

Volume 10, Number 2
February 2006

**THE FIRST 72 HOURS OF A
GOVERNMENT INVESTIGATION:
A GUIDE TO IDENTIFYING
ISSUES AND AVOIDING
MISTAKES**

SHEILA FINNEGAN

PREFACE

As government investigations of alleged corporate wrongdoing continue to dominate the news, counsel and others within corporations are well advised to prepare for the possibility that they, too, may be required someday to navigate the myriad and complex issues that such investigations create. The initial hours and days after learning of an investigation often pose the greatest challenge and present the greatest risk, as companies grapple with these issues under tight time constraints and with minimal information. They must tread carefully, continually assessing both the near-term and long-term consequences of each decision as it relates not only to the government's investigation but also to potential collateral civil litigation.

In this *Briefly*, Sheila Finnegan provides a checklist of issues that general counsel and others inside a corporation should consider in the initial hours and days after learning of a government investigation. Ms. Finnegan highlights the competing concerns that must be recognized and weighed in order to make well-informed decisions and avoid costly mistakes.

Like all other publications of the National Legal Center, this monograph is presented to encourage greater understanding of legal issues, legal procedures, and the law. It is intended to enlighten its readers through the thought, experience, and knowledge of others. The views expressed in this monograph are those of the author and do not necessarily reflect the positions of the advisors, officers, or directors of the National Legal Center.

This publication is presented purely as an educational public service. This monograph is for general information and should not be used as a substitute for legal consultation on a specific matter.

Richard A. Hauser
President
National Legal Center

Volume 10, Number 2
February 2006

**THE FIRST 72 HOURS OF A
GOVERNMENT INVESTIGATION:
A GUIDE TO IDENTIFYING
ISSUES AND AVOIDING
MISTAKES**

SHEILA FINNEGAN

© 2006 National Legal Center
for the Public Interest
ISSN 1089-9820
ISBN 0-937299-46-4
ISBN 1-930742-74-6
Published February 2006

**NATIONAL LEGAL CENTER
FOR THE PUBLIC INTEREST**

1600 K Street, N.W., Suite 800
Washington, D.C. 20006
Tel: (202) 466-9360
Fax: (202) 466-9366
E-mail: info@nlcpi.org
Please visit our Web site at: www.nlcpi.org

The National Legal Center for the Public Interest is a tax-exempt, nonprofit public interest law and educational foundation, duly incorporated under the law of the District of Columbia to provide nonpartisan legal information and services to the public at large. NLCPI is qualified to receive tax-deductible contributions under I.R.C. Sec. 501(c)(3).

TABLE OF CONTENTS

PREFACE

RICHARD A. HAUSER Inside Front Cover

THE FIRST 72 HOURS OF A GOVERNMENT INVESTIGATION: A GUIDE TO IDENTIFYING ISSUES AND AVOIDING MISTAKES

SHEILA FINNEGAN

I. INTRODUCTION 1

PART I

II. KEY ISSUES TO CONSIDER IN THE CRUCIAL EARLY HOURS AND DAYS AFTER LEARNING OF A GOVERNMENT INVESTIGATION 2

A. Preserving Documents and Suspending Routine Destruction Practices 2

1. Halt the Routine Disposal of Documents and Electronic Data 4
2. Preservation Memo 4
3. Backup Tapes 5
4. Documentation of Ongoing Steps To Preserve Documents 6
5. Departing Employees 6

B. Discussion with Government Attorney 6

1. Status of Company as Witness/Subject/Target 6
2. Negotiating Scope/Return Date of Subpoena 7

C. Alerting the Board of Directors and/or Audit or Other Committees 7

D. Restrictions on Trading in the Company's Securities ... 8

E. Disclosure Issues 9

1. Whether To Publicly Disclose the Investigation .. 10
2. Accuracy of Imminent Public Statements/Filings . 11
3. Correcting Past Statements and/or Claims 12
4. Disclosures to Outside Auditors 12
5. Reporting Obligations under Sarbanes-Oxley and Other Federal Laws 13

F. Insurance Carrier Notification 14

G. Actions with Respect to Possible Wrongdoers	15
H. Assessing the Need for Remedial Measures	16
I. Preparing for Possibility of Media Coverage	17
J. Notification to Employees of Possible Contact by Government	18
1. Advising Employees of Rights and Company Requests	19
2. Requesting/Insisting that Employees Cooperate	20
K. Coordinated Defense Efforts and Payment of Defense Costs	21
1. Employees Who Are Witnesses	21
2. Employees Who Are Subjects/Targets	22
3. Government’s View on Advancing Defense Costs	23
4. Joint Defense Agreements	24
L. Conducting an Internal Investigation	25
1. Written Request for Investigation To Procure Legal Advice	26
2. Who Should Oversee and Conduct the Investigation?	26
3. Scope of the Internal Investigation	27
4. Information To Be Gathered During Internal Investigation	28
5. Interviews of Employees	29
a. Person to Observe (“Witness”) the Interview	29
b. Warnings	30
c. Are Interviews with Employees Privileged?	33
d. Beware of Disclosing Information/Documents During Interviews	33
e. Witness-Tampering Laws	34
f. Requesting Employees To Maintain Confidentiality	35
6. Interviews of Former Employees and Other Outsiders	36
7. Use of Experts	36
8. Protecting Results of Internal Investigation and Related Materials	36
9. Drafting an Internal Investigation Report and Related Materials	36

10. Retaining Drafts and Notes from
 Internal Investigation 37

11. Government Requests To Waive Privileges 38

 a. Cooperating by Waiving Privilege 38

 b. Alternative to Turning Over Report of Internal
 Investigation 39

 c. Nonwaiver Agreement 40

PART II

**III. ISSUES AND ACTIONS TO CONSIDER WHEN THE GOVERNMENT
 EXECUTES A SEARCH WARRANT 41**

 A. Make Contact with the Search Site 42

 B. Consent 42

 C. Examine the Warrant 43

 D. Speak to and Collect Information from the
 Government Agents 43

 E. Send Employees Home and Advise Them of
 Their Rights 44

 F. Monitor the Search 45

 G. Protect Privileged Documents 46

 H. Documents Needed To Operate the Business 46

 I. Alert the Company’s Media Spokesperson 46

 J. Inventory List of Seized Materials 47

 K. Post-Search Inventory and Debriefing 47

 L. Review Checklist of Issues To Consider in Light of
 Government Investigation 47

CONCLUSION 47

BIBLIOGRAPHY 49

ABOUT THE AUTHOR 53

**THE MISSION OF THE
 NATIONAL LEGAL CENTER Inside Back Cover**

THE FIRST 72 HOURS OF A GOVERNMENT INVESTIGATION: A GUIDE TO IDENTIFYING ISSUES AND AVOIDING MISTAKES*

SHEILA FINNEGAN

INTRODUCTION

When the company learns that it is the focus of a government investigation¹—whether from investigators attempting home interviews of employees, the service of a subpoena or search warrant, or some other means—the general counsel must be ready to respond immediately and navigate a minefield of complex issues. Because critical decisions must be made quickly and often without the benefit of complete information, the challenges and risks are substantial.

Identifying the issues that need to be considered in the crucial first hours and days is itself a daunting task. These issues include: preservation of documents, particularly electronic data; disclosure requirements; assessment of the accuracy of imminent public statements and/or SEC filings; whether restrictions should be imposed on trading in the company’s securities; whether to retain outside counsel and who to retain; internal investigation issues (e.g., should officers/employees have separate counsel and who should bear these costs?); preparing for potential press inquiries and collateral civil litigation; assessing the need for remedial measures; and reviewing the plans in place if the government executes a search warrant.

* This monograph is for general information and should not be used as a substitute for legal consultation on a specific matter.

¹ We use the term “government investigations” loosely to refer to investigations conducted not only by traditional state and federal law enforcement agencies such as the Department of Justice and state Attorneys General, but also the Securities and Exchange Commission and self-regulating organizations (“SROs”) such as the National Association of Securities Dealers (“NASD”) and the New York Stock Exchange (“NYSE”).

Missteps in the critical early hours and days after learning of a government investigation—whether from the failure to act or the failure to consider all the ramifications of a chosen action—can have costly and far-reaching consequences for the company. For this reason, we have attempted with this monograph to create a concise guide or checklist of issues that frequently arise during this crucial period, and to highlight some of the key considerations for each.

Because the analysis and best course of action necessarily will depend upon the particular facts confronting the company, and because the law surrounding these issues continues to develop, this monograph is not intended to give any specific advice or definitive answers or suggestions. One size does not fit all. Nor does the monograph provide a comprehensive analysis of each of the many issues that are flagged, as each issue in itself would require a detailed discussion. Rather, this monograph is intended to be a reference to assist in-house counsel in quickly identifying potential issues to consider and discuss, both internally and with specialists in internal investigations and related areas, before making any definitive decisions that could adversely affect the company. Part I of the monograph describes these issues. Part II focuses on actions to consider in the event that the government executes a search warrant on company premises.

PART I

KEY ISSUES TO CONSIDER IN THE CRUCIAL EARLY HOURS AND DAYS AFTER LEARNING OF A GOVERNMENT INVESTIGATION

A. Preserving Documents and Suspending Routine Destruction Practices

One of the first steps that counsel must take after learning that the company and/or its officers and employees are under investigation is to suspend automatic document destruction practices to avoid the inadvertent destruction of pertinent documents and electronic data.

Counsel should also issue a written directive to all who may possess such documents to preserve them.

But like many of the myriad issues that will confront counsel, the issue of document and information preservation is far more complex than sending out directives to preserve documents. For example, e-mails and other electronic data may be destroyed despite the issuance of such a directive because (among other reasons): (1) the data is in shared space on the computer server so no employee views the data as his/her own and takes responsibility for preserving it; (2) the computer system has automatic delete features (e.g., e-mails that remain in an inbox after a certain number of days are automatically deleted); (3) employees simply disregard the preservation directive; and (4) the company regularly recycles backup tapes.

Destruction of relevant documents, even if inadvertent, can have dire ramifications for the company. The government undoubtedly will investigate the circumstances of any destruction to determine whether criminal obstruction charges are warranted.² Even if the government determines that there is insufficient evidence to bring obstruction charges, the government may well view the company with suspicion in future dealings and question the sincerity of the company's stated

² One of the criminal obstruction statutes that the government may consider (among others) is section 802 of the Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1519), which provides:

[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or in contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

To date, this language has not been interpreted by a court, but it appears to eliminate the nexus between the destruction of documents and an official proceeding. The statute also does not appear to require a willful or corrupt state of mind, although it is unclear, after the Supreme Court's decision in *Arthur Andersen v. United States*, 125 S. Ct. 2129 (2005), whether one can be convicted of criminal obstruction without such intent.

desire to cooperate. The government may also be less likely to agree, at least preliminarily, to limit the scope of any subpoena and to grant additional time to gather documents. The government might even consider seeking a search warrant.

The following are a few steps (of many) to consider in the early stages of an investigation to avoid inadvertent destruction of documents and electronic data:

1. Halt the Routine Disposal of Documents and Electronic Data

It is no easy task to figure out all the places where responsive electronic data exists and what must be done to preserve it. Counsel will need to discuss with IT employees and others what information is stored on PCs and in networked e-mail accounts, as well as in any storage under the employees' individual control (such as PDAs, laptops, ZIP drives, voice mail). If there is an automatic deletion feature on e-mail, it may be possible to turn the feature off for designated employees. Another option is to make a mirror image of the accounts of employees who are likely to have responsive documents. Nonlawyers must be made to understand the importance of being thorough in identifying and preserving all relevant documents and data. Help from outside experts should be considered.

2. Preservation Memo

In any preservation memo that is issued, counsel should try to identify as broadly as possible all documents to be retained and all persons who may possess such documents, including third parties who possess documents under the company's control. Consider having recipients of the memo acknowledge their receipt and understanding of the memo. Sometimes this can be done by a return e-mail. Reissue the memo periodically, and continually reevaluate the scope of the memo for any needed alterations and expansion as more information about the investigation becomes available. Consider whether to audit employees' compliance with the memo. Keep in mind that the preservation memo may be discoverable.

3. Backup Tapes

One recurring issue is what to do about disaster recovery backup tapes. Many companies routinely recycle these, causing the data on the tapes to be overwritten. When a company learns of a government investigation, the question arises of whether the company should continue to recycle these backup tapes. In the *Zubulake* case, the court said a company clearly did not need to preserve every e-mail and every backup tape upon recognizing the threat of litigation, and that such a rule would “cripple large corporations[.]”³ However, the Committee Notes to Proposed Amended Rule of Civil Procedure 37(f) also suggest that where backup tapes may be the sole source of discoverable information, affirmative steps may be required to preserve the tapes.⁴ The best course may be to discuss and negotiate these issues with the government at the outset since the government could have a very different view from the company about what should be maintained. If it is not possible to discuss these issues with the government, counsel may wish to consider implementing some of the measures identified by the court in *Zubulake*: making a mirror image of the computer system at the time the duty to preserve attached; retaining all then-

³ *Zubulake v. UBS Warburg LLC et al. (Zubulake IV)*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

⁴ Proposed Rule 37(f) states, “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.” *See* Proposed Amendment to Federal Rule of Civil Procedure 37(f) (as adopted by the Judicial Conference of the United States, Sept. 20, 2005). The Committee Notes to Proposed Rule 37(f) state (in pertinent part): “Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.” *Id.*

existing backup tapes for the relevant personnel; and cataloging any later-created documents in a separate electronic file.⁵

4. Documentation of Ongoing Steps To Preserve Documents

Actions taken now and the reasons for those actions may be questioned later. Documenting the rationale for decisions when they are made may help to show that efforts were in good faith.

5. Departing Employees

Ensure that there is a procedure in place for departing employees who may have responsive documents on their computers. The company may have a practice of wiping clean the computer hard drives of departing employees so the computers can be recycled. Find out whether such a practice exists and, if it does, make sure hard drives are imaged before they are recycled.

B. Discussion with Government Attorney

1. Status of Company as Witness/Subject/Target

Not long after receiving a subpoena, in-house or outside counsel for the company should contact the government attorney in charge of the investigation. Counsel should inquire as to the company's status (witness, subject, or target)⁶ and try to find out as much as possible

⁵ See *Zubulake*, 20 F.R.D. at 218.

⁶ The U.S. Attorneys' Manual defines a "target" as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." The Manual defines a "subject" as "a person whose conduct is within the scope of the grand jury's investigation." United States Attorneys' Manual, tit. 9 (Criminal), section 11-151 ("Advice of 'Rights' of Grand Jury Witnesses"), <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/11mcrn.htm#9-11.151> (last visited Dec. 15, 2005). Of

about the investigation. Some government attorneys are more forthcoming than others, and may even provide “nontarget” or “nonsubject” letters. SEC attorneys generally will not indicate whether a company is a subject or target and will say that, unlike the Department of Justice, the SEC does not utilize these labels. Nevertheless, counsel may be able to obtain useful information from the SEC about how the company is viewed.

2. Negotiating Scope/Return Date of Subpoena

Often, the government drafts a subpoena with very broad language (covering every conceivable document) and specifies a “return” date within only a few weeks. The government fully expects the company’s attorney to seek to negotiate not only the scope of the subpoena but the return date. It is not unusual for the government to agree preliminarily to limit the production as long as all documents are preserved so they may be produced at a later time, if needed. The government also will often agree to a reasonable extension of time to produce the documents or to a “rolling” production. It may be preferable to delay discussion of specific proposals until counsel has had time to assess the volume of records called for under the subpoena and the time and burden involved in producing them. This information should be gathered as quickly as possible. Any agreement to limit the scope of a subpoena should be clearly documented in a letter to the government.

C. Alerting the Board of Directors and/or Audit or Other Committees

If it appears that the company or a senior officer is a target of the investigation, or the company otherwise has significant exposure, counsel likely will want to schedule a meeting of the Board of Directors and/or Audit Committee or other relevant committees to apprise them of the government’s investigation. Counsel may also

course, a prosecutor is free to change a person or entity’s status from subject to target based on new information.

wish to discuss any corrective actions that have been taken or are under consideration. Keep in mind that communications with the Board and/or committees—whether reflected in memos, meeting minutes, e-mails, or notes—may be discoverable. To the extent that portions of board minutes or other documents summarize privileged legal strategy, the documents should be so designated. In any event, the Board will benefit if meeting minutes reflect the careful review that the Board has given the alleged wrongdoing and the actions taken in response.

Depending upon the circumstances, and particularly if there are allegations of misconduct by senior management, the Board may decide to conduct its own internal inquiry. Internal investigations are discussed later in this monograph.

Sometimes individual directors, officers, or others may ask whether it is advisable to contact a politician or other person with perceived influence or “clout” to intervene on the company’s behalf. Even if the influential person were willing to intervene (doubtful in today’s environment), such contact in most situations does more harm than good.

D. Restrictions on Trading in the Company’s Securities

Depending upon the situation and particularly if the government is investigating possible misconduct by senior officers, it may be advisable to prohibit trading in the company’s securities by the company and those with knowledge of the investigation while the investigation is active.⁷

⁷ As the Supreme Court explained in *United States v. O’Hagan*, 117 S. Ct. 2199, 2207 (1997), “[u]nder the ‘traditional’ or ‘classical theory’ of insider trading liability, § 10(b) and Rule 10b-5 are violated when a corporate insider trades in securities of his corporation on the basis of material, nonpublic information. Trading on such information qualifies as a ‘deceptive device’ under § 10(b).”

E. Disclosure Issues

Upon learning of a government investigation, a myriad of disclosure issues likely will arise that must be considered by the company and its “Disclosure Committee” if there is one: (a) Must the investigation be disclosed? (b) Must any of the facts, events, and conduct that are being investigated be disclosed; (c) If the company is about to make any public statements or filings, are these in need of modification or supplementation in light of recent events? (d) Do any past statements or claims made by the company need to be corrected or supplemented based on what has been learned? (e) Should the company’s outside auditors be informed of the investigation or underlying facts? (f) Are there any reporting obligations under the Sarbanes-Oxley Act or other laws?

While corporations do not have a general affirmative obligation to publicly disclose all material information under the federal securities laws, they and their insiders generally may not trade in the corporation’s securities while aware of material nonpublic information. In addition, they must publicly disclose any material information necessary to correct any untrue statement of a material fact or to make any statements they do make, in light of the circumstances under which they were made, not misleading.⁸ Finally, they must comply with the SEC’s prospectus and periodic reporting requirements. These requirements, among other things, mandate disclosure of any material legal proceedings known to be contemplated by governmental authorities.⁹ Also, the listing standards of the NYSE and other exchanges generally require the prompt disclosure of material information.

Given the gravity and complexity of these types of disclosure and reporting issues, and the need to continually reassess them as the investigation progresses and new facts come to light, counsel is well advised to consult with a specialist on such issues.

⁸ See, e.g., Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2000); 17 C.F.R. § 240.10b-5-1 (2005).

⁹ SEC Regulation S-K, item 103.

1. Whether To Publicly Disclose the Investigation

Some of the factors to consider in assessing whether disclosure of the investigation is required include: (1) whether the investigation will materially impact the company's performance and prospects; (2) the likelihood that the investigation will result in formal charges; and (3) the likely impact of any charges on the company or on the market for its securities. For a small company, the defense costs, if not covered by a Directors & Officers ("D&O") insurance policy, could potentially be material to the company's performance results.

In some circumstances, companies opt to publicly disclose the existence of a government investigation in the very early stages even though there may not be an affirmative duty of disclosure under federal securities or other laws.¹⁰ If disclosure is made, counsel must be prepared for the resulting onslaught of questions from analysts, reporters, shareholders, suppliers, and creditors who will press for details. It is also possible that shareholder class actions and derivative actions will be filed. In responding to inquiries about the investigation, the company must balance its desire to fully respond with the need to avoid premature disclosures that may later turn out to be inaccurate and thus expose the company to potential liability.

¹⁰ For example, on July 11, 2005, DreamWorks Animation SKG, Inc. announced in its Form 8-K (under "Other Events") that it had issued a press release the same day stating (among other things) that "it has received a request from the staff of the Securities and Exchange Commission and is voluntarily complying with an informal inquiry concerning trading in its securities and the disclosure of its financial results on May 10, 2005. The Company stated in the press release that it intends to cooperate fully with the inquiry." Available at <<http://www.sec.gov/Archives/edgar/data/1297401/000119312505140804/d8k.htm>> (last visited Dec. 15, 2005). In a Form 10-Q filed on August 12, 2005, Dreamworks again referenced the SEC's informal inquiry (under "Legal Proceedings") and added: "The SEC has informed us that the informal investigation should not be construed as an indication that any violations of law have occurred. We are cooperating fully with the inquiry." Available at <<http://www.sec.gov/Archives/edgar/data/1297401/000119312505167077/d10q.htm>> (last visited Dec. 15, 2005).

Sometimes companies elect not to disclose an investigation unless and until they receive an indication from the government that the investigation will go beyond a request for documents, and the government believes wrongdoing has occurred. For example, in the context of an SEC investigation, some companies have opted not to disclose the receipt of a document request from the SEC and instead have waited to disclose until they have received a Wells Notice indicating the SEC's intent to pursue a claim against the company or one of its officers, or until the SEC has indicated a desire to take testimony from employees. In making the disclosure decision, companies sometimes are influenced by whether there are other similarly situated companies that have made disclosure, as well as whether customers, suppliers, or others are likely to be affected by the disclosure or the investigation itself.

Even if the company elects not to disclose the investigation, the company must take care not to falsely deny the existence of an investigation. Therefore the company's officers and spokespersons should be alerted about how to respond in the event that a question is ever posed about the investigation. If possible, such advice should be in writing, lest it be misconstrued or mischaracterized.

2. Accuracy of Imminent Public Statements/Filings

At the point when counsel learns about a government investigation, the company may be about to announce financial results or file a quarterly report on Form 10-Q, or an annual report on Form 10-K. Perhaps the chief executive officer is about to have a teleconference with analysts. Counsel should consider whether any of the public statements that are about to be made need to be modified or supplemented in light of the company's knowledge of the government's investigation or any of the underlying facts.

Keep in mind the content of any merger or other agreements that are filed with, or incorporated by reference into, proxy statements, registration statements, or other SEC filings. Such agreements may contain provisions that represent, for example, that the company has not taken any action that would cause the company to be in violation

of the Foreign Corrupt Practices Act¹¹ or other law. Even if the agreement was not prepared as a disclosure document, if it is made public or disclosed to shareholders, it may be actionable by the SEC.

3. Correcting Past Statements and/or Claims

Counsel should also consider whether any new information learned by the company necessitates the correction or supplementation of past financial statements, filings, or claims of the company. For example, it may be necessary to correct a past financial statement or amend a past disclosure or registration document that can no longer be considered correct and be relied on by investors.

It may also become necessary to correct past reports or claims submitted to the government. For example, a health care provider that learns from an internal investigation that the company received payments to which it was not entitled may need to disclose and refund the overpayment so as not to run afoul of the criminal law.¹²

4. Disclosures to Outside Auditors

The securities laws prohibit officers and directors and those acting under their direction from coercing, manipulating, misleading, or fraudulently influencing the corporation's auditors when they know that their actions, if successful, may cause the financial statements to be materially misleading.¹³

It may be desirable to disclose the government's investigation to the company's independent auditors even if the investigation has not been publicly disclosed and is not expected to have a material impact on the

¹¹ 15 U.S.C. §§ 78dd-1 et seq.

¹² 42 U.S.C. § 1320a-7b(a)(3) makes it a felony if a person "having knowledge of the occurrence of an event affecting his initial or continued right to payment" then "conceals or fails to disclose such event with an intent fraudulently to secure" the payment.

¹³ Section 303(a) of the Sarbanes-Oxley Act of 2002 implemented by Rule 13b2-2(b)(1). See SEC Release No. 34-47890 (effective June 26, 2003), 17 C.F.R. § 240.13b2-2 (2005).

financial statements. If the government is investigating possible accounting irregularities, the auditor likely will undertake its own investigation to determine whether it has any exposure and whether it should withdraw a prior opinion or qualify a prospective opinion.

Even if the investigation does not concern an accounting issue, if the company conducts an internal investigation, the outside auditors likely will seek detailed information concerning the results of the investigation and supporting documents. In responding to such a request, counsel must balance the danger of waiving attorney-client privilege and even work product protection against the consequences of refusing auditor demands for materials.¹⁴

5. Reporting Obligations under Sarbanes-Oxley and Other Federal Laws

In a public company, if an in-house lawyer learns of credible evidence of wrongdoing (a “material violation”) by the company or its directors, officers, employees, or agents, there may be a duty under the Sarbanes-Oxley Act to report this information up-the-ladder. The scope of the covered laws is broad, including: (a) breach of a fiduciary or similar duty to the Issuer (of securities) under federal or state law; (b) violation of federal or state securities laws, and (c) violation of any other federal or state law.¹⁵ Other federal statutes may also require

¹⁴ Disclosure of attorney-client communications to auditors will waive the privilege for those communications and, possibly, for other undisclosed attorney-client communications on the same subject. Whether disclosure of work product to auditors will result in a waiver is open to question and turns on whether the outside auditor is an adversary or is likely to reveal the company’s information to an adversary. Courts differ on this issue. *See* BERWIN COHEN, ROBERT T. DUFFY & LARRY R. LANGDON, PROTECTING A PUBLIC COMPANY’S CONFIDENCES 86-89 (National Legal Center for the Public Interest Feb. 2005).

¹⁵ 17 C.F.R. part 205. Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, SEC Release No. 33-8185 (Sept. 26, 2003). These Final Rules were promulgated pursuant to section 307 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7245), which was signed by President Bush on July 30, 2002. For an

disclosure of wrongdoing to the government, depending upon the circumstances.¹⁶

F. Insurance Carrier Notification

In coordination with the company's insurance department, counsel should review the applicable policies to determine whether coverage may exist for individual officers or directors or the company itself and what notification is required. If coverage exists, the insurer must be given notice not only of actual claims but circumstances likely to give rise to a claim. As the government's investigation progresses, counsel should consider the coverage implications of any actions that are being contemplated. For example, if a company admits that certain of its financial statements were false, and those very financial statements were given to an insurance company as part of the process of applying for insurance, the insurance company may attempt to rescind coverage.

Counsel should also be careful to obtain all necessary consents from the insurance company. D&O policies typically contain cooperation clauses that contractually prohibit or require insurer consent to any admission of liability, as well as to selection of counsel and any settlements. Keep in mind that, in at least one recent deferred prosecution agreement, the government required the company to represent that the fine paid by the company was not covered by insurance and to agree that, if coverage existed, fifty percent of any insurance payment would be remitted to the United States.¹⁷

in-depth discussion of this topic, see SABINO (ROD) RODRIGUEZ III & ROBERT KNUTS, REPRESENTING THE PUBLIC COMPANY: A POST-SARBANES-OXLEY GOVERNANCE PARADIGM FOR IN-HOUSE LAWYERS AND OUTSIDE COUNSEL (National Legal Center for the Public Interest Jan. 2004).

¹⁶ See, e.g., 41 U.S.C. § 57(c), § 53 (requiring the reporting of kickbacks related to government contracts).

¹⁷ See Deferred Prosecution Agreement entered into by KPMG and the United States Attorney for the Southern District of New York dated Aug. 26, 2005, at ¶ 5.

G. Actions with Respect to Possible Wrongdoers

In some instances, the company may need to consider the imposition of restrictions on, or additional oversight of, the activities of employees or officers suspected of improper conduct until sufficient information is gathered to know whether the suspicions have any basis. Ultimately, if the company obtains evidence of wrongdoing, it may wish to dismiss or discipline the individuals, though it must also consider whether any actions that are taken will create adverse evidence against the company in related civil litigation. In terms of demonstrating cooperation, however, the SEC has said that it considers whether the company has taken disciplinary action against wrongdoers.¹⁸

At the same time, employees may have rights that the company must consider in order to avoid future employment claims. For this reason,

¹⁸ See Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (the “Seaboard Report”), SEC Release No. 44969 (Oct. 23, 2001), Accounting and Auditing Enforcement Release No. 1470 (Oct. 23, 2001), *available at* <<http://www.sec.gov/litigation/investreport/34-44969.htm>> (last visited Nov 26, 2005). In the Seaboard Report, the SEC announced that it was not taking any action against Seaboard (the parent company) in a case in which the controller had caused the books and records to be misstated and then covered up those facts. The SEC identified criteria that it said it would consider in determining “whether, and how much, to credit self-policing, self-reporting, remediation and cooperation.” These criteria included: “Are persons responsible for any misconduct still with the company? If so, are they still in the same positions?” In Seaboard, the company terminated its former controller within 12 days of learning of misconduct. It also terminated two employees responsible for supervising the controller. *See also* Sec. Exch. Comm’n v. Ahold (Oct. 13, 2004) (the “Commission did not seek a penalty from Ahold because of, among other reasons, the company's extensive cooperation with the Commission’s investigation. Ahold self-reported the misconduct and conducted an extensive internal investigation Ahold promptly took remedial actions including, but not limited to, revising its internal controls and terminating employees responsible for the wrongdoing.”), *available at* <<http://www.sec.gov/news/press/2004-144.htm>> (last visited Dec. 14, 2005).

companies sometimes consult employment counsel to evaluate all the options and avoid a quick termination. Moreover, if the ostensible wrongdoer claims to be or may qualify as a whistle-blower, any efforts to discipline the individual could lead to the filing of a complaint and an investigation in which the company must show by clear and convincing evidence that the reason for taking adverse action was not related to the alleged whistle-blowing activity. An employee who prevails is entitled to seek reinstatement, back pay with interest, attorneys' fees, and other damages.¹⁹

H. Assessing the Need for Remedial Measures

The company should consider whether there is a need to review the compliance program to determine what led to the events at issue and whether any changes should be made to avoid a recurrence. Such a review may even be required under the existing compliance program. Potential remedial measures may involve improving internal controls, devising new policies and procedures, or requiring better training on existing policies. One issue to discuss is whether the review will be done by the chief compliance officer or by attorneys conducting an internal investigation, and whether the company desires to claim privilege for the results of the review.

As noted previously, there may be disclosure obligations for the company under the Sarbanes-Oxley Act and other federal securities laws (e.g., reporting on material deficiencies in financial controls that contributed to the losses). Even apart from any disclosure obligations, it is desirable for the company to identify and remedy any weaknesses

¹⁹ See section 302 of the Sarbanes-Oxley Act (codified at 18 U.S.C. § 1514A). Under this provision, public companies are prohibited from retaliating against an employee for providing to certain parties, including someone within the company who has the authority to investigate, information that the employee reasonably believed constituted a violation of federal fraud statutes or securities laws. If a complaint is filed, the Department of Labor must conduct an investigation, and the employer must show by clear and convincing evidence that it would have taken the same unfavorable employment action even in the absence of the whistle-blowing activity.

in the compliance program. Among other benefits, the company will be looked upon more favorably by the government if it does so. One of the factors considered by the SEC in assessing the extent of a company's cooperation is whether there are "assurances—in the form of internal controls and compliance procedures—that the misconduct will not be repeated."²⁰

Corrective action may also help shield the company and the Board from future liability for failing to respond to warning signals of compliance problems that existing internal controls had not flagged. Finally, under the Federal Sentencing Guidelines, a company's "culpability" score may be reduced if it has an effective compliance and ethics program, and one of the minimal requirements is that, "[a]fter criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance and ethics program."²¹

I. Preparing for Possibility of Media Coverage

Even prior to any public disclosures of the investigation, counsel must be prepared for the possibility that the investigation will be leaked to the press and reported in the media. This may well lead to adverse market reaction and shareholder lawsuits. Unfortunately, it may also make it more difficult for the government to terminate an investigation without taking action. Some companies retain a public relations consultant with specific experience in assisting companies in these circumstances to respond to press coverage. Companies also typically designate a single spokesperson for the company, and direct employees to refer all inquiries to the spokesperson.

²⁰ Seaboard Report, *supra* note 18. In Seaboard, the company implemented several new controls to strengthen its financial reporting processes and to prevent a recurrence.

²¹ See FEDERAL SENTENCING GUIDELINES MANUAL § 8B2.1(b)(7) (2005) (Effective Compliance and Ethics Program).

Any prepared statements from the company to the media concerning the investigation must be carefully worded so the statements are both accurate and appropriate for the multiple audiences that will read them, including the government. As noted previously, the company should take care not to directly or indirectly deny the existence of the investigation. Counsel should be equally careful with any statements made about the investigation to employees and others.

The company may wish to consider whether media coverage could have any impact on relationships with lenders, suppliers, and customers, and prepare a response plan. If it is possible that the government will contact these third parties as part of the investigation, counsel should discuss whether it is advisable to alert them to the investigation. If disclosure is made to some but not all of these third parties, this may prompt accusations that some received more favorable treatment than others.

J. Notification to Employees of Possible Contact by Government

If the government has not done so already, it may seek to interview employees by contacting them directly at home or the office. The company will also likely wish to interview employees with knowledge of the events under investigation. We describe the warnings that should be given to employees prior to conducting these interviews, and provide other suggestions for the interviews, in the discussion of Internal Investigations (section L.5.b).

In appropriate circumstances, it may be advisable to send a letter or memo to affected employees as soon as possible to alert them that they may be contacted by the government. This may be done for convenience (if there are many employees who need to be notified), and to ensure a clear record of what was communicated. As is discussed in more detail below, the content of such a letter or memo will vary depending upon whether company policy requires employees to cooperate with the government's investigation. In any event, it is imperative that nothing be said that could be construed as a directive not to cooperate with the government or as a suggestion of what the employee should say during an interview.

1. Advising Employees of Rights and Company Requests

In a situation in which the company is remaining neutral and not requiring employees to submit to a government interview as a condition of continued employment, a letter to employees may include some or all of the following:

- General description of the investigation (e.g., “The company recently received a grand jury subpoena calling for the production of certain records relating to the sale and marketing of our products. At this point, we do not know the scope or duration of the investigation or the exact nature of its subject matter. Nevertheless, the existence of the investigation raises the possibility that government investigators may attempt to contact company employees, either at work or at home.”)
- Employees’ rights (e.g., “If you are contacted, you should bear in mind that a government investigator cannot require an individual to submit to questioning. You are, of course, free to speak with a government investigator, but you are under no obligation to do so. The decision is entirely up to you.”)
- Request to notify company prior to interview so company attorney may be present (e.g., “The company requests that any employee who is contacted by a government investigator immediately notify _____ at _____ before proceeding with an interview. The purpose of this request is to allow the company’s attorney to be present for the interview (if you decide to go forward with an interview) so that the company’s interests are represented and an accurate record will be made of what the government agents tell you. Your compliance with this request, however, is entirely up to you.”)
- Suggested information to request of government investigator (e.g., “If you are contacted by an individual who claims to represent the government, you may wish to: (a) Ask for identification and a business card; (b) Determine precisely why the individual wishes to

speak with you; (c) Consider telling the individual that you want to schedule the interview at a later date. This will give you sufficient time to: confirm the identity of the individual; determine whether you want to go forward with the interview; and arrange for the Company attorney or some other attorney to be present if you so desire.”).

- Reminder to tell the truth (e.g., “If you choose to be interviewed, you should remember the following important facts: (a) Make certain you obtain the names, titles, telephone numbers and addresses of everyone present who claims to represent the government. Get their business cards, if possible; (b) Always tell the truth. You should know that you can be prosecuted for not telling the truth to government investigators, even if you are not put under oath.”)
- Right to have counsel/witness present for interview (e.g., “You have the right to have an attorney present during this interview. At a minimum, you should have a friend or relative present for the entire interview so that you will have a witness if there is ever any dispute about what you said or what you were asked.”)
- Right to take notes (e.g., “You have the right to take notes and keep them private. If you take notes, include the questions being asked and your answers.”)

2. Requesting/Insisting that Employees Cooperate

Rather than remain neutral, companies sometimes have informed employees that the company expects them to cooperate fully with the government. The company may even have a written policy that requires employees to cooperate with the government on matters pertaining to the company.²² In the Seaboard Report, the SEC stated

²² See WALL ST. J. (Mar. 22, 2005) (“American International Group, Inc. fired two top executives after the men signaled they would invoke their Fifth

that one of the questions that it asks when weighing what action, if any, to take against the company is, “[d]id the company ask its employees to cooperate with our staff and make all reasonable efforts to secure such cooperation?” Invocations of the Fifth Amendment privilege against self-incrimination by an employee (and perhaps even an ex-employee) may, in some cases, be used by the government to draw adverse inferences against the company in a civil proceeding, including one to which the government is a party.²³ The company itself cannot invoke the Fifth Amendment privilege since the privilege generally does not extend to corporate records. If a company takes the position that employees are expected to cooperate with the government’s investigation, the company will have to consider what action, if any, to take against employees who decline to cooperate with the government’s (and the company’s) investigation.

K. Coordinated Defense Efforts and Payment of Defense Costs

1. Employees Who Are Witnesses

Where the government seeks to question employees who are described by the government as mere witnesses, the question may arise as to whether the same attorney may represent the company and these employees. Even assuming there is no apparent conflict that forecloses multiple representation, the analysis should not stop there. If the employee’s interests later become adverse to the company, counsel may be conflicted out of continuing to represent the company.

Amendment rights against possible self-incrimination as regulators investigate whether AIG manipulated its books to mislead investors, people familiar with the matter said.” “Both men ‘were terminated pursuant to company policy that requires employees to cooperate with government authorities on matters pertaining to the company,’ said AIG spokesman Chris Winans.”).

²³ See, e.g., *Brink’s, Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983); *RAD Services, Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 277 (3d Cir. 1986); *LiButti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997) (setting forth a multifactor analysis).

There is also a danger of the attorney disclosing to the company privileged communications with the employee without consent, or vice versa. This danger can be lessened if the attorney obtains an agreement from both clients consenting to the sharing of material information between them.

There are other reasons to avoid joint representation. Some government attorneys view joint representation as an effort by the company to “circle the wagons” and shape the facts revealed by the witnesses. Their resulting skepticism of information provided by these witnesses may cause the government attorneys to discount testimony that is favorable to the company. In fact, the Department of Justice has given as an example of conduct that “impedes” an investigation (even if it does not rise to the level of criminal obstruction) “overly broad assertions of corporate representation of employees or former employees.”²⁴ To avoid these types of concerns, companies sometimes agree to pay the legal fees of one or more separate attorneys who is made available to represent all or subclasses of employees/witnesses provided conflict rules permit this. It is also not unusual where both a parent and subsidiary are involved in an investigation, for the companies to have separate counsel.

2. Employees Who Are Subjects/Targets

The government may indicate (or it may otherwise be obvious) that certain current or former employees are suspected of engaging in wrongdoing. Such individuals undoubtedly will need separate representation. The company must decide whether to advance the fees of attorneys who represent these individuals. If the individual in question is a director or an officer, the company may be required to advance defense costs pursuant to the company’s bylaws or articles of incorporation, provided the individual signs an undertaking promising to repay the funds if he is later found not to be entitled to

²⁴ See Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (the “Thompson Memorandum”), available at <http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm> (last visited Dec. 15, 2005).

indemnification.²⁵ The bylaws for some companies state that legal fees will be advanced until a “final disposition,” which arguably is until a conviction or, some would argue, until after an appeal of any conviction.

Absent a requirement in the company’s organizational documents, the decision to advance defense costs is likely left to the discretion of the Board. If the company has no definitive evidence that the employee believed his/her conduct was unlawful, or that he/she was acting in a way opposed to the best interests of the company, the Board may decide to advance legal fees once an undertaking is signed. Some companies may opt to do so only as long as the employee is cooperating with the government.

3. Government’s View on Advancing Defense Costs

One issue to consider in deciding whether to advance defense costs (if this is discretionary) is how the government will view these payments. If the government possesses information that causes it to believe the individual seeking defense costs is a wrongdoer, the government may question how the company can claim to be cooperating and at the same time stand behind the wrongdoer by using corporate funds to pay for his defense. Indeed, the Thompson Memorandum states that a “factor to be weighed by the prosecutor [in deciding whether to charge a corporation] is whether the corporation appears to be protecting its culpable employees and agents . . . [including]

²⁵ Often a company’s organizational documents provide that directors and officers (and perhaps employees) will be indemnified (after the fact) to the fullest extent permitted by law. Delaware law empowers a company to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative, including derivative actions asserted on behalf of the corporation. In order to be indemnified, however, a person must have acted in good faith and in a manner he or she reasonably believed to be in, or not opposed to, the best interests of the corporation. To be indemnified in a criminal matter, that person must also have had no reasonable cause to believe his or her conduct was unlawful. *See* DEL. CODE ANN. tit. 7, § 6426.

through the advancing of attorneys' fees. . . ."²⁶ The Thompson Memorandum acknowledges, however, that "[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously a corporation's compliance with governing law should not be considered a failure to cooperate."²⁷

4. Joint Defense Agreements

Assuming that certain individuals retain separate counsel, the question may arise of whether the company should enter into joint defense agreements with those individuals. While there may be benefits to such agreements, the company should think carefully about the conflict of interest issues and other potential ramifications before doing so. For example, if the company obtains information from an employee in the context of a joint defense agreement, it may be foreclosed from divulging this information to the government as part of its cooperation.²⁸ In addition, the government typically views joint

²⁶ Thompson Memorandum, *supra* note 24. *See also* Press Release, SEC 2004-67 (May 17, 2004), announcing charges against Lucent Technologies, Inc. and citing its "failure to cooperate" in part because, "[a]fter reaching an agreement in principle with the staff to settle the case, and without being required to do so by state law or its corporate charter, Lucent expanded the scope of employees that could be indemnified against the consequences of this SEC enforcement action. Such conduct is contrary to the public interest." Available at <<http://sec.gov/news/press/2004-67.htm>> (last visited Dec. 20, 2005).

²⁷ Thompson Memorandum, *supra* note 24.

²⁸ *United States v. LeCroy*, 348 F. Supp. 2d 375 (E.D. Pa. 2004), *amended on reconsideration* Jan. 10, 2005. One representative of the Department of Justice expressed the view that "[i]f the joint defense agreement puts the corporation in a position where it is unable to make full disclosure about the criminal activity, then no credit for cooperation will be factored in." The representative added: "[I]t is hard for me to understand why a corporation would ever enter into a joint defense agreement[.]" though he left open the possibility that a corporation potentially could make a sufficient disclosure despite limitations resulting from a joint defense agreement. *See Interview*

defense agreements with suspicion, as a device to coordinate on a uniform version of events and even a device to protect culpable employees and provide them with information about the government's investigation.²⁹ For these and other reasons, the company should also think carefully before entering into joint defense agreements with other companies that may be the focus of the same investigation.

L. Conducting an Internal Investigation

Often the company or the Board will quickly initiate its own internal investigation of the allegations that the government is examining in order to determine whether the allegations are well founded and, if so, to understand the nature and scope of what occurred and take corrective measures. We provide below some suggestions for conducting an internal investigation and highlight some of the common issues that arise.

with U.S. Attorney James B. Comey Regarding the Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, UNITED STATES ATTORNEYS' BULLETIN, Nov. 2003, available at <www.usdoj.gov/usap/eousa/foia_reading_room/usab5106.pdf> (last visited Nov. 26, 2005).

In addition, if the interests of the company and individual diverge at some point, there may be conflict of interest issues that create the risk of the company's counsel being disqualified. *See* United States v. Henke, 222 F.3d 633 (9th Cir. 2000) (defense counsel had to withdraw from representation where, by virtue of a joint defense agreement, he obtained confidential information from another defendant who later became a government witness. Counsel had a conflict because of his inability to use the confidential information to cross-examine the former defendant when he testified at trial.).

²⁹ The Thompson Memorandum states that, in assessing the degree to which a company has cooperated, the Department of Justice considers whether the company appears to be "protecting its culpable employees and agents." While acknowledging that "the cases will differ depending upon the circumstances," the Memorandum indicates that a "corporation's promise of support to culpable employees and agents . . . through providing information to the employees about the government's investigation pursuant to a joint defense agreement may be counted against the company."

1. Written Request for Investigation To Procure Legal Advice

The entity that requests the internal investigation (e.g., management, Board, Special Committee of the Board, Audit Committee) should authorize, in writing, the attorney's internal investigation. The letter should indicate that counsel is being retained to develop factual information for the purpose of providing advice concerning potential liabilities and claims against third parties and its own employees, as well as to defend the company in anticipated potential litigation, and to recommend future legal actions, such as improved compliance programs. The letter should indicate the existence of the government's investigation and any other basis for anticipating possible litigation.

2. Who Should Oversee and Conduct the Investigation?

Often internal investigations are overseen by a committee consisting solely of outside directors, and conducted by outside counsel with prior criminal or SEC experience. This is almost always the case if potential wrongdoing by high-level officers is being investigated. Other times, the circumstances may be such that in-house counsel conducts the investigation. In the event that outside counsel is retained, the government has made it clear that it gives more credence to investigations conducted by outside attorneys who do not have previous ties to the company. For example, the SEC has stated that it asks: "Did company employees or outside persons perform the review? If outside persons, had they done other work for the company? Where the review was conducted by outside counsel, had management previously engaged such counsel?"³⁰

Lawyers who conduct internal investigations should understand that they are under close scrutiny by the government. In November 2004, the (then) director of the SEC's Division of Enforcement stated that an area of "particular focus" of the Commission was the role of lawyers in internal investigations of their clients or companies because of concern that lawyers in some instances "may have conducted

³⁰ See Seaboard Report, *supra* note 18.

investigations in such a manner as to help hide ongoing fraud, or may have taken actions to actively obstruct such investigations.”³¹

It is paramount that counsel conducting the internal investigation solely represent the interests of the corporate entity and not any individual employee, officer, or Board member (sometimes these persons/entities will have their own attorneys). Failure to do this will undermine the credibility of the investigation and put the corporation at serious risk.

3. Scope of the Internal Investigation

The scope of the internal investigation typically mirrors that of the government’s investigation unless there is good reason to make it more broad. To fulfill management’s duty of care and satisfy the government, the investigation should be both thorough and probing. The SEC has said that, when considering whether to bring an enforcement action against a company, it asks (among other things): “Did the company commit to learn the truth, fully and expeditiously? Did it do a thorough review of the nature, extent, origins and consequences of the conduct and related behavior?” It also asks whether scope limitations were placed on any review that was done and, if so, what they were.³²

An internal investigation that overlooks relevant facts or is otherwise insufficient may lead to inaccurate disclosures to the government or even accusations that the company attempted to conceal wrongdoing. The Department of Justice, in assessing the level of a company’s cooperation, considers “whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the

³¹ Stephen M. Cutler, Director, Division of Enforcement, U.S. Securities and Exchange Commission, *The Themes of Sarbanes-Oxley as Reflected in the Commission’s Enforcement Program*, Speech at UCLA School of Law (Sept. 20, 2004), *available at* <<http://www.sec.gov/news/speech/spch092004smc.htm>> (last visited Nov. 26, 2005).

³² *See* Seaboard Report, *supra* note 18.

investigation . . . [including] making presentations or submissions that contain misleading assertions or omissions.”³³

4. Information To Be Gathered During an Internal Investigation

In considering what information to gather during an internal investigation, it is helpful to review the following criteria that the SEC uses in determining whether and how much to credit a company’s self-policing, self-reporting, remediation, and cooperation.³⁴

- What is the nature of the misconduct? Did the misconduct result from inadvertence, honest mistake, simple negligence, reckless or deliberate indifference to indicia of wrongful conduct, willful misconduct, or unadorned venality? Were the company’s auditors misled?
- How did the misconduct arise? Is it the result of pressure placed on employees to achieve specific results, or a tone of lawlessness set by those in control of the company? What compliance procedures were in place to prevent the misconduct now uncovered? Why did those procedures fail to stop or inhibit the wrongful conduct?
- Where in the organization did the misconduct occur? How high up in the chain of command was knowledge of, participation in, the misconduct? Did senior personnel participate in, or turn a blind eye toward, obvious indicia of misconduct? How systemic was the behavior? Is it symptomatic of the way the entity does business, or was it isolated?
- How long did the misconduct last? Was it a one-quarter, or one-time, event, or did it last several years? In the case of a public

³³ See Thompson Memorandum, *supra* note 24.

³⁴ See Seaboard Report, *supra* note 18.

company, did the misconduct occur before the company went public? Did it facilitate the company's ability to go public?

- How much harm has the misconduct inflicted upon investors and other corporate constituencies? Did the share price of the company's stock drop significantly upon its discovery and disclosure?
- How was the misconduct detected and who uncovered it?

5. Interviews of Employees

As part of an internal investigation, counsel will want to quickly identify and interview all of the employees who may have knowledge of the events under investigation. When possible, key documents should be reviewed beforehand as long as this will not unduly delay the interviews. These materials should include public filings, press releases, analyst presentations, and other public documents that may be relevant, as well as any documents requested by the government.

Keep in mind that circumstances may change and foreclose future questioning of certain employees, so counsel should be as thorough as possible during the interviews. In addition, counsel should be mindful that an employee who is interviewed may already be cooperating with the government and may even be a whistle-blower who has filed a *qui tam* lawsuit (sealed) against the company.

In conducting the interviews, consider these suggestions and issues:

a. Person To Observe (“Witness”) the Interview

It is often a good idea to have a witness present for employee interviews, particularly for interviews of key employees. The witness will be able to verify what was said during the interview in the event of any later allegation of witness tampering or of a dispute about what the employee said. The presence of a second set of ears will also enhance the accuracy of any interview notes and summaries that are made.

b. Warnings

Upjohn Warning: The employee should be told at the start of the interview that counsel represents the company (not the employee) and is interviewing the employee to gather information in order to provide legal advice to the company.³⁵ Counsel should explain that the interview is covered by the attorney-client privilege, and that this privilege belongs to and is controlled by the company. The employee should be told that the company has the right to keep the interview confidential, and that the company, but not the employee, may elect in the future to waive the privilege and disclose information from the interview to third parties, including the government.

This disclosure, commonly referred to as an “Upjohn warning,”³⁶ should prevent the employee from later claiming to have believed the attorney represented the employee during the interview, in an effort to invoke the attorney-client privilege and prevent the company from disclosing the employee’s statements to the government. The interview notes should document that the *Upjohn* warning was given.

³⁵ See MODEL RULES OF PROF’L CONDUCT R. 1.13(f) (2004) (“In dealing with an organization’s . . . employees . . . a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”).

³⁶ *Upjohn v. United States*, 449 U.S. 383 (1981). In *Upjohn*, the Supreme Court held that communications made by employees to company counsel at the direction of superiors to secure legal advice from counsel were protected by the attorney-client privilege. The Court set forth guidelines, as opposed to a bright-line test, for determining when the privilege applies to an attorney’s communications with employees. These guidelines include: (1) whether the communications were made by corporate employees at the direction of superiors for the purpose of obtaining legal advice; (2) whether the communications contained information necessary for counsel; (3) whether the matters communicated were within the scope of the employee’s corporate duties; (4) whether the employee knew that the communications were for the purpose of the corporation’s obtaining legal advice; and (5) whether the communications were ordered to be kept confidential by superiors. *Id.* at 394-96.

Sometimes the warning is made in a letter from the General Counsel or a designee that is distributed to all who will be interviewed.

Employees Asking If They Need a Lawyer: Counsel should anticipate that employees may ask during the interview whether they need or should get an attorney. If the employee's interests are, or might become, adverse to the company's, ethical rules prohibit counsel from offering any advice to an unrepresented employee other than that the employee should obtain counsel.³⁷ If there is no ethical obligation to affirmatively advise the employee to obtain an attorney, counsel may decide that it is not in the company's interest to do so because, for example, advising an employee to obtain counsel might delay and interfere with the company's efforts to learn what happened and to cooperate with the government. Rather than give advice, counsel may elect to tell the employee that he/she is not able to advise the employee on the issue and that the decision of whether to consult an attorney is entirely up to the employee. Some companies, however, choose to inform employees that they have the right to request their own counsel to be present during the interview even if the employees do not raise the issue. The company may or may not agree to pay for counsel. The approach may vary depending upon the particular situation of the employee being interviewed.

³⁷ MODEL RULES OF PROF'L CONDUCT R. 4.3 cmt. 2 (1983) ("[T]he possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule [4.3] prohibits the giving of any advice, apart from the advice to obtain counsel."). The entirety of MODEL RULE 4.3 states:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Zar Warning: In two fairly recent cases, the government accused officers of a company of conspiring to obstruct justice, in part, based on their having misled and lied to those conducting the company's internal investigation.³⁸ The government's theory was that the officers knew and intended that the false information given during the internal investigation would be presented to the government and thereby would obstruct the government's investigation.³⁹ As a result of these cases, some counsel now warn employees that the information provided during the interview may be turned over to the government, exposing them to possible obstruction charges if their statements are not truthful.

Of course, giving such a warning may have a chilling effect and cause employees to decline to provide information. If the company conditions continued employment on cooperation with an internal investigation, the employee may ultimately agree to be interviewed but perhaps will ask for time to consult an attorney and to have the attorney present for the interview. In addition, by giving the warning, counsel arguably creates the potential for an obstruction charge where it might not otherwise have existed had the employee never been informed that his statements would (or might be) disclosed to the government. All of these considerations should be assessed in the context of the particular facts presented to determine whether the additional warning should be given.

³⁸ James K. Robinson & Adam S. Lurie, *Little White Lies*, LEGAL TIMES, Aug. 16, 2004, describing the prosecutions of Ira Zar, the former chief financial officer of Computer Associates International, and Martin Grass and other former executives of Rite Aid Inc. *See also* Press Release, Department of Justice, Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges (Sept. 22, 2004) (announcing, among other things, the obstruction of justice charges against former senior officers of Computer Associates International, Inc.), *available at* <http://www.usdoj.gov/opa/pr/2004/September/04_crm_642.htm> (last visited Dec. 14, 2005).

³⁹ *Id.* Since the two cases involved guilty pleas, it is not known whether the government's novel obstruction theory would have been accepted by a court or jury.

c. Are Interviews with Employees Privileged?

Counsel's communications with lower-level employees may not be protected from disclosure as attorney-client communications, particularly in state court litigation or in federal court litigation where jurisdiction is based on diversity. For example, in Illinois, the courts have adopted a control group test for determining which employees within a corporation may have privileged conversations with counsel. The control group likely will be limited to senior management and employees that advise senior management on final decisions, and exclude employees who merely supply information.⁴⁰

Even if counsel's notes and summaries of interviews with certain employees are not protected by attorney-client privilege, they probably will be protected from disclosure as attorney work product absent a showing of substantial need and undue hardship. To enhance the likelihood that the interview notes and summaries will be deemed work product, counsel should avoid taking down verbatim statements of the employee and putting statements in quotation marks. In addition, counsel should not ask the employee to review or adopt the notes or summary. Finally, the attorney should feel free to intersperse comments reflecting the attorney's mental processes and legal analyses. As always, however, counsel should be mindful that these notes and summaries may someday be turned over to the government, either voluntarily or if a court finds them not privileged. Therefore, counsel may wish to refrain from judgmental statements.

d. Beware of Disclosing Information/Documents During Interviews

Be cautious in deciding what information and documents to share with employees and other witnesses who are interviewed since the purpose of the interviews is to learn what the witness knows. In addition, to the extent that any privileged documents are shown to the witness, the documents may become discoverable. Keep a clear record of any documents that are shown to a witness.

⁴⁰ *Consol. Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 258 (Ill. 1982).

e. Witness-Tampering Laws

Counsel should avoid any interview techniques that could possibly be construed by the government as an attempt to influence the witness's testimony or as witness tampering. Under the law, it is a felony offense to "engage in misleading conduct towards another person with intent to . . . influence . . . the testimony of any person in an official proceeding."⁴¹ An official proceeding need not be pending or impending at the time of the offense. Therefore, "misleading conduct" is prohibited even prior to any government investigation. In one recent case, a general counsel was charged with obstruction based, in part, on coaching employees on how to answer questions without disclosing the company's improper accounting practice.⁴²

It is not entirely clear where the line is drawn between appropriate advice in the preparation of witnesses and misleading conduct intended to "influence" testimony. Is advising a witness to answer questions narrowly and not to volunteer information an effort to

⁴¹ 18 U.S.C. § 1512(a)(2). Section 1512(b)(3) of this statute makes it unlawful to corruptly persuade another person, or attempt to do so with intent to "hinder, delay or prevent the communication to a law enforcement officer or Judge of the United States of information relating to the commission or possible commission or a Federal offense"

⁴² In September 2004, the former general counsel of Computer Associates International, Inc. pleaded guilty to obstruction of justice arising from his "coach[ing] [employees] on how to answer questions [from the government and outside counsel] without disclosing the 35-day month practice." This was a practice of keeping books open at the end of fiscal periods to allow the company to create the appearance that it had met quarterly revenue and earnings estimates. The practice was so widespread that employees reportedly joked that the company had its own "35-day month." See Press Release, Department of Justice, Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges (Sept. 22, 2004) (announcing, among other things, the guilty plea of Stephen Woghin, the former general counsel and senior vice president of Computer Associates International to securities fraud, conspiracy, and obstruction of justice, *available at* <http://www.usdoj.gov/opa/pr/2004/September/04_crm_642.htm> (last visited Dec. 14, 2005).

influence testimony or impede an investigation? How about advising a witness to assert the Fifth Amendment privilege against self-incrimination? Some might argue that even legal conduct can be a violation of the obstruction statutes if improperly motivated. Because the statutes do not clearly differentiate between improper conduct and legitimate defense activity, counsel must balance the need to represent the client company zealously against the need to avoid interview methods that the government might deem overly aggressive or manipulative. To this end, counsel should consider reminding witnesses that any statements made to the government must be truthful.

f. Requesting Employees To Maintain Confidentiality

During or after the interview, employees should be informed that the company requests that they keep the conversation with the company's attorney confidential in order for the company to maintain its privileges. They should also be asked to refrain from discussing the subject matter of the investigation with anyone other than counsel and from creating any new documents or e-mails that discuss or comment on the investigation. Counsel may also wish to inform employees that they likely will be interviewed again, either by the company or the government, and will likely be asked to describe any conversations they have had with nonattorneys concerning the subject matter of the investigation, whether in person, by telephone, or by e-mail.

Remind employees that all e-mails and other documents that discuss the subject matter of the investigation are being collected by the company as part of the investigation, and to respond to any requests from the government. Therefore, employees should exercise care not to destroy any such documents. In addition, to the extent that they generate any future e-mails or documents that pertain in any way to the investigation (even though they should not be discussing the investigation except with counsel), copies of these e-mails and documents must be forwarded to counsel for possible production to the government. This reminder may cause employees to think twice before sending future e-mails about the investigation.

6. Interviews of Former Employees and Other Outsiders

Sometimes persons with knowledge of the events under investigation are no longer employed by the company. Before contacting such individuals for information, counsel should consider whether the communications will be privileged and the risk that the investigation may be leaked by such a person if it is not already a matter of public knowledge.

7. Use of Experts

It may become necessary to retain experts to conduct analyses as part of the internal investigation. As with outside counsel, experts should be independent of the company to enhance the credibility of their work. Experts should be retained by outside counsel and, at least preliminarily, should be retained as consulting or nontestifying experts.

8. Protecting Results of Internal Investigation and Related Materials

To enhance the likelihood that internal investigation documents will be protected from disclosure under the attorney-client privilege and/or work product doctrine, communications through nonlegal intermediaries should be avoided. Any findings and communications in the course of the investigation should be kept confidential and disclosed only on a “need to know” basis to senior corporate officers with the authority to act. If it is necessary to distribute documents to senior management or Board members, ask that the documents be returned after they have been reviewed. Counsel should also limit the involvement of people who are not necessary to the investigation, as anyone who gains knowledge becomes a potential witness.

9. Drafting an Internal Investigation Report and Related Materials

Sometimes a report of an internal investigation is not prepared since it may be unnecessary or unwise to do so in a given situation, although

the absence of a report may engender suspicion on the part of the government. If the decision is made to prepare a report summarizing the results of an internal investigation, counsel should consider how much detail is required and be mindful of the multiple potential audiences who may someday review the report and related materials. Counsel should ensure that the content of the documents is as precise as possible and contains appropriate caveats. The final report should include both exculpatory and mitigating information, and should neither exaggerate the evidence nor minimize it, while clearly differentiating opinion from fact. Interpretations, judgments, and sweeping pronouncements should be avoided, particularly when summarizing employee interviews. Recognize that an employee who is accused of wrongdoing in such a report may bring a defamation action. This should not deter counsel from drawing conclusions that are supported by the facts, but consideration should be given to the weight of the evidence collected before specific allegations are made.

10. Retaining Drafts and Notes from Internal Investigation

In view of the passage of what some have coined the “Anti-Shredding Provision” of the Sarbanes-Oxley Act (15 U.S.C. § 1519), counsel should think carefully before destroying any drafts or notes generated during the internal investigation. The new statute prohibits the alteration or destruction of documents in relation to or contemplation of any government investigation. While in the past, attorneys may have sometimes destroyed drafts and notes once final interview summaries and reports were prepared, this may no longer be advisable. It may be possible to avoid drafts entirely if the report of internal investigation exists only in a single electronic file that is modified and supplemented as needed and as the investigation evolves. While it likely will be necessary to make notes at various times during the investigation, it would be wise to avoid having multiple people create notes of the same events or interviews. If possible, notes and other work product should be retained only by outside counsel.

11. Government Requests To Waive Privileges

a. Cooperating by Waiving Privilege

Recognize from the outset that the government likely will exert strong pressure on the company to “cooperate” by waiving its privileges, disclosing the results of its internal investigation, and possibly by producing the underlying work product to the government. The Department of Justice has stated that, in “gauging the extent of the corporation’s cooperation, the prosecutor may consider the corporation’s willingness . . . to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.”⁴³ Under a new policy, however, the Department at least has directed all United States Attorneys to establish a “written waiver review process” so that line assistants must seek approval from the United States Attorney or another supervisor before seeking a waiver.⁴⁴

SEC staff have indicated that the SEC takes a somewhat different approach from the Department of Justice and that companies should expect that the SEC *will* ask for the privilege to be waived, although the SEC typically will only request after-the-fact investigative reports and not the legal advice that companies receive concerning the investigation.⁴⁵ SROs likely will seek these reports as well, as they

⁴³ Thompson Memorandum, *supra* note 24.

⁴⁴ See Memorandum from Acting Deputy Attorney General Robert D. McCallum, Jr. (Oct. 21, 2005), *available at* <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm> (last visited Dec. 14, 2005).

⁴⁵ Remarks of Linda Chatman Thomsen, the Director of the SEC’s Division of Enforcement, as reported by Tim Reason, *The Limits of Mercy*, CFO.com (May 2005), *available at* <<https://www.cpa2biz.com/News/Selected+Features/The+Limits+of+Mercy.htm>> (last visited Dec. 15, 2005), and at the 37th Annual PLI Securities Institute (Nov. 5, 2006). See also the Seaboard Report, *supra* note 18 (“Did the company promptly make available to our staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct

increasingly are adopting policies and procedures that in many cases mirror those of the SEC and Department of Justice in response to pressure to police the conduct of their members. For example, in September 2005, the NYSE issued an “Information Memorandum” on “Cooperation” in which it explained that an entity may get credit for “extraordinary cooperation” where the entity waives its privileges and produces employee interview notes and reports of internal investigations.⁴⁶

To the extent that any charges are brought against the company, the Federal Sentencing Guidelines reward companies that surrender otherwise privileged materials to government investigators since an organization’s “culpability score” for sentencing is reduced if it “fully cooperated in the investigation.”⁴⁷

b. Alternative to Turning Over Report of Internal Investigation

If it becomes necessary to make a disclosure to the government, consider suggesting an alternative approach to turning over the report of the internal investigation. In prepared remarks to a Sentencing Commission working group, a representative of the Department of Justice suggested that the Department may be receptive to an offer of voluntary disclosure by direct access to witnesses rather than to

and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review?”).

⁴⁶ See NYSE Information Memorandum No. 05-65 (Sept. 14, 2005).

⁴⁷ See FEDERAL SENTENCING GUIDELINES MANUAL § 8C2.5(g)(1)-(2) (2005), available at <<http://www.ussc.gov/2005guid/gl2005.pdf>> at 493 (last visited Dec. 15, 2005). Note that “waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.” *Id.* at “comment” (n.12).

internal summaries and analyses of witness statements.⁴⁸ Another possible approach is to offer an oral presentation of the results of an internal investigation. While there still is a risk of subject matter waiver with this approach, the company will have a better chance of maintaining the privilege than if documents are provided. Keep in mind that, even if the government agrees to a limited disclosure, a private civil litigant will likely argue that the company's disclosure was a broad waiver as to *all* materials relating to the same subject matter, even if those materials were not all furnished to the government.

c. Nonwaiver Agreement

If the report and other materials must be produced, the company should seek a "confidentiality" or "nonwaiver" agreement from the government, even though there is a good chance that a court will still find that a waiver has occurred, at least as to the produced materials.⁴⁹

⁴⁸ Gregory J. Wallace, *Holder Memorandum Revisited: DOJ Offers Clarification of Corporate Waiver*, LJM BUSINESS CRIMES BULLETIN, vol. 9, no. 12 (Jan. 2003).

⁴⁹ The SEC has said that it has a policy of entering into confidentiality agreements where it determines that receiving information from a company pursuant to such an agreement will further the public interest, and that it will "vigorously argue in defense of those confidentiality agreements where litigants argue that the disclosure of information pursuant to such agreements waives any privilege or protection." *See* Implementation of Standards of Professional Conduct for Attorneys, SEC Release Nos. 33-8185, 34-47276 (Jan. 29, 2003). A nonwaiver agreement may say something like:

Please be advised that, by agreeing to produce and/or producing the confidential materials, the company has not waived and does not intend to waive, the attorney-client privilege, attorney work product protection or any other applicable protection as to any third party. The Securities and Exchange Commission staff will not assert that the company's voluntary communication of the confidential materials to the staff constitutes a waiver of such privileges or protections as to any third party. The Securities and Exchange Commission staff will maintain the confidentiality of the information produced by the company pursuant to this agreement and will not disclose it to any third party, except to the

It may even be possible to negotiate for disclosure to occur after or simultaneously with any settlement or other resolution so that a stronger case may be made that any disclosure was part of confidential settlement discussions and/or that the company and government are not adversaries and the disclosure was made as part of a common interest in fully investigating the alleged wrongdoing and so no waiver occurred.⁵⁰

PART II

ISSUES AND ACTIONS TO CONSIDER WHEN THE GOVERNMENT EXECUTES A SEARCH WARRANT

When the government seeks company records through issuance of a search warrant rather than a subpoena, this means the government has presented specific information to a judge or magistrate (usually by

extent that the staff determines that disclosure is otherwise required by law or would be in furtherance of the staff's discharge of its duties and responsibilities.

⁵⁰ The agreement with the government could be drafted to include language reflecting this common interest and nonwaiver, although there certainly would still be a risk that a court would find a waiver of the privilege. Such language might say something like:

The parties agree that the corporation and the U.S. Attorney's Office share a common interest in determining all the facts relating to the matters under continued investigation and in reaching a proper resolution of all related issues. The office agrees to use the information and documents produced by the corporation pursuant to this agreement solely for the purposes of its continuing criminal investigation and that it will give such information and documents equivalent secrecy protection as it would give Fed. R. Crim. P. 6(e) grand jury materials and material covered by law enforcement and informant's privileges. The parties therefore agree that the corporation has not waived the attorney-client or work product privilege by virtue of cooperation pursuant to this agreement.

affidavit) showing probable cause to believe that a crime was committed and that evidence of the crime exists on the company's premises. The government's decision to obtain records by search warrant rather than subpoena may well mean that the government believes records have been destroyed or are in danger of being destroyed in order to conceal evidence of wrongdoing.

Large companies often have a corporate response plan in place that specifies what should be done, and by whom, in the event that a search warrant is ever executed. This is a wise practice, as there is little time to react when government agents suddenly descend on an office or plant and begin rummaging through drawers and computers and walking away with boxes of documents and mirror images of computer hard drives.

While it is important not to interfere with the search, it is equally important to ensure that the government agents do not exceed the scope of the warrant and that the disruption of the business is minimized. If at all possible, the company should get an experienced criminal attorney at the search site immediately, or at the very least speak with one by telephone. The following is a list of additional immediate actions to consider.

A. Make Contact with the Search Site

In whatever way possible, make contact with the employee in charge at the search site ("the company representative"). If no one is in charge, designate someone. Obtain a phone number for the company representative and request that the line be kept open. Often a mobile phone works best, since the representative may need to move around during the search.

B. Consent

Consider telling the company representative not to consent to the search or to withdraw consent if it already has been given. If the company elects to consent to the search, it will be difficult to later challenge the warrant and attempt to suppress evidence that may be obtained during the search.

C. Examine the Warrant

Agents executing a search warrant are generally required to provide a copy of the warrant to the company.⁵¹ Have the warrant faxed to counsel as soon as possible so it can be examined. Counsel should make sure that the warrant identifies (a) the issuing magistrate; (b) a description of the place to be searched and items to be seized; (c) whether the warrant is being executed within the allowable time (usually within 10 days from when it was issued, and it must be served between 6 a.m. and 10 p.m. unless it specifies other hours). If the warrant does not authorize the search, immediately bring this to the attention of the agent who is in charge and request that the search be terminated.

D. Speak to and Collect Information from the Government Agents

Counsel for the company should ask to speak with the government agent who is in charge of the search (“the agent-in-charge”). If the agent-in-charge declines to take the phone call, the company representative at the site should speak with that agent.

– The agent should be informed that the company will do everything possible to make sure that the search proceeds smoothly but that the company requests that the agents refrain from starting (or continuing) the search until the company’s counsel arrives at the site and can ensure that the warrant is valid and that privileged documents are segregated. Most likely, the agent-in-charge will decline this request.

– Consider requesting that all questions be directed to the company’s attorney and that employees not be questioned outside the presence of counsel. Again, the agent-in-charge may well ignore this request and attempt to question employees during the search.

⁵¹ See FED. R. CIV. P. 41(f)(1)(B).

– Ask for a business card for the agent-in-charge (or at least get his name, agency, and phone number). If possible, get cards for the other agents as well or ask that they sign in at the desk if this is a normal procedure for guests. Also ask for the name and phone number of the prosecutor assigned to the case. Ask for a copy of the affidavit in support of the search warrant. This need not be provided and may even be sealed, but will provide a wealth of information if the agent has the affidavit and chooses to turn it over.

– The company should try to get as much information as possible from the agents about the reason for the search, but realistically will get little. At a minimum, counsel should attempt to learn what agencies are represented during the search, since this may reveal the subject of the investigation, as well as whether multiple agencies (e.g., FBI and IRS) are involved in the investigation. Of course, counsel should inquire about the conduct being investigated and whether the company or any of its employees are subjects or targets of the investigation.

– If the agent-in-charge has not yet provided a copy of the warrant to the company, a copy should be requested. The agent-in-charge should also be requested to segregate those materials that were seized before the warrant was served.

– To the extent that the company has suggestions for ways to minimize the disruption from the search, these should be discussed with the agent-in-charge. If appropriate, the company may suggest sealing off the area of the search so other personnel do not enter during the search. If it is essential that certain employees remain on the job and not be disrupted from their work, ask whether the search of their work area can be completed first.

E. Send Employees Home and Advise Them of Their Rights

Employees should be informed that they should cooperate with the search and not do anything to interfere with it. At the same time, employees may be informed of their rights: they are under no obligation to answer questions on the spot or create or sign any documents and may,

if they choose, consult with an attorney before answering questions and have an attorney present during questioning. The employees should be told that the decision of what to do is entirely up to them.

To the extent possible, employees should be sent home for the day unless business needs require that they remain. The government agents likely will attempt to conduct on-the-spot interviews of employees despite the request that this not be done without the presence of counsel and despite the resulting disruption to the business.

If employees are sent home, consider giving them the name and phone number of the company's attorney before they leave (it may be necessary later to identify alternative counsel if there are potential conflicts). It is best to give the employees a cell phone number for the attorney in the event the government contacts them at home outside of normal business hours.

Employees should be requested not to discuss the search with other employees unless the company's attorney is present. They should also be advised to refer any media inquiries to the company's designated spokesperson. As always, counsel must be careful not to say anything that the government might perceive as an effort to impede the investigation.

F. Monitor the Search

If necessary, the company representative should identify a handful of employees to remain during the search to assist in monitoring and keeping a record of the details of the search. This record should be kept at the direction of and furnished to the company's counsel so that the privilege attaching to it remains intact. Without interfering with the search, these employees should attempt to make a record of the name of the agent being monitored, his or her agency, where the agent is searching (be as specific as possible), the beginning and ending time for the search of each location, and what the agent removed. If agents are copying computer files, the agents should be asked what files they are copying, or the person monitoring the agents should observe the process and record this. To the extent that the agents are searching in places not identified in the warrant, the agents should be notified of this and told that the company objects to any search of the location not identified in the warrant.

G. Protect Privileged Documents

If there are privileged documents at the search site, the agent-in-charge should be informed of this and told of the specific locations where the privileged documents are kept. The agent should be advised that the company does not waive the attorney-client privilege and other privileges. The company should request the agent to segregate these documents and not review them. Depending upon the number of documents involved, it may be difficult to review documents for privilege until later. If so, the company may want to suggest sealing these documents until they have been reviewed.

If privileged material exists on computer files that the government has seized, counsel will have to negotiate with the government about the segregation and review of such files to ensure that privileged documents are protected. One approach is to request the government to make two copies of seized computer data so one copy may be sealed and turned over to the magistrate or special master and the other copy may be reviewed by counsel for the company.

H. Documents Needed To Operate the Business

If the government is removing documents that are critical for the operation of the business, these should be identified and the company should ask to make copies of the documents before they are removed. If the critical materials are voluminous, ask to have a copy service make copies as soon as possible.

I. Alert the Company's Media Spokesperson

As soon as possible during or after the search, counsel should contact the company's public affairs spokesperson about the search so that the spokesperson can prepare for possible inquiries from the press. A statement should be prepared in the event that the press learns of the search.

J. Inventory List of Seized Materials

An agent present during the search must prepare and then verify an inventory of any property seized and must do this in the presence of another agent as well as in the presence of a company representative. The agent also must provide a receipt for the property taken. After the search, the agent must return the inventory list to the magistrate judge who issued the warrant. Upon request, the magistrate judge must provide a copy to the company.⁵²

K. Post-Search Inventory and Debriefing

After the agents have left, the company should identify the areas that were searched and the employees who work in those areas. Those employees should go through the area and identify what was seized. Employees should be interviewed about these documents and debriefed concerning any questions that were posed to them during the search and any answers that they gave. Suggested practices for employee interviews that were discussed previously in this monograph apply here as well.

L. Review Checklist of Issues To Consider in Light of Government Investigation

Now that the company is on notice of a government investigation, counsel should consider the myriad of issues that were identified in Part I of this monograph.

CONCLUSION

Although this monograph has identified a large number of issues to contemplate in the event of a government investigation, additional issues undoubtedly will surface. These may stem from the unique nature of a particular corporate situation or investigation, or from new developments in the law. In grappling with these myriad and thorny

⁵² See FED. R. CIV. P. 41(f)(2), 41(f)(3)(B), (4).

issues, counsel must be ever mindful of both the short-term and long-term consequences of any decision that is made, not only with respect to the investigation at hand but potential follow-on litigation. Given the complexity of the issues and the risks for the company, counsel is well advised to seek out a specialist in government investigations at the earliest opportunity.

BIBLIOGRAPHY

Anello, Robert J. July 31, 2003. "Justice Under Attack: The Federal Government's Assault on the Attorney-Client Privilege." *Cardozo Pub. Law, Policy & Ethics J.* 1:1.

Axelrod, David F. May 15-16, 2003. *A Few Observations About Compliance Record-keeping: Between a Rock and a Hard Place*. Washington, D.C.: Georgetown University Law Center: Continuing Legal Education Advanced State & Local Tax Institute.

Cohen, Berwin, Robert T. Duffy, and Larry R. Langdon. Feb. 2005. *Protecting a Public Company's Confidences*. Washington, D.C.: National Legal Center for the Public Interest.

Cutler, Stephen M., Laurie M. Stegman, and Paul M. Helms. Nov. 2005. *Document Preservation and Production in Connection with Securities and Exchange Commission Investigations and Enforcement Actions*. Corporate Law and Practice Course Handbook Series [PLI Order No. 6063]. Chicago: Practising Law Institute.

Fein, David B., and William J. Kelleher III. Dec. 3, 2001. *SEC Reveals Key Considerations in Self-Disclosure Actions*. Andrews Corporate Officers & Directors Liability. Available at <www.andrewsonline.com>.

Grier, R. Dixon. Dec. 13, 2004. "Forensic accountants make it add up." *The National Law Journal*. Available at <www.NLJ.com>.

Kalberman, Stacey. Aug. 27, 2001. *Director and Officer Liability: An Overview of Corporate and Insurance Indemnification*. Andrews Corporate Officers & Directors Liability. Available at <www.andrewsonline.com>.

Mathewson, Lisa A. Sept./Oct. 2005. "Joint Defense Agreements in the Corporate Context: No Guarantees." *Champion Magazine*. The National Association of Criminal Defense Lawyers. Available at <<http://www.nacdl.org/public.nsf/0/1c707e2c1df83162852570b3006f1ba7?OpenDocument>>.

Matyas, David. Dec. 13, 2004. "Voluntary disclosure catches on." *The National Law Journal*. Available at <www.NLJ.com>.

Mayer, Brown, Rowe & Maw LLP. *Current Issues in Internal Corporate Investigations*. 2005. Mayer, Brown, Rowe & Maw LLP. Available at <www.mayerbrownrowe.com>.

McRae, Marcellus, Brian Goebel, and Mark Mermelstein. Oct. 2003. "What To Do When Your Client's Office Is Searched." *The Practical Lawyer*.

Moore, Cheryl Jerome, and David Clouston. Dec. 13, 2004. "A crucial first day in an SEC investigation." *The National Law Journal*. Available at <www.NLJ.com>.

Murphy, Paul B., and Lucian E. Dervan. Summer 2005. "Watching Your Step: Avoiding the Pitfalls and Perils of Corporate Internal Investigations." *ALAS Loss Prevention Journal*.

Musoff, Jay K., and Adam S. Zimmerman. Dec. 13, 2004. "D.C. Circuit wrestles with intent in securities fraud." *The National Law Journal*. Available at <www.NLJ.com>.

Myers, Robert C., and Seth C. Farber. Dec. 1, 2003. "Corporate Internal Investigations in the Age of Cooperation: Strategies for Limiting Disclosure of Confidential Information." *Andrews Corporate Officers & Directors Liability*. Available at <www.andrewsonline.com>.

Robinson, James K., and Adam S. Lurie. "Little White Lies." Aug. 16, 2004. *Legal Times*.

Rodriguez, Sabino (Rod), III, and Robert Knuts. Jan. 2004. *Representing the Public Company: A Post-Sarbanes-Oxley Governance Paradigm for In-House Lawyers and Outside Counsel*. Washington, D.C.: National Legal Center for the Public Interest.

Strassberg, Richard M., David B. Pitofsky, and Samantha L. Schreiber. July 18, 2005. "White Collar Crime, Lawyers on Trial." *New York Law Journal*.

Tarun, Robert W. 2003. *Fifteen Practical Tips for Corporate Internal Investigations in the Sarbanes-Oxley Era*. Corporate Compliance Institute. Chicago: Practising Law Institute.

Tharp, John J., Jr. *Responding to SEC Inquiries: The Basics*. 2002. Mayer, Brown, Rowe & Maw LLP. Available at <www.mayerbrownrowe.com>.

Tucker, James B., and Amanda B. Barbour. Oct. 2005. "You Can Beat the Crime, But You Can't Beat the Ride: What Corporations Need to Know Before an Investigation." Contemporary Legal Note Series No. 48. Washington Legal Foundation. Available at <www.wlf.org>.

Wallance, Gregory J. Jan. 2003. "Holder Memorandum Revisited: DOJ Offers Clarification of Corporate Waiver." *LJN Business Crimes Bulletin*. Vol. 9, No. 12.

Warin, F. Joseph. Sept. 2005. (Gibson, Dunn & Crutcher LLP). "Responsive Measures for Government Investigations." *Association of Corporate Counsel*.

Winer, Kenneth B., Samuel J. Winer, Gregory S. Bruch, and Michael D. Wolk. 2003. *SEC Enforcement*. RR Donnelley. Available at <www.realcorporatelawyer.com>.

ABOUT THE AUTHOR

SHEILA FINNEGAN is Co-Chair of the White Collar Defense and Corporate Compliance practice group of Mayer, Brown, Rowe & Maw, comprised of 30 attorneys in the firm's offices in Chicago, New York, Washington, D.C., Los Angeles, Houston, Charlotte, and Palo Alto. Before joining the firm, Ms. Finnegan was the Chief of the Criminal Division in the United States Attorney's Office for the Northern District of Illinois, where she prosecuted health care fraud, bank fraud, public corruption, and other cases. Ms. Finnegan also oversaw all health care fraud cases, and personally handled the largest parallel criminal/civil health care fraud case in the Northern District of Illinois, for which she was recognized with a top Department of Justice award.

As a partner in Mayer, Brown, Rowe & Maw's Chicago office, Ms. Finnegan has conducted numerous internal investigations and represented companies and individuals in accounting fraud, health care fraud, consumer fraud, securities fraud, antitrust, and other investigations conducted by the Department of Justice, various U.S. Attorneys' Offices, the Securities and Exchange Commission, and Attorneys General Offices in Illinois and New York. She regularly consults with colleagues in the firm's White Collar Defense and Corporate Compliance practice group, many of whom formerly held high-ranking positions with the SEC, NASD, the Department of Justice, various U.S. Attorneys' Offices, and state Attorneys General Offices.

Ms. Finnegan has completed more than 35 civil and criminal trials to verdict in federal and state courts, and has used her investigatory and trial skills in the defense of class actions alleging product defects, securities fraud, and consumer fraud brought against major corporations in the pharmaceutical, insurance, financial, and retail sales industries. She is also a member of Mayer Brown's electronic discovery group, advising companies on the creation of defensible e-discovery processes, preservation of electronic data, and responses to burdensome e-discovery requests.

Ms. Finnegan received her J.D. from the University of Chicago in 1986, where she was a member of the law review and graduated *cum laude*. She served as a law clerk to the Honorable Milton I. Shadur, United States District Court, Northern District of Illinois. She has

served as an Adjunct Professor of Trial Advocacy at Northwestern University Law School since 2002.

Assistance in the preparation of portions of this monograph was provided by several colleagues at Mayer, Brown, Rowe & Maw but particularly Sheri Davis-Drucker, Robert Curley, Thomas Allman, Jay Tharp, Robert Duffy, Vince Connelly, and Z. Scott.

Like all other publications of the National Legal Center, this monograph is presented to encourage a greater understanding of a current issue of importance to the private sector. The views expressed in this monograph are those of the author and do not necessarily reflect the opinions of the advisers, officers, or directors of the Center.

Richard A. Hauser
President
National Legal Center