7 Disclosure of Results of Internal Investigations to the Government or Other Third Parties

Charles J. Stevens and Winston Y. Chan

I. INTRODUCTION

A company conducting an internal investigation inevitably must decide whether information gathered in the course of the investigation should be disclosed to the government or other third parties. This issue raises two initial questions. First, the company must analyze whether the *nondisclosure* of information evidencing criminal conduct within the company itself constitutes an independent crime or whether an applicable statute or regulation imposes an independent duty to disclose. Second, the company must consider whether, even if there is no affirmative disclosure obligation, disclosure of information gathered in the investigation might nonetheless benefit the company.

Charles J. Stevens is the partner-in-charge of the San Francisco office of the law firm Gibson, Dunn & Crutcher LLP; co-chair of the White Collar Defense and Investigations Practice Group; and a former U.S. attorney for the Eastern District of California. Winston Y. Chan is a partner in Gibson Dunn's San Francisco office; a member of the firm's White Collar Defense and Investigations Practice Group; and a former assistant U.S. attorney for the Eastern District of New York. Emily C. Aldridge of Gibson, Dunn & Crutcher LLP and Mary Tharin, formerly of Gibson, Dunn & Crutcher, assisted with the updating of this chapter.

Several developments in the past decade or so have substantially complicated this analysis. Among other things, current U.S. Department of Justice (DOJ) policy has created strong incentives for disclosure of investigation results to the government. Various federal agencies have also established voluntary disclosure programs that offer opportunities for lenient treatment in the event of early disclosure.

When weighing the potential benefits of voluntary disclosure, of course, counsel must carefully analyze the potential risks. Disclosure of wrongful conduct by company employees never guarantees lenient treatment. Indeed, some argue that disclosure simply "educates" the government and increases the likelihood of prosecution against the company or the individuals involved, or both. In light of the proliferation of multitrack civil, criminal, and regulatory proceedings, counsel also must consider how a disclosure to criminal authorities could impact the related civil matters, as such disclosures typically are not protected from future discovery, whether because the information disclosed is not privileged or because the disclosure effected a waiver of the attorney-client privilege or the work-product doctrine.

Once a company has decided to disclose, it must also determine the mechanics of the disclosure. Counsel needs to consider who should make the disclosure, to whom it should be made, and whether the disclosure should be oral or written.

In this chapter we explore each of these questions. None has a simple answer, and each depends upon the unique circumstances of the situation confronting counsel and company management. Because disclosure of wrongdoing may have significant ramifications for the company's business and future, the general counsel and senior management should participate in the decision-making process.[1]

II. REQUIRED DISCLOSURE

A. *Common Law Rule*

The threshold question regarding disclosure is whether the company risks criminal liability when it uncovers evidence of criminal conduct but does not report its knowledge to the appropriate authorities. The general rule is that a company is not required to report knowledge of criminal conduct to authorities or to

1. Those involved in such process should, to the maximum extent possible, be free of any involvement in the underlying misconduct.

disclose evidence of that conduct voluntarily.[2] For example, the federal misprision of felony statute is violated only if (1) an individual has actual knowledge of the commission of a felony by someone else; (2) the individual fails to notify authorities; and (3) the individual deliberately takes an *affirmative step to conceal the crime*.[3]

In light of the affirmative step requirement, courts have on the one hand held that "'[mere] silence, without some affirmative act, is insufficient evidence' of the crime of misprision of felony," even if there is firsthand knowledge of a crime.[4] On the other hand, the giving of an untruthful statement to investigating authorities is a sufficient act of concealment to sustain a conviction for misprision of felony.[5] It has been held that it is not misprision to disclose some knowledge of a crime to an investigating agent and intentionally withhold other relevant information.[6] However, because *partial* disclosure could in some cases mislead the investigating agents and therefore possibly constitute an act of obstruction or concealment, companies and their counsel should use extreme care in making partial disclosures.

Based upon the rules just described, agents of the company may not actively conceal the wrongdoing from investigators or intentionally mislead them. Indeed, if the affirmative step requirement of the misprision statute is satisfied, criminal liability will likely arise under several other statutes as well.[7] For example, an

2. 18 U.S.C. § 4; United States v. Caraballo-Rodriguez, 480 F.3d 62 (1st Cir. 2007); United States v. Baez, 732 F.2d 780 (10th Cir. 1984); United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980); United States v. Hodges, 566 F.2d 674 (9th Cir. 1977); Neal v. United States, 102 F.2d 643, 646 (8th Cir. 1939).

3. United States v. White Eagle, 721 F.3d 1108 (9th Cir. 2013); *Neal*, 102 F.2d at 646. The Ninth Circuit requires that a defendant also knows that the crime he or she is concealing is a felony. *See* United States v. Olson, 2017 WL 2055631, at *3 (9th Cir. May 15, 2017).

4. *White Eagle*, 721 F.3d at 1117; United States v. Ciambrone, 750 F.2d 1416, 1418 (9th Cir. 1984); Lancey v. United States, 356 F.2d 407, 410 (9th Cir.), *cert. denied,* 385 U.S. 922 (1966); *Hodges*, 566 F.2d at 675; United States v. Pittman, 527 F.2d 444, 445 (4th Cir. 1975), *cert. denied,* 424 U.S. 923 (1976).

5. *See, e.g.,* United States v. Mubayyid, 658 F.3d 35 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 2378 (2012); *Hodges*, 566 F.2d at 675; *Pittman*, 527 F.2d at 445; *Lancey*, 356 F.2d at 410.

6. *White Eagle*, 721 F.3d at 1117 (defendant's partial disclosure, though unethical, was insufficient for a concealment conviction because it made no representation to the government as to the existence of fraud); *Ciambrone*, 750 F.2d at 1418 (holding that truthful but partial disclosure of knowledge of a counterfeiting operation is not misprision of a felony because investigating agents could not have been misled by truthful statements and there is no obligation to disclose the information voluntarily).

7. 18 U.S.C. § 2 (accessory after the fact), *id.* § 1503 (obstruction of justice), § 1505 (destruction or concealment of documents to be used in certain administrative proceedings). *See also id*. § 1512; *id*. §§ 1516, 1517. There may also be state statutes implicated by the conduct.

individual violates the federal accessory-after-the-fact statute if that individual has knowledge that another has committed a crime and proceeds to assist the perpetrator with the purpose of hindering the perpetrator's apprehension.[8] Likewise, impeding certain types of government auditors in their attempt to complete an audit examination or investigation constitutes a crime.[9]

A related question that commonly arises during internal investigations is whether the destruction of company records, not yet subpoenaed, could give rise to liability. Certainly the intentional destruction of categories of documents known to be sought by a grand jury can constitute the crime of obstruction of justice.[10] In addition to the misprision and obstruction concerns, counsel must consider that the federal witness-tampering statute also precludes the destruction of documents (even if the documents were subject to a claim of privilege) if the purpose of the destruction was to impair a judicial proceeding.[11] Note, too, that this statute applies even if a judicial proceeding is not pending at the time of the destruction.

The Sarbanes-Oxley Act imposes additional document retention requirements that were intended to expand the reach of preexisting obstruction statutes (and to significantly increase penalties for violations). Specifically, section 802 of the act provides for a term of imprisonment of up to 20 years for anyone who knowingly "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any matter within the jurisdiction of a federal department or agency."[12] Likewise, section 1102 of the act imposes the same penalty for anyone who corruptly "alters, destroys, mutilates, or conceals" a record or document "with the intent to impair the object's integrity or availability for use in an official proceeding,"

8. United States v. Elkins, 732 F.2d 1280 (6th Cir. 1984) (destruction of contraband while investigators attempting to search for same); United States v. Mills, 597 F.2d 693 (9th Cir. 1979); United States v. Barlow, 470 F.2d 1245 (D.C. Cir. 1972).

9. *See, e.g.,* 18 U.S.C. §§ 1516, 1517.

10. *See, e.g.,* United States v. Jahedi, 681 F. Supp. 2d 430 (S.D.N.Y. 2009); United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006); United States v. Walasek, 527 F.2d 676 (3d Cir. 1975); United States v. Solow, 138 F. Supp. 812 (S.D.N.Y. 1956). It would also certainly constitute misprision of a felony for an individual to destroy documents or other evidence for the purpose of "covering up" criminal conduct.

11. 18 U.S.C. § 1512. *See* Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) (assessing reach of § 1512). For an analysis of § 1512 and its relationship to other obstruction statutes, see United States v. Kulczyk, 931 F.2d 542 (9th Cir. 1991). For a complete discussion of the witness-tampering statute, *see* Chapter 6, "Perjury and Obstruction of Justice."

12. 18 U.S.C. § 1519. *See* United States v. Gray, 642 F.3d 371 (2d Cir. 2011).

regardless of whether the official proceeding is pending or about to be instituted at the time of the offense.[13]

Yet not every decision to discard incriminating documents constitutes misprision or obstruction. Lawyers conducting internal investigations are frequently asked by management whether the company may discard documents pursuant to the company's policy of periodic document destruction (for example, some companies regularly discard documents after a certain period of time has elapsed from their creation). Allowing document destruction to proceed in the ordinary course (assuming no grand jury subpoena or agency request for documents has been received or is anticipated) is generally acceptable.[14] If, however, a judicial proceeding is anticipated, or if the destruction is in any way linked to a concern about future discovery, counsel's safe choice is to advise the client to institute a hold on the usual destruction policy and to instruct employees to preserve relevant documents.

B. *Statutory Disclosure Requirements*

Although federal criminal statutes generally do not compel the disclosure of criminal conduct, various statutes and regulations impose special disclosure requirements.

The Sarbanes-Oxley Act imposes rules regarding *internal* disclosure of allegations of material violations of certain laws. Specifically, section 307 of the act requires the U.S. Securities and Exchange Commission (SEC) to issue rules setting forth the minimum standards of professional conduct for attorneys appearing and practicing before the SEC, including a specific rule requiring attorneys to report evidence of material violations of law "up-the-ladder" within an organization.[15] The SEC responded by adopting what is known as the Part 205 Rules, which imposed significant new *internal* reporting requirements,[16] but did not require attorneys to "report out" beyond the organization.[17]

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13. *Id*. § 1512(c).

14. "A 'knowingly . . . corrup[t] persuade[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material." *Arthur Andersen LLP*, 544 U.S. at 707–08 (discussing required "nexus between the 'persuasion' to destroy documents and [a] particular proceeding"). *See also* United States v. LeMoure, 474 F.3d 37 (1st Cir. 2007).

15. 15 U.S.C. § 1547.

16. *See generally* 17 C.F.R. § 205.3.

17. *Id*. § 205.

The federal securities statutes and rules often impose affirmative disclosure obligations on public companies. For example, in each annual report on Form 10-K, an issuer must disclose whether any of its officers or directors is or has been, within the previous five years, "a named subject of a pending criminal proceeding."[18] While it is not completely clear what qualifies as a criminal proceeding under this requirement, courts have found that the receipt of a Wells Notice[19] and the commencement of SEC investigations[20] do *not* qualify. Additionally, Regulation S-K now compels disclosure of legal proceedings "known to be contemplated against the company."[21] More generally, the filing of certain registration statements under the Securities Act of 1933 and periodic reports under the Securities Exchange Act of 1934 requires the disclosure of various "material" facts.[22] "Materiality" is an elusive concept for issuers seeking comfort that a decision to refrain from disclosure is safe.[23] Courts frequently view conduct as "material" if it compromises the financial stability of the corporation or involves self-dealing.[24] Legal compliance statements also have been found to trigger disclosure obligations,[25] but some courts have limited this requirement to statements that defendants knew were false.[26] Counsel conducting investigations relating to potential environmental problems should take note that the

18. *See* Regulation S-K; 17 C.F.R. § 229.401(f)(2).

19. Richman v. Goldman Sachs Group, 868 F. Supp. 2d 261, 272 (S.D.N.Y. 2012).

20. David M. Stuart & David A. Wilson, *Disclosure Obligations under the Federal Securities Laws in Government Investigations*, 64 BUS. LAW. 973, 982–83 (2009) ("An investigation on its own is not a 'pending legal proceeding' until it reaches a stage when the agency or prosecutorial authority makes known that it is contemplating filing suit or bringing charges.").

21. 17 C.F.R. § 229.103.

22. *See, e.g.,* Regulation S-K; 17 C.F.R. § 229.303(a)(3)(ii) (management's discussion and analysis disclosure shall include description of "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material . . . unfavorable impact" on registrant's business).

23. The basic standard for determining "materiality" is whether "there is a substantial likelihood that a reasonable shareholder would consider [the information] important" in deciding how to proceed. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) (applying test to proxy statements). *See* Basic Inc. v. Levinson, 485 U.S. 224 (1988) (applying *TSC Industries* standard in section 10(b) of the Securities Exchange Act and Rule 10b-5 context). "[T]o fulfill the materiality requirement 'there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" *Basic Inc.*, 485 U.S. at 231–32 (quoting *TSC Indus. Inc.*, 426 U.S. at 449).

24. *See* Maldonado v. Flynn, 597 F.2d 789, 796 (2d Cir. 1979); Gaines v. Haughton, 645 F.2d 761, 777–78 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982), *overruled on other grounds by In re* McLinn, 739 F.2d 1395 (9th Cir. 1984).

25. Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 640 (3d Cir. 1989).

26. *See* Ind. State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc., 583 F.3d 935, 946 (6th Cir. 2009).

securities laws impose special disclosure obligations relating to environmental proceedings.[27] Given the complexity of the securities laws' disclosure requirements and the pervasive risk of shareholder lawsuits, public companies should consult securities counsel prior to making a disclosure decision with respect to information gathered in an investigation.

Certain highly regulated industries are subject to special statutory disclosure requirements. For example, the Anti-Kickback Enforcement Act of 1986 requires government contractors to report in writing to the inspector general of the contracting agency whenever there are "reasonable grounds" to believe that a kickback may have occurred between upper- and lower-tier government contractors.[28] Similarly, a final rule issued in 2008 amended the Federal Acquisition Regulation to require mandatory disclosure by federal government contractors of all violations of criminal law involving fraud, conflict of interest, bribery, and gratuities connected to any aspect of a federal government contract or subcontract. In a similar vein, federally insured banks are subject to provisions that require the submission of a written report to the Office of Comptroller of the Currency if there is cause to believe that the bank has been defrauded.[29] Indeed, regulators of financial institutions generally require outside counsel to conduct an internal investigation of the financial institution and to provide the regulators (e.g., Office of Comptroller of the Currency or Federal Deposit Insurance Corporation) with the report. The financial institution is generally required to sign a supervisory agreement providing for the report, or else the institution will be taken over by a conservator or receiver.

Even when disclosure of criminal conduct is not required by statute, a company must still be careful not to commit new crimes by incorporating or acting upon the prior misconduct in the course of its regular business. For example, if a company learns that an employee failed to perform certain product inspections required by a government contract, it would be unlawful for the company to certify in writing that the contract has been fully performed or even to accept payment

27. *See* Regulation S-K; 17 C.F.R. § 101(c)(xii) ("Appropriate disclosure . . . shall be made as to the material effects that compliance with [environmental regulations] may have upon the capital expenditures, earnings and competitive position of the registrant.").

28. 41 U.S.C. § 8703. Similarly, states may impose broad disclosure obligations upon government contractors. *See, e.g.*, CAL. PUB. CONT. CODE § 10282 (subcontractor or agent or employee of contractor may be guilty of felony for failing to report knowledge of work being performed in violation of government contract).

29. *See, e.g.,* 12 C.F.R. § 21.11 (1989).

on the contract where an implicit premise for the payment is full compliance with the agreement.[30] Even keeping records in the company files implying that the inspections were completed can cause additional criminal exposure.[31] Similarly, criminal liability may be premised on the dissemination of documents that incorporate or adopt material statements from earlier documents that are known to be false by the time of the republication.[32]

Although mere silence regarding previous unlawful conduct does not normally constitute an independent crime, such silence coupled with other conduct may well provide a basis for criminal liability under other statutes.[33] As a consequence, disclosure of past misconduct (at least at some level) may be the only means of avoiding additional future liability.[34]

C. *Agreements with Government Agencies*

Corporate entities should also remain aware of any contractual obligations they may have pursuant to prior agreements with government agencies. For example, the Office of Inspector General enters into corporate integrity agreements (CIAs), in which companies that provide medical services agree to certain obligations to ensure that they are not excluded from participation in Medicare, Medicaid, or other federal health care programs. While CIAs differ depending on the circumstances, they may place specific disclosure obligations on a corporation. Likewise, the DOJ and SEC sometimes enter into deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) with corporate entities that cooperate in these agencies' investigations. The agreements, which are designed to monitor and negotiate reforms at entities targeted for investigation, often contain reporting requirements. These agreements may appoint a monitor who is

30. *See, e.g.,* United States v. Milton-Marks Corp., 240 F.2d 838 (3d Cir. 1957).

31. *See, e.g.,* 18 U.S.C. §§ 1001 and 1516. *See also* United States v. Rutgard, 116 F.3d 1270, 1287–88 (9th Cir. 1997) (affirming conviction under 18 U.S.C. § 1001 of doctor who maintained patient files falsely stating medical necessity of treatment).

32. *See, e.g.,* United States v. Natelli, 527 F.2d 311 (2d Cir. 1975), *cert. denied,* 425 U.S. 934 (1976) (accountants held criminally liable because proxy statement contained materially misleading statements derived from previously prepared financial statements that accountants knew or should have known were false).

33. *See, e.g.,* 18 U.S.C. § 287 (false claim), § 1341 (mail fraud), § 1343 (wire fraud), § 1344 (bank fraud), § 1001 (false statement to government agency).

34. One way of dealing with inaccurate documents that are supposed to be maintained (e.g., test results) is to note on the document that it is inaccurate, and any questions should be directed to counsel or an appropriate person in management.

given comprehensive access to company records and require periodic reporting to a court. It is important to note that some courts have expressed skepticism about DPAs, indicating that judges may refuse to approve DPAs if the corporate entity's disclosures to the government do not seem completely voluntary.[35]

D. *Problems Arising from Counsel's Knowledge of Criminal Conduct*

One of the most troubling risks confronting counsel performing an internal investigation is the risk that the lawyer will become involved in what is perceived to be an obstruction of the government's ability to investigate. This problem can arise either in the guise of an obstruction charge[36] or as part of what is alleged to be a conspiracy under the *Klein* doctrine.[37] A *Klein* conspiracy is a conspiracy that impairs, impedes, or obstructs an agency of the U.S. government from performing its lawful function.

In the modern regulatory state, it is often difficult to discern the difference between advocacy on behalf of a client that is the subject of investigation, on the one hand, and impairing, impeding, or obstructing an agency in connection with that investigation, on the other. This dilemma is only compounded by Sarbanes-Oxley's provisions permitting—but not requiring—disclosure of facts learned by counsel.[38]

For example, in dealing with regulators in the health care fraud arena, company lawyers frequently find themselves on "the front line" arguing and advocating a particular position against the government's regulators. However, the regulators may perceive that the government has an absolute right to the information it is seeking and may view the advocacy of the lawyer as misleading and obstructionist.

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35. *See*, *e.g.*, United States v. Fokker Servs. B.V., No. 14-cr-121 (RJL), 2015 WL 729291, at *6 n.4 (D.D.C. Feb. 5, 2015); Transcript of Status Conference at 8, United States v. Fokker Servs. B.V., No. 14-cr-121 (RJL) (D.D.C. Aug. 21, 2014).

36. *See, e.g.,* 18 U.S.C. § 1512.

37. *Id*. § 371; United States v. Klein, 247 F.2d 908 (2d Cir. 1957), *cert. denied,* 355 U.S. 924 (1958). *See also* Haas v. Henkel, 216 U.S. 462 (1910); Hammerschmidt v. United States, 265 U.S. 182 (1924); Tanner v. United States, 483 U.S. 107 (1987); United States v. Caldwell, 989 F.2d 1056 (9th Cir. 1993); United States v. Whiteford, 676 F.3d 348, 356 (3d Cir. 2012).

38. 17 C.F.R. § 205.3(d)(1)(ii). An attorney who is "appearing and practicing before the Commission" may reveal confidential information related to his or her representation of an issuer if doing so is necessary to (1) prevent a material violation likely to cause substantial injury to the issuer or investors, (2) prevent the issuer from committing perjury, or (3) rectify the consequences of a material violation by the issuer.

As another example, if defense counsel responds negatively to a government agent's inquiry as to whether the corporate client has conducted a private audit of alleged overbilling when, in fact, such an audit was performed by the client (and it documented overbilling), the government might accuse counsel of participating in a conspiracy to obstruct when it discovers the private audit. Over the past decade, prosecutors have increasingly focused not only on corporate wrongdoers, but on the role played by both internal and outside counsel in the advice and guidance they provide to their corporate clients.[39]

An even more difficult problem arises under the *Klein* doctrine when company employees seek advice from counsel on the company's options after an investigation has uncovered legal problems with potential criminal ramifications. From the lawyer's perspective, a myriad of options for responding to the problem could exist in the abstract and be discussed in that light. Some of these options might, after due consideration, be viewed as improper or illegal and rejected by counsel. But complications arise when employees choose to exercise one of those options rejected by counsel. For example, an employee might destroy documentation of overbilling that falls within the scope of a grand jury subpoena, even after counsel gave advice to the contrary. In such cases, the government will contend that the seeking of advice from counsel in connection with a crime or fraud means the communications between counsel and the client are no longer privileged.[40] This result would obtain even if the lawyer is innocent of any wrongdoing and is an unknowing participant in a discussion that really is intended to further or advance a crime or fraud.[41] At best, the lawyer becomes a chief witness against the company and its employees. At worst, the lawyer becomes a defendant in a criminal prosecution.

The SEC is increasingly targeting obstructionist conduct by in-house attorneys through original Rule 102(e) cases, which can result in the revocation of a defense attorney's ability to practice before the SEC.[42] Chief compliance officers at SEC-industry-registered entities such as brokers and financial advisors

39. *See generally* Richard M. Strassberg, David B. Pitofsky & Samantha L. Schreiber, *Lawyers on Trial,* N.Y. L.J., July 18, 2005; Indictment, United States v. Stevens, No. RWT 10 CR 0694 (D. Md. Nov. 8, 2010).

40. United States v. Hodge & Zweig, 548 F.2d 1347 (9th Cir. 1977).

41. *Hodge & Zweig*, 548 F.2d at 1354.

42. *See*, *e.g.*, *In re* David M. Tamman, Esq., No. SECDIG 2013-113-3 (S.E.C.), 2013 WL 2732642, at *1 (June 13, 2013).

are held to a higher standard than in-house attorneys at non-industry-registered companies. Under the Exchange Act and Investment Advisers Act, an in-house counsel at an SEC-registered entity can be liable for failure to supervise employees who violate securities laws.[43]

It is imperative that counsel weigh every action and reaction carefully while proceeding through the course of an investigation and while dealing with a government agency. If a decision to cooperate has not been finalized, it is far safer to make clear to government representatives at the outset of an internal investigation that company counsel is in an advocate's position with respect to disclosure than to allow the government to believe that counsel intended to fully cooperate with the government's investigation—subsequent events will inevitably demonstrate that this was not the case.

III. VOLUNTARY DISCLOSURE

A. *The Benefits*

Even if a company concludes that it is not legally required to disclose information learned in the course of an internal investigation, it should consider the potential benefits of voluntarily disclosing the information.[44]

The government has been clear in its encouragement of voluntary self-disclosure. One component of cooperation that the DOJ has emphasized of late is the disclosure of wrongdoing by individual employees. The DOJ will consider a corporation's "willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives."[45] In a 2014 speech, then-DOJ Principal Deputy Assistant Attorney

43. Daniel M. Gallagher, Remarks at "The SEC Speaks in 2012" (Feb. 24, 2012), https://www.sec.gov/news/speech/2012-spch022412dmghtm.html; *see also In re* Theodore W. Urban, Admin. Proc. File No. 3-13655, Initial Decision Rel. No. 402 (Sept. 8, 2010).

44. Care should also be taken, of course, to ensure that the company is not *prohibited* from disclosing information learned in the course of an investigation. For example, companies often enter into joint defense agreements with individuals or other companies in complex criminal investigations; these agreements typically restrict parties' ability to disseminate information learned in the course of the joint defense. Counsel should further consider whether disclosure implicates any individuals' privacy rights, particularly in the health care arena.

45. U.S. Department of Justice, Principles of Federal Prosecution of Business Organizations § 9-28.700, *available at* http://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.700.

General Marshall L. Miller emphasized this factor, commenting that "it lies at the heart of our approach at the Criminal Division."[46] Miller cited the 2012 decision not to prosecute Morgan Stanley as evidence that the DOJ will reward corporations that identify individual executives responsible for the criminal conduct. The DOJ has also focused on encouraging health care providers to disclose potential violations of the False Claims Act to the government.[47]

In addition to the DOJ, the SEC has increasingly emphasized the importance of cooperation. SEC Enforcement Division Director Andrew Ceresney recently addressed the advisability of self-reporting Foreign Corrupt Practices Act (FCPA) misconduct to the SEC.[48] He emphasized the rewards that can result from self-reporting, including "reduced charges and penalties [and] non-prosecution or deferred prosecution agreements in instances of outstanding cooperation." The agency entered into its first-ever NPA in an FCPA matter in 2013.[49]

Voluntary disclosure affords many potential benefits.[50] It enables a company to bring exculpatory evidence to the prosecutor's attention, to articulate the corresponding legal defenses, and to correct errors or misunderstandings on the part of the investigators reporting to the prosecutor. In complicated investigations,

46. Principal Deputy Assistant Attorney General for the Criminal Division Marshall L. Miller, Remarks at the Global Investigation Review Program (Sept. 17, 2014), http://www.justice.gov/opa/speech/remarks-principal-deputy-assistant-attorney-general-criminal-division-marshall-l-miller.

47. *See* Press Release, U.S. Department of Justice, Office of Public Affairs, Our Lady of Lourdes Memorial Hospital Has Paid More Than $3.37 Million to Resolve Self-Disclosed Billing Improprieties (Oct. 16, 2014), *available at* http://1.usa.gov/1Gpm9vb; Press Release, U.S. Department of Justice, Office of Public Affairs, Memorial Hospital in Ohio Pays Government $8.5 Million to Settle False Claims Act Allegations (Mar. 13, 2014), *available at* https://www.justice.gov/opa/pr/memorial-hospital-ohio-pays-government-85-million-settle-false-claims-act-allegations; Press Release, U.S. Attorney's Office, Middle District of Tennessee, Wayne Medical Center to Pay $883,000 to Settle False Claims Act Allegations (Jan. 17, 2013), *available at* http://1.usa.gov/1bfQ6Ew; Press Release, U.S. Department of Justice, Office of Public Affairs, Intermountain Health Care Inc. Pays U.S. $25.5 Million to Settle False Claims Act Allegations (Apr. 3, 2013), *available at* http://1.usa.gov/1or5wE8; Press Release, U.S. Attorney's Office, Middle District of Tennessee, Maury Regional Hospital to Pay $3.59 Million to Settle False Claims Act Allegations (June 29, 2012), *available at* https://www.justice.gov/archive/usao/tnm/pressReleases/2012/6-29-12.html.

48. Director of Division of Enforcement Andrew Ceresney, Remarks at CBI's Pharmaceutical Compliance Congress in Washington, D.C. (Mar. 3, 2015), http://www.sec.gov/news/speech/2015-spch030315ajc.html.

49. SEC Non-Prosecution Agreement with Ralph Lauren Corporation (Apr. 18, 2013), *available at* http://www.sec.gov/news/press/2013/2013-65-npa.pdf.

50. One of the less regularly mentioned benefits is the potential for deterrence. If employees know their company self-discloses criminal conduct, they may well be less likely to engage in wrongdoing in the future.

prosecutors commonly overlook defenses and misapprehend facts due to, among other reasons, incomplete or inaccurate investigative reports. Assuming that the disclosure could conceivably preclude an indictment, it is generally beneficial to remedy these problems with a pre-indictment submission, and most successful pre-indictment presentations are premised on these potential benefits.

In some circumstances, voluntary disclosure may increase the likelihood of convincing the government that legal or equitable factors weigh against prosecution or a harsh sentence. The DOJ's Federal Principles of Prosecution of Business Organizations (also known as the "Filip Factors") prescribe the factors prosecutors should consider before bringing an action against a corporation.[51] One significant factor is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents." Voluntary disclosure can help to demonstrate the integrity of the company, especially if coupled with prompt and effective corrective action, and may persuade the government to decline indictment and focus on less forthright companies.[52]

A company may be able to avoid prosecution entirely by taking advantage of an agency's formal voluntary disclosure program. Certain of these disclosure programs represent a commitment by the government to strongly consider a declination of prosecution if the company voluntarily comes forward with incriminating information. The DOJ and other agencies, such as the U.S. Department of Defense, the U.S. Environmental Protection Agency, and the Internal Revenue Service, provide written guidelines for voluntary disclosure in such programs.[53] Each of these programs carries with it a common theme—that the disclosure

51. Memorandum from Deputy Attorney General Mark Filip, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008).

52. Attempting to demonstrate this integrity through disclosure seems particularly important for government contractors; indeed, failing to make disclosures before the government discovers the facts may call into question the contractor's "responsibility" and right to bid on and perform government contracts. And, even if criminal prosecution is inevitable, voluntary disclosure may still help government contractors in administrative debarment or suspension proceedings.

53. *See* U.S. Department of Justice, Offices of the U.S. Attorneys, U.S. Attorney's Manual § 9-42.430 (Aug. 2008); U.S. Department of Justice Antitrust Division Corporate Leniency Policy (Aug. 10, 1993); U.S. Department of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991); U.S. Environmental Protection Agency, Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations (U.S. Environmental Protection Agency audit policy, published at 65 Fed. Reg. 19,618 (Apr. 11, 2000)) (regarding potential civil violations); Office of Inspector General, "Operation Restore Trust" Voluntary Disclosure Program (May 3, 1995). *See also* United States v. Rockwell, 924 F.2d 928 (9th Cir. 1991).

must be truly voluntary. This means that the disclosure must not in any way be prompted by a fear that the unlawful activity will be discovered.[54]

Another potential benefit of voluntary disclosure may be found in the U.S. Sentencing Commission Guidelines for organizations.[55] The methodology for calculating fines under the guidelines can be dramatically altered based upon a voluntary disclosure by the company.

As with the sentencing guidelines for individuals, the organizational guidelines establish base penalties—fines in the case of organizations—that are determined by the nature of the offense committed and its economic effect. To arrive at a base fine, a sentencing court begins by looking at the guideline tables to determine the offense level of the misconduct in the same manner as for an individual whose conduct led to the corporation's conviction. Under the organizational guidelines, the base fine is then deemed to be the greatest of (1) the amount stated for the crime in the offense-level table just discussed; (2) the organization's pecuniary gain resulting from the criminal conduct; or (3) the pecuniary loss to others caused by the organization "to the extent the loss was caused intentionally, knowingly, or recklessly."[56]

This base fine is then modified by the court using a culpability score that takes into account a variety of facts and circumstances.[57] The culpability score determines the multiplier factor that is to be used in adjusting the base fine. A culpability score of ten, for example, requires the sentencing court to multiply the base fine by a multiplier of no less than two and no greater than four. Under these circumstances, a base fine of $10 million would become an actual fine of between $20 million and $40 million (as determined by the sentencing court). On the other hand, a culpability score of five reduces the multiple range to between one and two, with a corresponding decrease in the fine exposure.

54. *See*, *e.g.*, Office of Foreign Assets Control, Credit Suisse AG Settles Allegations of Violations of Multiple Sanctions Programs (Dec. 16, 2009), *available at* http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/12162009_a.pdf. Not surprisingly, a company considering a formal voluntary disclosure program often doubts whether it will be treated fairly once the disclosure is made. Moreover, once disclosure commences under such a program, there is rarely an opportunity to turn back. Therefore, counsel should engage in careful and thorough analysis with a company prior to participating in a voluntary disclosure program.

55. *See* U.S. Sentencing Commission, Guidelines Manual ch. 8 (2012).

56. *Id*. § 8C2.4(a).

57. *Id*. § 8C2.5.

An organization's voluntary disclosure of wrongdoing tends to reduce its culpability score, and thus its multiplier and actual fine. More specifically, if the organization

- voluntarily discloses the offense to the government *before disclosure is threatened or a government investigation begins*,
- fully cooperates in the subsequent government investigation, and
- clearly recognizes and accepts responsibility for its conduct before trial (i.e., pleads guilty), then five points will be subtracted from the culpability score.[58]

The effect of this five-point reduction on the multiplier will depend upon where on the culpability score range an organization finds itself, which in turn depends upon the other factors that go into the culpability score calculus.[59] However, as noted above, a reduction in the culpability score from ten to five would result in the court using a multiplier between one and two, rather than between two and four. Accordingly, a decision not to disclose carries with it substantial economic risks in the form of a fine, as well as terms and conditions of probation.

A final factor to consider is the whistle-blower bounty program created by the Dodd-Frank Act, which authorizes the SEC to provide large monetary awards to individuals who come to the Commission with information that leads to an enforcement action in which more than $1 million is ordered.[60] Awards can range between 10 percent and 30 percent of the money collected. Though few rewards were reported in the first few years after the program was enacted, the SEC announced an award of between $30 and $35 million in September 2014.[61] As the frequency and size of these awards increase and employees have additional incentives to report perceived wrongdoing, corporate executives should give increased consideration to speedy self-reporting.

Given the Miller doctrine, enhanced penalties caused by the Sentencing Guidelines, and whistle-blower incentives, disclosures of internal investigation

58. *Id*. § 8C2.4(a)(g)(1).

59. These factors include, but are not limited to, the involvement of high-level personnel in the crime and the organization's prior criminal history.

60. Dodd-Frank Act § 922(a); 15 U.S.C.A. § 78u-6 (2010).

61. Order Determining Whistleblower Award Claim, File No. 2014-10 (Sept. 22, 2014), *available at* http://www.sec.gov/rules/other/2014/34-73174.pdf.

results are likely to continue to increase substantially. In the early stages of an investigation, the company can argue that it should not be indicted at all given its efforts in bringing the wrongdoing to the attention of the government. If an indictment and conviction result, the cooperation should prove beneficial to the company with respect to the amount of the fine ultimately imposed at sentencing.

B. *The Risks*

The risks of voluntary disclosure (whether pursuant to a formal program or otherwise) are real and serious. Absent the possibility of concrete benefits associated with disclosure through the Sentencing Guidelines or formal agency programs, many defense attorneys still believe that the benefits of voluntary disclosure are not worth the risks. They contend that any pre-indictment presentation that implicitly concedes guilt serves only to convince the prosecutor that prosecution is warranted.

First, the information disclosed might be used directly against the company in a subsequent criminal case, unless a formal voluntary disclosure program or a written agreement precludes this use. There is even some risk that the government may attempt to use representations by defense counsel on the theory that counsel's statements are admissions under Rule 801(d)(2)(C) of the Federal Rules of Evidence.[62]

Second, even if not used directly, the information may provide the government with a virtual road map of leads, such as names of witnesses and the existence of documents containing relevant information. Disclosure may "educate" the government about previously unknown trial issues and defenses, enabling the government to explain these problems and counter the defenses, whether in drafting an indictment or at trial.

These risks are illustrated by the common scenario of a company discovering that an employee has engaged in criminal conduct without the knowledge of anyone in management, and contrary to company policy. Many erroneously believe that this situation does not expose the company itself to criminal prosecution and that the responsible course of conduct is to report the errant employee to

62. *See, e.g.,* United States v. Valencia, 826 F.2d 169 (2d Cir. 1987). For this reason, care should be taken to ensure that the purposes for which the disclosure may be used are expressly agreed upon (e.g., settlement purposes only, pursuant to FED. R. EVID. 408 and 410 or plea negotiations under FED. R. CRIM. P. 11).

the authorities. Under the legal theory of corporate vicarious liability, however, the company is criminally liable for the employee's unlawful act unless that act was outside the scope of the individual's employment—which courts have not often found to be the case.[63] To disclose unlawful conduct by an employee is often to "serve the company on a platter" to a prosecutor. In many cases, whether the company is indicted will turn purely on the prosecutor's appetite.

Third, it is possible that voluntary disclosure to the government will have a chilling effect on the willingness of employees to disclose knowledge of wrongful conduct. If employees believe their candid responses to the internal company investigators will be disclosed to the government, they may fear criminal liability, or that their employment is at risk.

Finally, factual information provided voluntarily to the government will likely be discoverable by opposing parties in parallel or follow-on civil actions because it is not protected by any privilege. To the extent the disclosure reveals attorney-client communications or information protected by the work-product doctrine, its provision to the government could constitute a waiver of such protections.[64] Indeed, as counsel and companies weigh the risks of disclosure against the potential benefits, concerns about civil plaintiffs' discovery of the information often dominate the discussion.

The issue of whether and to what extent a voluntary disclosure constitutes a waiver of the attorney-client privilege continues to be the subject of litigation, with the general rule being that disclosure of a communication protected by the attorney-client privilege completely waives the privilege with respect to that communication,[65] and potentially to other communications within that subject matter.[66] Although a few courts have recognized that public policy concerns may

63. *See, e.g.,* United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973); United States v. Basic Constr. Co., 711 F.2d 570 (4th Cir.), *cert. denied,* 464 U.S. 956 (1983); United States v. Beusch, 596 F.2d 871 (9th Cir. 1979); Standard Oil Co. of Tex. v. United States, 307 F.2d 120 (5th Cir. 1962).

64. For a complete discussion of these issues, *see* Chapter 2, "Implications of the Attorney-Client Privilege and Work-Product Doctrine."

65. *See In re* Qwest Communications Int'l, Inc., 450 F.3d 1179 (10th Cir. 2006), for a current discussion of the relevant case law in this area.

66. Federal Rule of Evidence 502 governs the scope of "subject matter" waivers, and subdivision (a) of Rule 502 concerns intentional waivers made in a federal proceeding, or to a federal office or agency. Rule 502(a) provides that, when there is a disclosure to a federal office or agency that waives the attorney-client privilege or work-product protection, "the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional;

argue in favor of allowing a company that has voluntarily conducted an internal investigation to disclose the results of that investigation without completely waiving the attorney-client privilege,[67] this concept of "limited" or "selected" waiver has been rejected by nearly every circuit.[68] In 2014, a Washington, D.C., district court ruled that no privilege applied to documents in relation to an internal investigation disclosed by a company.[69] Although the documents were turned over to the government to comply with federal mandatory disclosure regulations, the court found the decision to disclose was rooted in business necessity. The D.C. Circuit later reversed, holding that an internal investigation is privileged so long as "one of the significant purposes" of the investigation is to obtain or provide legal advice.[70]

It is not necessarily the case that a complete waiver of the attorney-client privilege also constitutes a waiver of the work-product privilege. There are circumstances under which the work-product privilege may remain even though the attorney-client privilege has been waived.[71] Because protection of documents under the work-product doctrine is based on a different premise than the attorney-client privilege, and because the protection of the doctrine is in some ways broader, the waiver issues with respect to work product are slightly different.

A number of courts have held that not all voluntary disclosures constitute a waiver of the protection afforded by the work-product doctrine. Rather, those

(2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." The Advisory Committee Notes stress that "subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner."

67. *See, e.g.,* Diversified Indus. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978); *In re* Woolworth Corp., No. 94-CIV-2217 (RO), 1996 WL 306576 (S.D.N.Y. June 7, 1996).

68. *See, e.g., In re* Pac. Pictures Corp., 679 F.3d 1121, 1127 (9th Cir. 2012); *In re* Qwest, 450 F.3d at 1192; Burden-Meeks v. Welch, 319 F.3d 897, 899 (7th Cir. 2003); *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.2d 289 (6th Cir. 2002); United States v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997); Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1422 (3d Cir. 1991); *In re* Martin Marietta Corp., 856 F.2d 619, 623–24 (4th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989); *In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982); Permian Corp. v. United States, 665 F.2d 1214, 1216–17 (D.C. Cir. 1981).

69. United States *ex rel*. Barko v. Halliburton Co., No. 05-cv-1276, 2014 WL 929430 (D.D.C. Mar. 11, 2014).

70. *In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014). *See In re* Kellogg Brown & Root, Inc., No. 14-5319, 2015 WL 4727411 (D.C. Cir. Aug. 11, 2015) (granting writ of mandamus where district court erred in holding that contractor waived attorney-client privilege and work-product protection when contractor's vice president reviewed investigatory documents in preparation for his deposition).

71. United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).

courts that have accepted the concept of limited work-product waiver look to a number of factors on a case-by-case basis to determine whether work-product protection is waived, including whether the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege, whether waiver of the privilege in the circumstances would tread on policy elements inherent in the privilege, whether the party had a reasonable basis for believing that the disclosed materials would be kept confidential by the government agency to which disclosure was made, and whether the disclosure was voluntary or involuntary.[72]

Companies occasionally attempt to enter into confidentiality agreements with the government in the hope of protecting disclosed information under the attorney-client privilege or work-product doctrine.[73] However, the federal courts of appeal have universally ruled that a producing party cannot use a confidentiality agreement to preserve attorney-client and work-product protections as to documents produced to an adverse government agency.[74] As the Advisory Committee's Note to Federal Rule of Evidence 502 states, in the absence of a court order ratifying a confidentiality agreement, the agreement "can bind only the parties."[75] Federal Rule of Evidence 502(d) further provides that a "federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding."[76] Under Rule 502(d), therefore, courts have fashioned protective orders that allow parties to disclose otherwise privileged information to the government without waiving privilege, including

72. *See, e.g., In re* Martin Marietta Corp., 856 F.2d at 625–26 (recognizing limited waiver of privilege for "opinion" work product); *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1371–72 (D.C. Cir. 1984); *In re* Steinhardt Partners L.P., 9 F.3d 230, 236 (2d Cir. 1993); *In re* Leslie Fay Cos. Sec. Litig., 161 F.R.D. 274, 280 (S.D.N.Y. 1995); *In re* Kidder Peabody Sec. Litig., 168 F.R.D. 459, 462–67 (S.D.N.Y. 1996).

73. *See*, *e.g.*, Gruss v. Zwirn, No. 09 Civ. 6441 (PGG) (MHD), 2013 WL 3481350, at *8–13 (S.D.N.Y. July 10, 2013) (collecting cases). Any such agreement should provide in clear terms that the information disclosed is not to be made available to other government agencies or members of the public without the company's prior consent. To be sure, many agencies will be reluctant to agree to this limitation, and the extent of any agreement will undoubtedly turn upon the specific situation and the relative bargaining power of the parties. (Since there are presumably other advantages that prompt a company to consider voluntary disclosure, the government agency may feel there is no need to grant the company's confidentiality request in order to obtain the materials. Conversely, the government agency may have a particular need for the information and be amenable if an agreement speeds the disclosure.)

74. *Gruss*, 2013 WL 3481350, at * 9–13.

75. Fed. R. Evid. 502 Advisory Committee's Note.

76. Fed. R. Evid. 502(d).

during investigations.[77] The vast majority of published decisions regarding Rule 502(d) protective orders, however, pertain to litigation rather than government investigations.[78] As a result, parties who use Rule 502(d) to protect privilege in the context of an investigation do so with some risk.

Given the uncertainty in the law and the flexibility of tests that courts have applied to waiver issues, it is impossible for company counsel to guarantee that the company's privileged information will remain privileged.[79] In any event, the *factual information* provided in a disclosure to the government likely will not be privileged or protected in the first instance. In sum, counsel should operate under the presumption that whatever is provided to the government may well wind up in the hands of opposing parties in parallel civil litigation and regulatory proceedings.

IV. THE MECHANICS OF DISCLOSURE

Care should be exercised with respect to the mechanics of informal disclosure. If the disclosure is made pursuant to one of the recognized voluntary disclosure programs, the mechanics of disclosure should be spelled out in the terms of the program. If, however, the disclosure is not made pursuant to a formal agency program, a number of practical issues arise. First is the question of *who* should make the disclosure—the corporation's counsel, a business representative, or both. Generally, the most prudent course is to effect disclosure through counsel. Counsel is generally in the best position to convey the information in an unemotional manner, and to refrain from saying or doing things that may undermine the effectiveness of a privilege or applicable confidentiality agreement, or narrow

77. *See* United States v. Daugerdas, No. S3 09 CR 581 WHP, 2012 WL 92293, at *1 (S.D.N.Y. Jan. 11, 2012).

78. *See*, *e.g.*, *In re* Gen. Motors LLC Ignition Switch Litig., No. 14-MD-2543 (JMF), 2015 WL 221057 (S.D.N.Y. Jan. 15, 2015) (noting that General Motors disclosed otherwise privileged documents to the government pursuant to a Federal Rule of Evidence 502(d) order); Potomac Elec. Power Co. & Subsidiaries v. United States, 107 Fed. Cl. 725, 728 (2012) (issuing a protective order under Rule 502(d) in tax refund suit).

79. Indeed, given the reluctance of courts to recognize limited waivers, along with the increasing pressure being put on corporations to cooperate, there is a growing trend among outside counsel not to memorialize their interviews and findings in writing. While counsel generally perceive that they will retain more control over the scope of the disclosure by documenting less of their investigation, this practice runs the obvious risk of errors in the reporting of the investigation, not to mention the increased opportunity for disputes to arise over what was stated in the witness interviews.

its scope. Most government agencies, especially the DOJ, feel more comfortable dealing with lawyers than with individuals who might be viewed as percipient witnesses, or even targets.

The next issue to consider is *when* disclosure should be made. Company management should be very careful to weigh the benefits of prompt disclosure with the risk of making a disclosure before the investigation has been completed and all the facts are understood. Credibility is the most valuable asset to a party that voluntarily discloses potentially incriminating information; repeated corrections and additions to previous disclosures will destroy a company's credibility, as well as annoy the government. The piecemeal approach to disclosure has little to commend it.

Finally, a company must decide on the *form* of the disclosure: written, oral, or both. For a full discussion, see Chapter 9, "Report of the Investigation."

V. CONCLUSION

The complexity of decision making for company counsel conducting an internal investigation into alleged wrongdoing by company employees has increased dramatically in light of the government's voluntary disclosure programs, the U.S. Sentencing Commission Guidelines, and the increased likelihood that disclosure effects a waiver of the attorney-client privilege or the work-product doctrine, making the counsel's investigative work available to hostile third parties. Given this complexity, the most prudent course of action is for company counsel to analyze at the outset the nature and scope of the investigation to be conducted and the course of action that will be taken at the end of the investigation, depending upon the conclusions reached. In other words, before company counsel starts to walk down an investigative path, counsel and the client should clearly understand what the company will do when the end of the path is reached.