviews after collecting and analyzing the documents. By doing so, the attorney will better understand the context in which the alleged improper conduct occurred and will also be in a position to confront witnesses with documents that require explanation. Moreover, the investigating attorney will often first interview lower level employees that are not directly implicated in allegations of wrongdoing – again, to give the investigating attorney insight into the context, that is, the corporate culture, business pressures faced, competitive environment.

Note, however, that notwithstanding this standard practice, at times it may be essential to deviate from an investigation plan to obtain information that might otherwise be lost. For example, in the absence of a contractual provision or employment policy to the contrary, an employer generally can require an employee to answer an interviewer's questions.[14] If a key witness, however, is about to leave the company or be terminated, the company (and the investigating attorney) may lose the opportunity to question that witness. Depending on that witness's role, the omission of the interview may undermine the effectiveness of the entire investigation. Therefore, it is critical that the investigating attorney, through the client contact, keep informed about pending employee departures so that necessary adjustments can be made to the investigative plan.

Interviews should be conducted by two attorneys so that one attorney can focus on the witness's answers (including nonverbal cues) while the other attorney takes notes. The presence of two witnesses also increases the likelihood that all relevant information will be remembered and provides for corroboration in the event a dispute arises about what was said. The investigating attorney should unequivocally tell the witness that he/she is expected to tell the truth. Truthful interviews are essential to helping the investigative attorney assess legal risks and defenses. In addition, the attorney will want a clear record that he/she is not in any way obstructing justice or suborning perjury. Finally, interviewees who lie to investigating attorneys do so at their peril. In a recent case, prosecutors charged an *interviewee* with obstruction of justice for allegedly making false statements and omissions to an investigating attorney retained by a company.[15]

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[14] An employee's refusal to cooperate with an ongoing internal investigation is a breach of the employee's duty of loyalty and may be grounds for dismissal. *See TRW, Inc. v. Superior Court*, 31 Cal. Reptr. 2d 460, 25 Cal. App. 4th 1834 (2d Dist. 1994) (holding that dismissal of an employee who refused to cooperate with an internal investigation did not violate public policy); *Easterson v. Long Island Jewish Med. Ctr.*, 156 A.D.2d 636, 549 N.Y.S.2d 135 (2d Dep't.1989) (holding that dismissal of employee for failing to provide documents upon request to her supervisor did not violate New York law).

[15] *See* Second Superseding Indictment, *United States v. Singleton*, No. H-04-514-SS (S.D. Tex.), at 16-21 (alleging obstruction where the interviewee allegedly believed that the investigating attorney would pass on false information from the interview to the government).

In conducting the interviews, the attorney *must* take certain steps to preserve the company's privilege and ensure that the employee cannot claim the formation of an individual attorney-client relationship that might conflict with the company. At the outset of the interview, the interviewing attorney must advise the interviewee that:

- The investigating attorney is conducting an investigation to assist the company (or Audit Committee or other client) in determining its legal rights and risks.
- The interview is confidential and the employee is expected to keep the interview confidential.
- The information learned in the interview will be shared with the company.
- The interview is covered by the attorney-client privilege, but that the privilege belongs to the company, and may be waived at the company's discretion.
- The investigating attorney represents the company, *not the individual*.
- Although the employee is obligated to keep the information confidential, the company has the right to disclose the information to anyone, including the government.[16]

Following the interview, it is often helpful to prepare an interview memorandum. The investigative team will rely on these memoranda to exchange information and undertake analyses, particularly if numerous members of the investigative team will be conducting interviews and information must be shared. At all times, however, the investigating attorney must be mindful of the need to protect attorney-client and work product privileges. To protect the attorney-client privilege, it is useful to recite at the beginning of the memorandum the disclosures made to the employee that are set forth above. In addition, the memorandum will only receive heightened opinion work product protection under Fed. R. Civ. P. 26(b)(3) if it contains the attorney's mental impressions. Therefore, it is also useful to include the attorney's impressions throughout the body of the memorandum and to preface the interview memorandum with the following:

> This memorandum summarizes our conversation with [the interviewee]. It is not a verbatim transcript. It reflects our recollections and interpretations of statements made by [the interviewee], as well as other mental impressions, conclusions, legal theories and work product. [The interviewee] has not reviewed or approved this memorandum. This memorandum has been prepared in anticipation of litigation and for the purpose of providing legal advice to [client].

Notwithstanding these protections, the investigating attorney must also be mindful at all times that the client may ultimately decide that it is in its best interest to disclose its work product to the government to seek leniency or amnesty in return for cooperation. Although the client may seek to limit such disclosure

[16] If an employee is advised that the attorney represents only the company, no personal attorney-client relationship will be established. *See United States v. Aramony,* 88 F.3d 1369, 1390-1391 (4th Cir. 1996). However, a failure to provide these warnings in an unequivocal manner can put the company's privilege in jeopardy. *See*, *e.g.*, *In re Grand Jury Subpoena*, 415 F.3d 333, 340 (4th Cir. 2005).

to the government and contend that waiver does not extend to other interested parties (such as plaintiff investors in class action litigation), courts have generally rejected the selective waiver doctrine.[17] Consequently, the investigating attorney should be judicious in choosing which mental impressions to include in the memorandum – knowing that someday they may be used against the company.

Similarly, the attorney should approach the interviews themselves with a degree of wariness. Interviewees may have their own agendas – vendettas against other employees, disputes with the company, etc. – that may color the interviewees' comments. Interviewees may also be cooperating with the government, and may be looking for any clue that can be used to suggest that the company (or the investigating attorney) is somehow seeking to obstruct justice or failing to conduct a thorough and independent investigation.

In conducting the interview, the attorney should not only seek to determine what occurred, but also must keep in mind the potential claims and defenses the company has so that it can provide legal advice at the conclusion of the investigation. In addition, assuming such inquiries fall within the scope of the investigation, the attorney should explore internal control issues to help the client assess – if internal policies were violated and/or wrongdoing occurred – why the violation occurred. For example, was authority too decentralized? Were the guidelines for conduct unclear? Were there deficiencies in training? Why wasn't the violation detected and reported through existing audit and compliance procedures?

Finally, depending on the nature of the allegations, it may be appropriate, and perhaps even necessary, to seek to interview third parties with knowledge of the conduct at issue in the investigation. Work product privileges will still apply to these interviews, but the facts communicated by third parties are discoverable.

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[17] The Eighth Circuit's decision in *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc), is the leading case supporting the concept that disclosure of documents in a nonpublic SEC investigation will not serve as a general waiver. However, most circuits have rejected *Diversified* and instead followed the rationale in *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002), which characterizes the decision to disclose confidential information as part of a settlement with the government as a tactical one that results in waiver of the privilege in dealings with other parties. Still, efforts persist to permit a selective waiver. Recently, for example, the U.S. Judicial Conference's Advisory Committee on Evidence Rules has proposed Fed. R. Evid. 502(c), which states:

> In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection – when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority – does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.

See http://www.uscourts.gov/rules/Reports/EV05-2006.pdf.

VIII. THE FINAL REPORT

After reviewing the documents and conducting the interviews, the attorney should analyze the information collected in light of applicable legal claims and defenses. There may be need for additional legal research. Or it may be necessary to schedule follow-up interviews with the first set of interviewees to explore issues that arose later in the investigation. The attorney should remember to confer with the client contact and the client group as a whole if this process warrants an expansion of the initial scope of the investigation – or even if it will simply delay the presentation of the final report.

After drawing his/her conclusions, the investigating attorney should plan to meet with the client before preparing the final report to revisit whether the form of the report should change in light of the conclusions. For example, if the report is going to be shared with the government, the client may want to authorize a detailed factual explication to support the client's position that no prosecution is warranted. Prosecutors prefer a detailed written report because it can save the government substantial resources; the government will be able to follow a road map instead of undertaking a large-scale investigation of its own. On the other hand, the client may wish to explore whether a more cursory oral presentation will be accepted by the government so that privileges can be preserved for subsequent litigation by third parties.

Whether presented orally, with a PowerPoint whose language is pointedly neutral (in case disclosure to third parties is compelled) or in a formal "white paper" to be delivered to the government, the report should generally contain the following elements:

1. An explanation of the scope of the investigation;

2. A detailed discussion of the procedures undertaken to gather information (volume of documents collected and reviewed, sources of documents, number and nature of interviews conducted);

3. A summary of the factual findings; and

4. An analysis of potential claims that could be brought and legal defenses.[18]

In addition, the report will often identify options available to the company and potential remedial and protective measures the company can take to prevent itself from the recurrence of any wrongdoing (or perception of wrongdoing if none is found). These measures may include policy changes, new internal controls or strengthening of compliance and audit functions, and enhanced training to identify and foster behavior that comports with company policies and applicable laws.

[18] The investigating attorney should attempt, where possible, to avoid quoting or directly citing interview memoranda or other attorney-client communications or work product, since express disclosure of these privileged materials – particularly if shared with regulators or prosecutors, will make it more difficult to shield them from third parties in subsequent litigation.

Finally, the report may recommend that disciplinary action be taken against employees who have violated company policies. Such discipline is often necessary to demonstrate to the government that the company's compliance procedures have teeth and that the company will diligently address and seek to rectify wrongdoing. At the same time, the discipline should be commensurate with the gravity of the offense and can range from a letter of reprimand to a loss of bonus to termination. Obviously, the company should consult employment counsel before effecting any such discipline to make sure the company handles the matter consistently with its procedures and the employee's contractual, statutory, and common law rights.