

## Strategies for Mitigating Civil Liability Consequences of FCPA Investigations & Enforcement Actions

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The Foreign Corrupt Practices Act (FCPA) prohibits covered individuals and entities from “corruptly providing money, gifts or anything else of value to foreign officials for the purpose of obtaining or retaining business.”<sup>1</sup> Its broad reach is nearly unprecedented. Not only does the FCPA impose civil and criminal penalties on U.S. companies and citizens who engage in prohibited bribery, but it applies extraterritorially to companies listed on a U.S. stock exchange or any person while acting in the United States.<sup>2</sup> Indeed, eight of the top 10 largest FCPA-related settlements were paid by foreign companies.<sup>3</sup> Essentially, the FCPA regulates business ethics for global businesses.<sup>4</sup>

Despite its broad reach, the FCPA does not provide for a private right of action.<sup>5</sup> Disgruntled investors or other aggrieved parties cannot, therefore, sue companies and their managers directly for suspected foreign bribes. Nonetheless, private litigants have devised many creative ways to ride into court on the coattails of an alleged FCPA violation. Indeed, certain types of follow-on litigation have become a virtually guaranteed byproduct of an internal or government FCPA investigation.<sup>6</sup>

Plaintiffs have achieved significant success with these follow-on actions. A 2010 study of shareholder follow-on suits revealed that 26 out of the 37 lawsuits evaluated resulted in settlement.<sup>7</sup> Plaintiffs' lawyers attribute the reluctance of accused companies to fully litigate these cases to the salacious nature of bribery accusations.<sup>8</sup> Given the moral condemnation generally associated with bribery, companies may desire to keep allegations of such conduct far from the public eye and the jury box.<sup>9</sup>

Moreover, the potential payout for follow-on plaintiffs is significant. In many instances, the settlements of follow-on litigation have exceeded by large margins any fines the accused company paid to the government. For example, Syncor International Corp. settled FCPA allegations with the government for \$500,000 while paying follow-on plaintiffs \$15.5 million; FARO Technologies, Inc. settled with the government for \$2.95 million while paying follow-on plaintiffs \$6.88 million; and Nature's Sunshine Products, Inc. settled with the government for \$600,000 while paying follow-on plaintiffs \$6 million.<sup>10</sup>

The relationship between civil litigation and government enforcement actions can proceed

in both directions. That is, private litigation alleging that a corporate defendant engaged in foreign bribes can also inspire government involvement. For example, a lawsuit was filed against Alcoa, Inc., a producer of aluminum, alleging that it violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by bribing senior officials of the Government of Bahrain.<sup>11</sup> The same plaintiffs later filed a similar lawsuit against the aluminum distributor.<sup>12</sup> In both cases, the Department of Justice (DOJ) intervened and initiated criminal FCPA investigations into the defendants' alleged misconduct.<sup>13</sup> Likewise, after shareholders filed a consolidated derivative action against Avon Products, Inc. in May 2011 claiming that its directors' failure to oversee its compliance with the FCPA caused the company substantial losses,<sup>14</sup> Avon disclosed receipt of a Securities and Exchange Commission (SEC) subpoena formally investigating the FCPA claims against the company.<sup>15</sup>

Given the potentially significant consequences of follow-on litigation, companies with global operations are well advised to devise a strategy to avoid and defend against such litigation. To advance this goal, this article lays out some of the strategic considerations that should inform the decision-making process at various points before, during and after a company begins to suspect that prohibited conduct has occurred in order to mitigate the adverse consequences from related civil litigation.

## The Potential for Significant Increase in Follow-on Litigation

Follow-on litigation is neither new nor unique to the FCPA context. Indeed, disgruntled parties have long been quick to answer bad business news with private litigation. Take the Vioxx drug recall for example. On September 30, 2004, Merck & Co. withdrew arthritis drug Vioxx from the market, citing studies finding an "increased risk of confirmed cardiovascular events beginning after 18 months of continuous therapy."<sup>16</sup> On November 1, 2004, The Wall Street Journal published an article suggesting that Merck knew of the cardiac risks well before it recalled the product.<sup>17</sup> Just five days later, Merck investors filed a securities class action complaint alleging that Merck knowingly misrepresented the risks of heart attacks accompanying the use of Vioxx.<sup>18</sup>

Plaintiffs' attorneys appear similarly poised and ready to pounce on allegations of foreign bribery. The reaction of investors and their attorneys in the case of SciClone Pharmaceuticals, Inc., a self-described "China-centric specialty pharmaceutical company," demonstrates just this enthusiasm.<sup>19</sup> On August 6, 2010, the SEC and DOJ notified SciClone that they had initiated a formal investigation of SciClone's alleged FCPA violations in China.<sup>20</sup> Three days later on August 9, SciClone disclosed the investigation in its SEC Form 10-Q.<sup>21</sup> On August 13, less than 100 hours after the government announced its investigation, plaintiffs filed a securities fraud class action against SciClone.<sup>22</sup> The complaint quoted directly from SciClone's 10-Q disclosing the government investigations, and accused SciClone and several of its officers of making false and misleading statements about SciClone's financial condition and legal compliance programs.<sup>23</sup>

Beyond materializing quickly, follow-on litigation may also materialize as multiple lawsuits. For example, the DOJ announced in 2006 that it was investigating Swiss logistics giant Panalpina Group and its service customers, including Pride International, Inc., for possible FCPA violations.<sup>24</sup> In July 2009, plaintiffs filed a follow-on securities fraud case in the Southern District of Texas.<sup>25</sup> In the following months, plaintiffs filed three additional, separate shareholder derivative cases in Texas state court.<sup>26</sup> In September 2009, the DOJ Antitrust Division filed criminal charges against Panalpina.<sup>27</sup> Although the civil cases were stayed pending resolution of the FCPA investigation, they were subsequently resurrected, and Panalpina and Pride International settled with the government for more than \$230 million in civil and criminal penalties in late 2010.<sup>28</sup>

Compounding close scrutiny by potential plaintiffs is the federal government's own recently stepped up efforts to combat foreign bribery. U.S. Attorney General Eric Holder emphasized in 2009 that the government "must vigorously enforce our own laws that prohibit bribery of foreign officials, such as... the Foreign Corrupt Practices Act. And we must work together to support our partners in the anti-corruption enforcement."<sup>29</sup> Both of the government agencies responsible for enforcing the FCPA have heeded this call. In 2010, the SEC created a dedicated FCPA unit.<sup>30</sup> In 2011, the DOJ promoted a new head of the Fraud Section's FCPA Unit as well as two assistant chiefs, and also increased the number of line prosecutors in the Unit.<sup>31</sup>

U.S. Assistant Attorney General Lanny A. Breuer stated in January 2011 that the DOJ has “dramatically increased [its] enforcement of the Foreign Corrupt Practices Act in recent years” and that the FCPA, “which was once seen as slumbering, is now very much alive and well.”<sup>32</sup> Given that the announcement of government FCPA investigations often inspires follow-on litigation, this increased emphasis on government investigation and prosecution will likely result in an eventual commensurate increase in follow-on litigation.<sup>33</sup>

## Types of Follow-On Civil Litigation

Specific instances of FCPA follow-on litigation can come in all shapes and sizes. While as noted above the FCPA itself does not provide for a private cause of action, creative litigants have squeezed alleged FCPA violations into many different substantive law contexts. Below we discuss some of the more common categories.

### Securities Fraud

Federal law prohibiting securities fraud provides one avenue for follow-on litigants.<sup>34</sup> The familiar elements of a claim for federal securities fraud are: (1) An untrue or misleading statement of material fact; (2) made in connection with the purchase or sale of securities; (3) with scienter, *i.e.*, intent to defraud or recklessness; (4) reliance by plaintiffs on the misleading statement; and (5) damages to plaintiffs caused by their reliance.<sup>35</sup> In the typical case, after a company has publicly disclosed potential FCPA violations and/or settled with the government, plaintiff shareholders institute a securities fraud claim by alleging that prior to these disclosures the company had fraudulently failed to disclose, or made false or misleading disclosures regarding, the nature and scope of the company’s FCPA violations or internal controls for detecting such violations.

In recent years, plaintiff shareholders have followed this precise playbook. For example, in *In re FARO Technologies Securities Litigation*, after FARO had publicly disclosed that it had made foreign “improper payments,” shareholders filed suit alleging that the company had overstated its sales figures by including sales achieved through these unlawful payments that the company failed to disclose had been in violation of the FCPA, and also that the company failed to dis-

close deficiencies in its internal controls.<sup>36</sup> Plaintiffs’ complaint survived a motion to dismiss, and the company settled the case in 2008 for \$6.875 million—nearly three times what it paid to settle FCPA claims brought by the government.<sup>37</sup> Nature’s Sunshine and Immucor, Inc. experienced similar outcomes.<sup>38</sup> While Nature’s Sunshine had only paid \$600,000 in FCPA-related fines to the government, the company paid \$6 million to settle a securities fraud suit brought against it.<sup>39</sup> Immucor paid \$2.5 million to settle its securities fraud suit.<sup>40</sup>

### Shareholder Derivative Actions

Derivative lawsuits brought by shareholders on behalf of the corporation are another possible vehicle for FCPA follow-on litigation. In a typical derivative action, a shareholder sues a corporation’s officers and/or directors in the corporation’s name for violating their obligations to the corporation, generally asserting claims for breach of the fiduciary duties of loyalty and care.<sup>41</sup> In the FCPA context, after a company’s potential FCPA violations become public, a plaintiff may allege that directors and officers breached their fiduciary duties by failing to exercise proper oversight of the company and to ensure that it adhered to the law, including failing to implement an effective FCPA compliance program, failing to ensure an existing compliance program was enforced, or even participating in the alleged FCPA violations themselves. Therefore, a plaintiff contends, the directors and officers should be held liable to the corporation for losses stemming from the company’s FCPA violations.

Numerous FCPA follow-on derivative cases filed in just the past few years have made allegations along these lines. For example, in March and April 2011, after casino operator Las Vegas Sands Corp. announced it was being investigated for FCPA violations, five shareholder groups filed derivative suits alleging the directors had breached their fiduciary duties by failing to ensure the company did not engage in business practices that violated the FCPA.<sup>42</sup> Following a 2010 settlement with the SEC and DOJ, shareholders of Tidewater Inc., an oil and gas services company, initiated a derivative action alleging that defendants knew or recklessly disregarded that Tidewater personnel had paid bribes to Azerbaijani and Nigerian government officials to obtain favorable treatment for Tidewater,

and that the directors had breached their fiduciary duties by failing to establish and maintain adequate internal controls to ensure compliance with the FCPA.<sup>43</sup>

In 2010, a Dow Chemical Co. derivative suit filed after the media reported claims that Dow executives had bribed Kuwaiti officials alleged, among other things, that Dow's directors breached their fiduciary duties because they "failed to detect and prevent" the purported bribery.<sup>44</sup> Three consolidated derivative actions filed by Avon Products shareholders after the company announced potential FCPA violations with respect to business operations in China claimed that the company's directors' "conscious and systematic failure" to oversee Avon's compliance with the FCPA caused the company substantial losses from February 2006 through the foreseeable future.<sup>45</sup> After Bio-Rad Laboratories, Inc. disclosed in an SEC filing that it had likely violated the FCPA's accounting provisions and may have violated the FCPA's antibribery provisions, a shareholder filed a derivative suit alleging breaches of fiduciary duty stemming from the company's purported failure to implement internal controls sufficient to ensure compliance with the FCPA.<sup>46</sup> And less than one month after Johnson & Johnson settled FCPA enforcement actions with the DOJ and the SEC, its shareholders filed a derivative action in May 2011 alleging breaches of fiduciary duty based on the company's failure to implement internal controls sufficient to detect and prevent bribery of foreign officials as well as its failure to disclose the full extent of the company's potential FCPA liability for making improper payments to Iraqi officials.<sup>47</sup>

## Whistleblower Litigation

Lawsuits claiming retaliatory discharge for internally reporting FCPA violations are a particularly likely avenue for follow-on litigation, especially in light of the Dodd-Frank Act's whistleblower provisions.<sup>48</sup> The SEC's Office of the Whistleblower published its first list of enforcement actions that might be eligible for whistleblower rewards in November 2011, and the list includes FCPA-related cases.<sup>49</sup> In the prototypical case, a discharged employee sues the company for

wrongful discharge, claiming he or she was fired in retaliation for reporting unlawful conduct that violated the FCPA.

American International Group, Inc. (AIG) was recently sued in an action like this. The plaintiff, an AIG compliance manager, allegedly learned of an arrangement in which a South Korean government entity would invest \$50 million into an AIG Global Real Estate Managed Fund. In exchange, AIG would sponsor a "six week paid vacation" for an employee of the government entity. The plaintiff allegedly reported this arrangement to AIG's Global Anti-Corruption Officer and was terminated several weeks later, prompting the lawsuit.<sup>50</sup> In another example, the former head of Sands China Ltd., a subsidiary of Las Vegas Sands, filed a wrongful termination action in October 2010 alleging that Las Vegas Sands and Sands China breached his employment contract by retaliating against him for refusing to comply with a superior's demand to engage in activity that potentially violated the FCPA.<sup>51</sup>

## Other Commercial Litigation

While securities, derivative and employee whistleblower litigation seem to be the most prevalent follow-on claims, enterprising attorneys have found other areas of the law in which FCPA violations can serve as predicates to civil claims. FCPA follow-on suits have been seen in the civil RICO,<sup>52</sup> civil antitrust,<sup>53</sup> plain-vanilla breach of contract,<sup>54</sup> and tort<sup>55</sup> settings as well.

A recent case marked the first example of FCPA charges directly resulting in a competitor obtaining compensation for the alleged FCPA violations. In March 2010, Innospec Inc. and its subsidiary pleaded guilty in the U.S. and U.K. respectively to bribing foreign officials in order to promote its lead additives for fuels over its competitors' lead-free alternatives.<sup>56</sup> After the company paid a total of \$40.2 million in combined fines and penalties as part of a global settlement, one of Innospec's competitors, NewMarket Corp., filed a civil action in July 2010 alleging that Innospec conspired to restrain trade and engage in commercial bribery by bribing foreign officials to secure disadvantageous treatment of NewMarket's products.<sup>57</sup> NewMarket specifically stated in its

complaint that its action “arises from Innospec’s guilty pleas” and attached the plea agreement with the DOJ, the information filed by the DOJ, the SEC complaint, and the U.K. court’s opinion.<sup>58</sup> The companies agreed to settle the matter in September 2011 for \$45 million, slightly more than Innospec’s combined global settlement with U.S. and U.K. regulators.<sup>59</sup>

## Preparing For Follow-On Litigation

Global companies need to anticipate the potential for civil liability exposure at every stage of their analysis of a potential FCPA violation. Before, during and after an investigation of potential violations, the decisions made by the company will impact its ability to defend the civil litigation and minimize its consequences. With follow-on litigation looming on the horizon, there are steps companies dealing with internal and/or government FCPA investigations can take to prepare themselves and minimize their risks. While it is not realistic to think a company can completely insulate itself from post-investigation litigation, there are some options available that can help protect the company in this next stage of FCPA-related proceedings.

First, companies can develop and enforce robust compliance programs, which can provide a bulwark against follow-on claims such as for securities fraud and breach of fiduciary duties. Second, companies can enhance their risk factor disclosures in public documents, which can further protect them from later accusations of misleading investors. Third, companies can work to minimize the admissions and omissions they make during FCPA investigations, which otherwise may play pivotal roles in follow-on litigation and damage the companies in those lawsuits. Fourth, companies can take steps to ensure attorney-client privilege and attorney work product protections survive the FCPA investigation and remain intact for the follow-on litigation.

These steps are discussed in greater detail below. But the unifying theme common to all of them is that they concern contexts *other* than litigation, either long before any concrete FCPA issues arise at all, or during the internal and/or government FCPA investigations themselves. The takeaway, then, is that com-

panies should not wait until lawsuits are filed to worry about follow-on litigation; the possibility of such suits should always be part of the calculus when addressing FCPA-related issues.

## Develop & Enforce a Robust Compliance Program

The inherent merits of a strong FCPA compliance program are well-known and much-discussed.<sup>60</sup> But a good compliance program can also have downstream benefits in mitigating follow-on litigation.

First, robust and defensible FCPA compliance procedures can help prevent class action securities fraud lawsuits, or at least provide tools to defeat them early on. As noted above, one element of a federal securities fraud claim is “scienter,” which the U.S. Supreme Court has defined as “a mental state embracing intent to deceive, manipulate or defraud.”<sup>61</sup> To adequately plead scienter under the strict rules imposed by the Private Securities Litigation Reform Act of 1995 (PSLRA), plaintiffs must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”<sup>62</sup> This is a heavy burden. As the Supreme Court has recently explained, the PSLRA requires plaintiffs to do far more than just provide a factual basis for their scienter allegations. Instead, plaintiffs must plead specific facts from which a “powerful or cogent” inference of scienter that is “at least as compelling as any opposing inference of non-fraudulent intent” can be drawn.<sup>63</sup>

In follow-on FCPA securities fraud actions where plaintiffs cannot identify any high-level corporate officer who actually knew of the FCPA violations, plaintiffs may attempt to plead scienter by alleging instead that the company recklessly disregarded obvious red flags that should have alerted it to the illegal foreign practices, and/or that the company’s internal controls to prevent such violations were so deficient as to constitute willful ignorance of illegal conduct. For example, in securities litigation involving UTStarcom, Inc., plaintiffs pleaded scienter based on allegations that defendants “knew there were significant internal control weaknesses that precluded them from knowing if... UTSI was obtaining sales by bribing foreign government officials in violation of the FCPA.”<sup>64</sup> But the existence of a strong FCPA compliance program can make it difficult for plaintiffs to state such allega-



tions with sufficient particularity to survive a motion to dismiss. Moreover, the very existence of a compliance program itself may provide the kind of “opposing inference of nonfraudulent intent” compelling enough to overcome whatever inference can be drawn from plaintiffs’ allegations.<sup>65</sup> And even if plaintiffs are somehow able to survive the pleading stage, actual evidence of a strong compliance program may be enough to win summary judgment on the issue of scienter.

Second, a strong compliance program may provide some relief from derivative claims alleging breaches of fiduciary duties. Derivative plaintiffs asserting claims following FCPA investigations often allege “oversight” or “*Caremark*” claims, *i.e.*, claims that directors failed to exercise sufficient oversight such that FCPA violations occurred under their noses.<sup>66</sup> Under Delaware law (which governs a significant number of derivative actions), the “necessary preconditions for director oversight liability” are:

**(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system of controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.**<sup>67</sup>

In light of this standard, the benefits of a robust compliance program are obvious: it negates the first “precondition” of lack of controls, and to the extent the company has diligently implemented the program, the second precondition can be undermined as well. For example, in the Dow Chemical case plaintiffs alleged that the board “failed to detect and prevent bribery in connection with [a] transaction” in Kuwait.<sup>68</sup> In granting the company’s motion to dismiss, the court held that plaintiffs “failed to allege facts suggesting that the Dow board ‘utterly fail[ed]’ to supervise insiders, or that any director acted with anything other than good faith” in part because “the Dow board has set up policies to prevent improper dealing with third parties. In particular, Dow’s Code of Ethics expressly prohibits any unethical payments to third parties.”<sup>69</sup>

## Enhance Risk Factor Disclosures

Risk factor disclosures—statements in SEC and other public filings advising investors of the potential ways the company’s business may not succeed—can be an important tool in narrowing or eliminating the types of claims that can arise when an FCPA violation occurs. Companies that make inadequate disclosures about FCPA compliance and other risks stemming from doing business in certain parts of the world may face exposure to securities fraud claims that include allegations that the company made intentional or reckless omissions or misleading statements about these risks.

The follow-on litigation involving Immucor, a maker of products used in blood testing, is a good example. In the early 2000s, Immucor determined weaknesses in its internal controls over business practices at an Italian subsidiary, but Immucor did not disclose those weaknesses to the public.<sup>70</sup> Investors sued Immucor for securities fraud on the grounds that its failure to disclose these known weaknesses was materially false and misleading, and in 2006 the court denied Immucor’s motion to dismiss the complaint. In particular, the court held that a “reasonable investor would have been swayed had Immucor identified to the public (as it admits that it identified internally) weaknesses in its internal controls.”<sup>71</sup> Immucor ultimately settled with its shareholders in May 2007 for \$2.5 million.<sup>72</sup>

The lesson of Immucor and similar lawsuits is that inadequate disclosure of FCPA-related risks creates litigation exposure. Companies—especially those doing business in areas of the world more prone to corruption—can help protect themselves against these kinds of cases by ensuring they are disclosing risks relating to FCPA liability. But surprisingly, many global companies are not doing this. A survey of recent 10-Ks reveals that many of the largest global companies are not making *any* FCPA-related risk factor disclosures, much less disclosures sufficient to convey risks that a reasonable investor would consider important to an investment decision. Many companies do not even *mention* anticorruption laws generally, the FCPA or the U.K. Bribery Act. Many also do not describe in their risk factor disclosures the existence of internal compliance programs, or the risks associated with those programs.

These companies may be exposing themselves to unnecessary litigation risk, risk that could be avoided by

crafting comprehensive FCPA-related risk factor disclosures that may eliminate or narrow the scope of potential follow-on claims. An appropriate disclosure could include, for example:

- Risks associated with doing business in countries with high perceived corruption;
- Risks associated with violating anticorruption laws;
- Risks associated with potential failures in the company's compliance program, no matter how well-designed; and
- Risks associated with corruption-related criminal and civil liability.

In sum, warning investors about potential dangers of doing business abroad can help protect companies from later litigation about inadequate disclosure. While this advice may seem obvious, a surprising number of companies are presently not following it.

## Use Caution about Company Admissions Before, During & After FCPA Investigations

Companies facing FCPA investigations make numerous statements about those investigations. These statements often provide details about the company's activities, the nature of the facts being investigated, and what steps the company has taken or will take. Some of these statements are public, and are required to be made (*e.g.*, statements made in SEC filings). But many assertions are made internally, where the company does not intend the statement to be public or to be used against it in litigation. These internal assertions occur, for example, in meetings with professionals, including lawyers, bankers and auditors, and appear in internal company memoranda and presentations to boards of directors.

While these statements are made in the context of FCPA investigations, their relevance does not end with those investigations. What a company has said, or has not said, can be extremely important in follow-on FCPA litigation. As a result, companies making statements about ongoing FCPA investigations need to constantly consider the downstream implications of their admissions or omissions, and act accordingly.

## Sources of Admissions & Omissions Relating to an Investigation

There are numerous sources of admissions and omissions, some obvious, and some less so. Companies should take special care with respect to, at a minimum, the following kinds of statements:

- **Press releases:** Companies frequently issue press releases in connection with FCPA investigations. For example, when the company first announces it is being investigated by the government, when certain milestones relating to the investigation occur, or when the company and the government resolve the investigation (*e.g.*, by entering into a settlement).
- **Settlement agreements with the DOJ, SEC and collateral litigants:** Anything a company says in a settlement agreement may be a "statement" about the FCPA investigation. That an agreement is confidential is not necessarily any guarantee the document would not show up in follow-on litigation. Even confidential documents sometimes leak out, and they are not protected from disclosure in the civil discovery process.
- **Special committee reports:** One result of an internal investigation into potential FCPA violations is that a special committee of the company's board may issue a report on the investigation's findings. These documents are important for the company's governance practices, but they may be discoverable in follow-on litigation. Persons responsible for drafting these reports should do so carefully, understanding that the report later could be used against the company or special committee. Indeed, counsel to the special committee should consider whether a written report is necessary under the circumstances, because there are often situations that do not require a written report in order to satisfy the special committee's duties.
- **SEC filings (8-Ks, 10-Ks, 10-Qs, etc.):** A company's SEC filings will often contain disclosures regarding any ongoing FCPA investigation. As discussed above, statements (or lack thereof) in

these documents often form the basis for securities fraud follow-on litigation. As a result, companies should be careful to ensure that required disclosures adhere closely to objective facts, and avoid unnecessary characterization of facts or events.

- **PowerPoint presentations:** It is natural in business settings to use PowerPoint and other written presentation materials in connection with board meetings or other important occasions, including discussions of FCPA investigations. But effective PowerPoints may also make effective evidence for the company's litigation adversary down the road. Care should be taken when preparing non-privileged internal company materials relating to the facts and circumstances of an FCPA matter. For example, where an investigation has financial or accounting implications, members of the company will have a need to understand facts and convey them to others. When the CFO or corporate controller prepares documentation, memoranda, or PowerPoint slides reflecting their analysis and understanding of the underlying facts, these materials may become discoverable in follow-on litigation and may constitute admissions that can be used against the company at trial. Where possible, oral presentations may be advisable instead.
- **Written summaries provided to outside auditors:** Auditors often play a significant role in internal FCPA investigations, because they need to understand how the underlying facts impact the company's financial statements and its internal control environment. This activity is another source of potentially discoverable information and the resulting materials may be accessible and admissible in follow-on litigation. As a result, companies should be as careful with preparation of these materials as they are with other statements about the investigation.
- **Analyst conferences and other public statements:** While an FCPA investigation is proceeding, companies are still operating their business, and talking about the business and the investiga-

tion's impact on it. Although these statements are usually focused on reporting to investors about the business, they also may include comments about facts relating to the investigation.

## Examples of Admissions & Omissions in Follow-On Litigation

There are numerous real-world examples of a company's admissions and omissions impacting subsequent follow-on litigation. Several instances are discussed below.

**Admissions**—In 2008, UTStarcom and its CEO and CFO settled with the SEC claims that they violated the securities laws by making misrepresentations regarding the company's foreign practices. As part of the settlement, the CEO and CFO agreed to a "cease and desist" order that detailed, among other admissions, the CEO's and CFO's knowledge for many years of internal control weaknesses at the company. In a complaint filed shortly after the cease and desist order became public, plaintiffs used these admissions, citing the cease and desist order 20 times in their complaint to establish the timing of various events, and to plead scienter on behalf of both UTStarcom and the individual defendants, including as to FCPA violations.<sup>73</sup> This case ultimately was settled for \$30 million.<sup>74</sup>

A follow-on lawsuit against KBR, Inc. provides another cautionary tale regarding admissions. In 2009, KBR and its CEO pleaded guilty to bribing Nigerian officials in order to obtain contracts worth \$6 billion to build natural gas facilities in Nigeria. These plea agreements made numerous admissions, such as the CEO's admission that he received approximately \$10.8 million in kickbacks from one consultant he hired to bribe Nigerian officials. Plaintiffs later used these admissions in a derivative lawsuit, alleging that the admitted FCPA violations were evidence of KBR's lack of proper corporate oversight.<sup>75</sup>

**Omissions**—The court considering a securities fraud complaint against Immucor held that a press release, SEC filings and statements in an analyst phone conference were materially misleading as alleged because they omitted certain facts.<sup>76</sup> Specifically, although the company faced exposure for criminal liabil-



ity due to multiple prohibited bribes allegedly made by its President and CEO, Immucor allegedly mischaracterized the violations as an isolated clerical error subjecting it only to a monetary penalty. The court held that “defendants’ duty was to describe fully the nature and scope of the conduct under investigation—conduct of which [the CEO/President] was fully aware because he participated in it.”<sup>77</sup> The court opined that:

**a reasonable investor would have considered it important to know that Immucor might be criminally liable, because such liability could have other effects on Immucor’s ability to do business, such as debarment, licensing trouble, marketplace credibility and other outcomes capable of affecting the price of Immucor’s stock.**<sup>78</sup>

Courts of appeal have come to the same conclusion regarding omissions. In *Glazer Capital Management, L.P. v. Magistri*, the U.S. Court of Appeal for the Ninth Circuit recognized that a failure to disclose possible FCPA violations in a public statement, such as an SEC filing, could support a securities fraud claim.<sup>79</sup> The court ultimately held that plaintiffs had not pleaded sufficient facts to survive a motion to dismiss, but in doing so noted that publicly disclosed representations and warranties that the company was in compliance with all laws, when the company knew those representations to be false because of FCPA violations, could be enough to plead securities fraud.<sup>80</sup>

## Recommendations for Any Statement Made About an Investigation

Management and company counsel involved in preparing or communicating any of the above statements need to be aware of the potential civil litigation consequences at the time of creation. Several common sense considerations can help minimize the potential future consequences of these statements.

- **Adhere closely to the facts:** Most of the advice set forth in this section stems from this simple and perhaps obvious rule: if a company has to say something about an FCPA investigation, that

something should be limited to objective facts—and facts the company knows to be true. What this means in practice is that companies should stick to the facts, and double-check those facts in advance, to ensure the company’s statements are accurate. If it later turns out the “facts” were not true—even if the company did not intentionally make a false statement—that contradiction can provide ample fodder for a follow-on suit.

- **Avoid opinions, speculation, and beliefs:** Adhering to the facts also means avoiding statements that are not based in fact. Companies may honestly believe that their personnel have done nothing wrong, but a public statement to that effect made before an FCPA investigation is completed can serve as powerful ammunition for a subsequent follow-on suit if the belief turns out to be mistaken. Similarly, statements by executives of what their “opinion” is about potential FCPA allegations or violations should be avoided. Again, if those opinions turn out to be at odds with the facts, the company and the opinionated executive may suffer as a result during later litigation.
- **Offer narrow conclusions, and only if required:** Another corollary to the facts-only rule is that companies should avoid stating conclusions. Lay out the facts, and let the audience—be it the investing public, the media or the government—draw their own conclusions. Any conclusion the company provides will surely show up in follow-on litigation. And to the extent a company needs to provide a conclusion, that conclusion should be as narrowly drawn as possible. Sweeping conclusions will not help the company in later litigation.
- **Avoid sugarcoating:** There is a natural inclination to try to put a positive spin on bad events. In and of itself there is nothing wrong with this instinct, but taken too far it can hurt the company in subsequent litigation. As Immucor’s experience bears out, understating potential FCPA violations can lead to claims that the company has misled the public.<sup>81</sup>

- **Avoid adjectives and adverbs:** When stating the facts, keep those facts simple. While adjectives and adverbs may provide spice to an otherwise bland factual description, spice is not what a company wants. Characterizing events as “minor” or “major,” “ongoing” or “isolated,” is often unnecessary, and can be used against the company later. Companies should keep their statements objective and plain.
- **Be brief:** This last suggestion flows naturally from all the rest. Once a company limits itself to the facts, and avoids opinions, beliefs, conclusions, sugarcoating, adjectives, and adverbs, the remaining unadorned facts should not take long to state. A company should say exactly what it needs to say, and nothing else. The surplusage can come back to hurt the company later.

## Protecting the Attorney-Client Privilege & Work Product Protections

The attorney-client privilege is one of the most sacrosanct of privileges recognized in law. As explained by the Supreme Court, immunizing confidential communications between a lawyer and his or her client from discovery is necessary to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>82</sup>

Although doctrinally distinct,<sup>83</sup> the work product doctrine achieves similar ends. To promote the adversary process, “documents and tangible things that are prepared in anticipation of litigation” by a party’s attorney are generally insulated from discovery.<sup>84</sup> This doctrine recognizes that allowing an opponent access to an attorney’s work product would cause “much of what is now put down in writing [to] remain unwritten.”<sup>85</sup> “Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.”<sup>86</sup>

Materials potentially implicating these doctrines necessarily involve the most sensitive of issues impacting a company. In the context of the FCPA, they could, among other things, chronicle a company’s internal

investigation into suspected wrongdoing or detail its attempts to develop a stronger FCPA compliance program. If they had access to such materials, follow-on plaintiffs could use a company’s attempts to comply with the law as the basis for claiming liability.

Given the success plaintiffs have had using a company’s *non*-privileged statements,<sup>87</sup> it is imperative that companies understand how the attorney-client privilege and work product doctrine apply to statements made in the context of FCPA investigations and follow-on litigation so they can take the necessary steps to preserve those protections. While certain material may initially appear to fall within the ambit of one of these protections, both doctrines are filled with exceptions and often strictly construed by courts so as to avoid depriving parties of relevant evidence.<sup>88</sup> Moreover, the FCPA investigation process is fraught with opportunities where an uninformed decision could prevent any privilege from attaching to sensitive communications or result in the waiver of an otherwise applicable protection to unintended parties.

Accordingly, companies must understand the contours and limitations of these protections in order to avoid inadvertently providing follow-on plaintiffs with potentially powerful ammunition. The following sections outline certain considerations that should inform the decision-making process in developing a strategy for dealing with privileged materials in an FCPA investigation and subsequent litigation.

## Carefully Consider Disclosures to the SEC & DOJ

Disclosing otherwise protected information to the Securities and Exchange Commission and Department of Justice can be tempting and potentially advantageous to a company involved in an FCPA investigation. Both the SEC and DOJ consider a company’s willingness to cooperate with these agencies in determining whether to reward the company with leniency.<sup>89</sup> And both have determined that companies “cooperated” by, among other things, declining to invoke the attorney-client privilege and work product protection when producing documents relevant to their internal investigations.<sup>90</sup>

When deciding whether to disclose protected materials to the SEC or DOJ, companies should be mindful that doing so may render these materials discoverable in follow-on litigation. Although case law is not uniform, several courts have held that such disclosure operates as a waiver, and have demonstrated little sympathy for the company's "Hobson's choice between waiving [applicable protections] through cooperation with investigatory authorities, or not cooperating with the authorities."<sup>91</sup> Moreover, some courts have held that the waiver applies not only to the voluntarily disclosed material, but to all undisclosed protected communications on the same subject matter.<sup>92</sup>

Companies should also keep in mind that disclosing privileged information may not actually be necessary to obtain cooperation credit from the DOJ or SEC. According to the SEC Enforcement Manual and the U.S. Attorneys' Manual,<sup>93</sup> neither agency should ordinarily demand that a party waive the attorney-client privilege or work product protection.<sup>94</sup> Moreover, these agencies do not predicate cooperation credit on a company's agreement to disclose privileged information.<sup>95</sup> Instead, the proper inquiry for determining whether to award a company credit for cooperation is whether or not the company has timely disclosed all relevant facts about the alleged misconduct.<sup>96</sup>

If a company deems that the disclosure of protected material is necessary, it should mitigate the risk that this material will end up in the hands of follow-on plaintiffs by entering into confidentiality agreements with the receiving agency or agencies. Pursuant to such an agreement, the company makes clear that it does not intend to waive any applicable privilege as to third parties and the agency, in turn, makes clear that it intends to keep the disclosed information confidential.<sup>97</sup> Some courts have held that certain confidentiality agreements permit selective waiver to the government, and have denied third-party demands for information on that basis.<sup>98</sup>

Such agreements, however, are far from air-tight. For example, the SEC's Model Confidentiality Agreement provides that the SEC Staff may disclose privileged materials "to the extent that the Staff determines that disclosure is otherwise required by law or would be in furtherance of the Commission's discharge of its duties and responsibilities."<sup>99</sup> Moreover, the Tenth Circuit has found such qualified confidentiality agree-

ments insufficient to sustain a claim of privilege, while the Sixth Circuit has held confidentiality agreements entirely irrelevant to the waiver analysis regardless of the strength of protections they contain.<sup>100</sup>

## Carefully Consider Disclosures to Auditors

As noted above, auditors often play a significant role in internal FCPA investigations. In the course of preparing an audit opinion, they may seek to review attorney opinion letters or other materials generated by the investigated company's counsel that relate to the alleged wrongdoing.<sup>101</sup> Indeed, auditors may need a company to provide such sensitive material in order to issue an unqualified opinion.

Producing otherwise protected documents to auditors creates a risk that these materials will end up in the hands of follow-on plaintiffs. Courts disagree about whether transmitting work product to auditors effects a waiver.<sup>102</sup> Recognizing that applying the waiver doctrine "might discourage companies from seeking legal advice and candidly disclosing that information to independent auditors," some courts have held that transmission of work product to independent auditors does not waive the protection.<sup>103</sup> Others have held that transmission waives the protection, explaining that "[s]haring potentially inculpatory information with an entity dedicated to uncovering financial irregularities is entirely inconsistent with the zone of privacy that underlies the work product doctrine."<sup>104</sup>

Although courts appear increasingly inclined to hold that sharing work product with auditors does not operate as a waiver,<sup>105</sup> this trend is of little consolation to large issuers that cannot predict where they will be hauled into court. Until the disagreement among courts is resolved, large companies cannot easily evaluate their risk at the time the auditor demands protected information. The inquiry becomes even more complicated if FCPA-related litigation is not clearly "anticipated" at the time of transmission.<sup>106</sup>

Given the uncertain landscape of the work product protection in the context of independent auditors, companies should carefully consider whether and to what extent disclosure of work product is necessary. They should work with their auditors to determine

whether such work product is absolutely essential to obtaining an unqualified opinion. And if disclosure is necessary, counsel should craft the disclosures based on the guidelines described above and on the assumption that follow-on plaintiffs will have access to them later.

## Carefully Consider Internal Investigation Procedures

Relevant unprivileged materials normally will be discoverable by follow-on litigants regardless of whether a company decides to waive privilege during a government investigation. Accordingly, companies should carefully consider whether the procedures they employ in conducting an internal FCPA investigation will even allow them an opportunity to claim the benefits of any privilege or work product protection in future litigation.

The internal investigation process generally involves a number of meetings. The audit committee, internal management, and the board will often be tempted to discuss privileged matters concerning an ongoing FCPA investigation. Disclosing privileged communications in the presence of certain third parties, however, can constitute a waiver of privilege.<sup>107</sup> To avoid giving follow-on plaintiffs access to materials prepared for, presented or discussed at, or generated during these meetings, companies should consider limiting attendance at meetings to those individuals necessary to further the investigation. Alternatively, companies can carefully craft the agendas and monitor discussions so as to avoid wading into privileged waters.

Carefully considering the scope and necessity of written deliverables at each stage of the investigation, as discussed above, also mitigates the risk that otherwise-privileged inculpatory material will end up in the hands of follow-on plaintiffs. Some good practices to follow include:

- Where a written deliverable is required, consider the audience who will receive it, and if that audience consists of individuals who are not necessary to the furtherance of the investigation, limit the content of the report to nonprivileged materials.

- When circulating a written deliverable containing privileged materials, clearly mark it as such. Conspicuous marking will not only minimize the risk that recipients will destroy any applicable protection by disclosing the material to unauthorized individuals, but it will help to ensure that privileged materials are not inadvertently produced to opponents during discovery in any follow-on case.

As is the case with meetings, employee interviews also are a crucial part of ferreting out and remedying FCPA violations. Oftentimes attorneys either conduct or are present in these interviews and generate work product or privileged communications as a result. To ensure that these materials remain protected, companies must exclude unnecessary third parties from the interview.<sup>108</sup> Moreover, company attorneys should give the interviewed employee what attorneys have colloquially referred to as “*Miranda Warnings*,” advising the employee that they do not represent him or her and that the company can and may choose to disclose the contents of the interview. In the event that the employee is not given or does not understand such instructions, he or she may sue the company upon disclosure of what he or she believes to be confidential information and demand interview notes, memoranda and other protected materials in discovery during that lawsuit.

A company should also consider hiring outside counsel to conduct the internal investigation. Typically, in-house counsel’s role is not confined to giving legal advice. Instead, in-house counsel may participate “in and render decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues.”<sup>109</sup> Because courts fear that:

**businesses will immunize internal communications from discovery by placing legal counsel in strategic corporate positions and funneling documents through counsel... [they] require a clear showing that the attorney was acting in his professional legal capacity before cloaking documents in the privilege’s protection.**<sup>110</sup>

Sometimes the proponent of the privilege cannot meet this heightened burden.<sup>111</sup> On the other



hand, communications between a corporation and its outside counsel are presumed to be made for the purpose of rendering legal advice and do not have to pass such close judicial scrutiny before being afforded protected status.<sup>112</sup>

## Get Involved Early

Things can happen fast in FCPA investigations. Indeed, there are often only hours between the announcement of an FCPA investigation and the filing of follow-on lawsuits.<sup>113</sup> During this time, in-house counsel will be under enormous pressure to make a number of decisions that can have far-reaching implications in any ensuing government investigation and follow-on litigation, such as:

- Will we cooperate with the SEC and/or DOJ investigation?
- What are we willing to do to cooperate?
- Will we give them everything?
- Will we waive the attorney-client privilege and/or work product protections?
- How will we collect documents?
- Who has documents relevant to the alleged violation?
- How will we collect them?
- Will collection from any custodian run afoul of foreign privacy laws?<sup>114</sup>
- How are we going to handle production of the documents?
- Are we going to review documents before production?
- If so, who is going to handle the review?

Given that a company must ensure “timely” disclosure of all relevant facts if it hopes to qualify for cooperation credit,<sup>115</sup> in-house counsel often will not have the luxury of an extended amount of time to consider these issues. The consequences of not adequately considering them, however, can be enormous. As described above, declining to assert privilege will likely give follow-on plaintiffs access

to sensitive, and potentially inculpatory materials that they can use to leverage a large settlement.<sup>116</sup> Producing documents to the government that are not directly related to the alleged wrongdoing could expose the company to further government scrutiny and liability.<sup>117</sup> And employing a careless method of producing documents could result in an inadvertent production of protected materials that will effect an unintended privilege waiver.<sup>118</sup>

Accordingly, it is imperative that counsel develop a strategy early on. Give careful consideration to whether waiving privilege in any government investigation is necessary and/or desirable. Investigate any foreign privacy laws that document collection and production might implicate. Hire a forensic consultant to handle document collection and production. And carefully consider the government’s demands for information to ensure that they do not exceed the scope of FCPA-related conduct. Although engaging in these tasks may be arduous, the proper decisions in this stressful time can potentially save the company from enormous exposure in follow-on litigation.

## NOTES

1. F. Joseph Warin, Michael S. Diamant & Jill M. Pfenning, *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33 (2010) (“Warin, *Compliance in China*”) (citing Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C.A. §§ 78dd-1 et seq.)).
2. 15 U.S.C.A. §§ 78dd-1(a).
3. FCPA Blog, *J&J Joins New Top Ten* (Apr. 8, 2011), available at <http://www.fcpablog.com/blog/2011/4/8/ji-joins-new-top-ten.html>.
4. Although the contours of the FCPA and a legally adequate FCPA compliance program are outside the scope of this article, numerous commentators have thoroughly discussed these issues. See, e.g., Warin, *Compliance in China*, *supra* note 1; F. Joseph Warin, Michael S. Diamant & Veronica Root, *Somebody’s Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321 (2011).
5. See, e.g., *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1024, Fed. Sec. L. Rep. (CCH) P 95510, 1990-2 Trade Cas. (CCH) ¶ 69209 (6th Cir. 1990). On November 30, 2011, Rep. Ed Perlmutter (D-Colo.) introduced a bill in the U.S. House of Representatives that would “authorize certain private rights of action under the [FCPA] for

- violations by foreign concerns that damage domestic businesses.” See Foreign Business Bribery Prohibition Act, H.R. 3531, 112th Cong. (2011). Successful plaintiffs would be entitled to treble damages as well as reasonable attorney’s fees and costs. The bill has been referred to the House Committee on Energy and Commerce and the Committee on the Judiciary, as well as the Subcommittee on Courts, Commercial and Administrative Law.
6. See *infra* 8-13 (discussing examples).
  7. Reuters, *Bribery Investigations Spark Shareholder Suits* (Nov. 1, 2010), available at <http://www.reuters.com/article/2010/11/01/us-bribery-lawsuits-idUSTRE6A04CO20101101>.
  8. Reuters, *Bribery Investigations Spark Shareholder Suits* (Nov. 1, 2010).
  9. Reuters, *Bribery Investigations Spark Shareholder Suits* (Nov. 1, 2010).
  10. See Securities and Exchange Commission (SEC) Litigation Release No. 17887, *SEC Obtains \$500,000 Penalty Against Syncor International Corporation for Violating the Anti-Bribery Provisions of the Foreign Corrupt Practices Act* (Dec. 10, 2002); Nathan Vardi, *Plaintiff Lawyers Join the Bribery Racket* (Aug. 16, 2010), available at <http://www.forbes.com/sites/nathanvardi/2010/08/16/plaintiff-lawyers-fcpa-bribery-racket>; Raymond Wong, *FCPA Settlements: It’s a Small World After All*, Nera Economic Consulting (Jan. 28, 2009); *Judgment and Final Order, In re Nature’s Sunshine Prods. Sec. Litig.*, No. 2:06-cv-00267-TS (filed Feb. 10, 2010); SEC Litigation Release No. 21162, *SEC v. Nature’s Sunshine Products, Inc.*, Douglas Faggioli and Craig D. Huff, No. 09CV6722 (D. Utah filed July 31, 2009).
  11. Complaint, *Aluminum Bahrain v. Alcoa, Inc.*, No. 2:2008cv00299 (W.D. Pa. Feb. 27, 2008).
  12. Complaint, *Aluminum Bahrain B.S.C. v. Sojitz Corp.*, No. 4:09-cv-04032 (S.D. Tex. Dec. 18, 2009).
  13. See Memorandum of Law in Support of the Unopposed Motion of the United States to Intervene and for a Stay of Discovery, *Aluminum Bahrain B.S.C. v. Sojitz Corp.*, No. 4:09-cv-04032 (S.D. Tex. May 27, 2010) (explaining the DOJ’s investigation into the Sojitz and Alcoa actions).
  14. Complaint, Murray C. White, derivatively on behalf of Avon Products, Inc. v. Andrea Jung, et al. and Avon Products Inc. as nominal defendant, No. 10-CV-5560 (S.D.N.Y. May 12, 2011).
  15. Avon Prods., Inc., Quarterly Report (Form 10-Q), at 11 (Sept. 30, 2011).
  16. See *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 176 L. Ed. 2d 582, Fed. Sec. L. Rep. (CCH) P 95733 (2010).
  17. *Merck*, 559 U.S. at 592.
  18. See *Merck*, 559 U.S. at 587; see also *In re BP plc Sec. Litig.*, No. 4:10-md-02185 (S.D. Tex. 2011) (alleging BP misled investors by conveying its commitment to and implementation of safety reform mechanisms, and misrepresenting that BP was prepared to contain and address an oil spill in the Gulf of Mexico).
  19. SciClone Pharmaceuticals, Inc., [www.sciclone.com](http://www.sciclone.com).
  20. SciClone Pharm., Inc., Quarterly Report (Form 10-Q), at 16 (June 30, 2011).
  21. SciClone Pharm., Inc., Quarterly Report (Form 10-Q), at 16 (June 30, 2011).
  22. SciClone Pharm., Inc., Quarterly Report (Form 10-Q), at 28 (June 30, 2011).
  23. SciClone Pharm., Inc., Quarterly Report (Form 10-Q), at 28 (June 30, 2011). On December 15, 2011, SciClone announced that the court granted final approval of a settlement agreement under which SciClone will pay \$2.5 million in attorneys’ fees and will implement certain corporate governance measures, to be in effect for at least three years, to settle the class action suit. SciClone Pharm., Inc., *SciClone Pharmaceuticals Announces Final Settlement of Stockholder Derivative Litigation* (Dec. 15, 2011), available at <http://investor.sciclone.com/releasedetail.cfm?ReleaseID=633551>.
  24. See Judith Burns, *Justice Department Probing Oil Operations in Nigeria*, Dow Jones Newswires (July 25, 2007), available at [http://www.rigzone.com/news/article\\_pf.asp?a\\_id=48131](http://www.rigzone.com/news/article_pf.asp?a_id=48131).
  25. *Deccan Value Advisors Fund L.P. v. Panalpina World Transp. (Holding) Ltd.*, No. 5:09-cv-00080 (S.D. Tex. July 23, 2009).
  26. *Arnold, Derivatively ex rel. Pride Int’l Inc., v. Bragg*, No. 2009-66082 (Harris Cnty., Tex. Oct. 14, 2009); *Dixon, Derivatively ex rel. Pride Int’l, Inc. v. Brown*, No. 2010-24302 (Harris Cnty., Tex. Apr. 15, 2010); *Ferguson, Derivatively ex rel. Pride Int’l Inc. v. Raspino*, No. 2010-23805 (Harris Cnty., Tex. Apr. 15, 2010). These cases were consolidated into a single action under the caption *Ferguson v. Raspino*, No. 2010-23805.
  27. Information, *United States v. Panalpina World Transp. (Holding) Ltd.*, No. 1:10-cr-00270-RJL (D. D.C. Sept. 30, 2010).
  28. Samuel Rubinfeld & Joseph Palazzolo, *Panalpina Settlements Announced, with \$236.5 Million in Penalties*, The Wall Street Journal Blog (Nov. 4, 2010); Plea Agreement, *United States v. Panalpina, Inc.*, available at <http://www.justice.gov/opa/documents/panalpina-inc-plea-agreement.pdf>. Following the conclusion of the government investigation, the civil plaintiffs filed an amended complaint on January 18, 2011, raising allegations substantially similar to those made in the prior

- lawsuits. See *Pride Int'l, Inc.*, Quarterly Report (Form 10-Q), at 13-14 (Mar. 31, 2011).
29. Attorney General Eric H. Holder, Jr., Remarks at the Sixth Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009), available at <http://vienna.usmission.gov/091107holder.html>.
  30. SEC Staff, Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2010), available at <http://www.sec.gov/news/speech/spch011310newsconf.htm>.
  31. U.S. Assistant Attorney General Lanny A. Breuer, Address at the Annual Meeting of the Washington Metropolitan Area Corporate Counsel Association (Jan. 26, 2011), available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-110126.html>.
  32. U.S. Assistant Attorney General Lanny A. Breuer, Address at the Annual Meeting of the Washington Metropolitan Area Corporate Counsel Association (Jan. 26, 2011). In a statement before the Senate Subcommittee on Crime and Terrorism in November 2011, Assistant Attorney General Breuer indicated that the DOJ is also proposing to amend RICO to specify that violations of the FCPA would qualify as predicate acts for purposes of establishing a "pattern of racketeering activity" under RICO, though no specific legislation has yet been introduced. *Combating International Organized Crime: Evaluating Current Authorities, Tools, and Resources: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Lanny Breuer).
  33. The U.K. Bribery Act (U.K. Bribery Act, 2010, §§ 6-7), which took effect on July 1, 2011, may also provide new ammunition for follow-on plaintiffs by expanding the scope of prohibited conduct relative to the conduct covered by the FCPA. Similar to the FCPA, the Bribery Act creates several categories of offenses prohibiting the bribery of foreign officials and punishing covered commercial organizations for failing to prevent bribery. The Bribery Act, however, departs from the FCPA by expanding the definition of criminal conduct and the range of organizations and individuals subject to the law. See F. Joseph Warin, Charles Falconer & Michael S. Diamant, *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 *Tex. Int'l L.J.* 1, 7-43 (2010) (comparing FCPA to Bribery Act) ("Warin, *The British Are Coming!*"). In short, conduct that might not warrant DOJ and/or SEC involvement may prompt investigation by Britain's Serious Fraud Office that will inspire follow-on litigants to seek redress in the courts.
34. See 15 U.S.C.A. § 78j; 17 C.F.R. § 240.10b-5.
  35. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342, 125 S. Ct. 1627, 161 L. Ed. 2d 577, Blue Sky L. Rep. (CCH) P 74529, Fed. Sec. L. Rep. (CCH) P 93218 (2005).
  36. *In re Faro Technologies Securities Litigation*, 534 F. Supp. 2d 1248, 1254-55, (M.D. Fla. 2007).
  37. Gibson, Dunn & Crutcher LLP, 2008 *Mid-Year FCPA Update* (July 7, 2008), available at <http://www.gibsondunn.com/publications/pages/2008mid-yearfcpaupdate.aspx>.
  38. *In re Nature's Sunshine Products Securities Litigation*, 486 F. Supp. 2d 1301, 1304-05, Fed. Sec. L. Rep. (CCH) P 94330 (D. Utah 2007) (alleging securities fraud in part based on Sarbanes-Oxley certifications signed by a CEO at a time when the CEO had approved of a payment that violated the FCPA, and the violation had not been publicly disclosed); *In re Immucor Inc. Sec. Litig.*, No. 1:05-CV-2276-WSD, 2006 WL 3000133, at \*1 (N.D. Ga. Oct. 4, 2006) (alleging securities fraud based on statements "that knowingly or recklessly understated the scope and gravity of potential [FCPA] violations by Immucor's Italian subsidiary").
  39. Gibson, Dunn & Crutcher LLP, 2010 *Mid-Year FCPA Update* (July 8, 2010), available at <http://www.gibsondunn.com/publications/pages/2010Mid-YearFCPAUpdate.aspx>; Gibson, Dunn & Crutcher LLP, 2009 *Year-End FCPA Update* (Jan. 4, 2010), available at <http://www.gibsondunn.com/publications/Pages/2009Year-EndFCPAUpdate.aspx>.
  40. Gibson, Dunn & Crutcher LLP, 2007 *Year-End FCPA Update* (Jan. 4, 2008), available at <http://www.gibsondunn.com/publications/Pages/2007Year-EndFCPAUpdate.aspx>.
  41. See, e.g., *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 37 Employee Benefits Cas. (BNA) 2756 (Del. 2006).
  42. See, e.g., Complaint, *Kohanim v. Adelson*, No. 11-636656 (Dist. Ct. Nev. Mar. 9, 2011). These cases were consolidated in August 2011 under the caption *La. Mun. Police Emps. Ret. Sys. v. Adelson*, No. 2:11-cv-00595-RLH-(GWF) (D. Nev.).
  43. Complaint, *Strong v. Taylor*, No. 11-00392 (E.D. La. Feb. 16, 2011). Trial is currently set to begin in September 2012.
  44. *In re Dow Chem. Co. Derivative Litig.*, C.A. No. 4349-CC (Del. Ch. Jan. 11, 2010) at \*45-56. The court dismissed this suit because plaintiffs failed to allege that the board knew about, or had reason to suspect, bribery, and because Dow's compliance program indicated that the board had satisfied its fiduciary duty to prevent overseas bribery. *In re Dow*, at \*46, 49 n.85.

45. Complaint, *Avon Prods., Inc. v. W. Don Cornwell*, No. 1:10-cv-05933-RMB (S.D.N.Y. July 2010). In May 2011, plaintiffs filed an amended complaint incorporating additional facts disclosed in Avon's public filings and in a *Wall Street Journal* article, including that the company had expanded its internal investigation to assess "questionable payments" made to government officials in Argentina, Brazil, India, Japan, and Mexico, and had fired four executives implicated in improper payments to Chinese officials. Complaint, *White v. Jung*, No. 1:10-cv-05560 (S.D.N.Y. May 12, 2011). In September 2011, the court denied defendant's motion to dismiss without prejudice in light of plaintiffs' expressed intention to further amend their complaint. Avon Prods., Inc., Quarterly Report (Form 10-Q), at 12 (Sept. 30, 2011).
46. *City of Riviera Beach Gen. Emps.' Ret. Sys. v. Schwartz*, No. MSC11-00854 (Cal. Super. Ct. Apr. 13, 2011). In September 2011, the court granted defendants' motion to dismiss the complaint without prejudice and gave plaintiff until February 2012 to file an amended complaint. Bio-Rad Labs., Inc., Quarterly Report (Form 10-Q), at 19 (Sept. 30, 2011).
47. Complaint, *Wollman v. Coleman*, No. 11-cv-02511 (D.N.J. May 2, 2011).
48. See, e.g., Gibson, Dunn & Crutcher LLP, *2010 Year-End FCPA Update* (Jan. 1, 2011) (discussing Dodd-Frank Act whistleblower provisions and noting that the statute "expands protections from retaliation for whistleblowers").
49. SEC, Office of the Whistleblower, *Claim an Award*, <http://www.sec.gov/about/offices/owb/owb-awards.shtml>.
50. Complaint, *Lebron v. AIG*, No. 09-CV-4285 (S.D.N.Y. May 1, 2009).
51. *Jacobs v. Las Vegas Sands Corp.*, No. A-10-627691 (Dist. Ct. Nev. Oct. 20, 2010). Las Vegas Sands has since filed counterclaims against the plaintiff alleging that he attempted to extort money from the company by threatening to publicize his allegations and that he stole sensitive and privileged documents that he now refuses to return. Sands China has claimed that it is not subject to the Nevada state court's jurisdiction, an issue that has yet to be resolved. Las Vegas Sands Corp., Quarterly Report (Form 10-Q), at 20 (Sept. 30, 2011).
52. Complaint, *Grynberg v. BP p.l.c.*, No. 4:2011cv01731 (S.D. Tex. May 6, 2011); Complaint, *Hidalgo v. Siemens Aktiengesellschaft*, No. 11-20107, 2011 WL 74581 (S.D. Fla. Jan. 11, 2011); *Nat'l Grp. for Commc'ns & Computers, Ltd. v. Lucent Techs., Inc.*, No. 03 Civ. 6001 (NRB), 2004 WL 2903745 (S.D.N.Y. Jan. 5, 2005).
53. Complaint, *NewMarket Corp. v. Innospec, Inc.*, No. 3:2010cv00503 (E. D. Va. July 23, 2010).
54. *Metro Communication Corp. BVI v. Advanced Mobilecomm Technologies Inc.*, 854 A.2d 121 (Del. Ch. 2004).
55. Complaint, *Hidalgo v. Siemens Aktiengesellschaft*, No. 1:2011cv20107 (S.D. Fla. Jan. 11, 2011).
56. FCPA Blog, *Innospec's \$40 Million Global Settlement* (Mar. 18, 2010), available at <http://www.fcpablog.com/blog/2010/3/18/innospecs-40-million-global-settlement.html>.
57. Complaint, *NewMarket Corp. v. Innospec Inc.*, No. 3:2010cv00503 (E.D. Va. July 23, 2010).
58. Complaint, *NewMarket Corp.*
59. Wall Street Journal Blog, *Innospec to Pay \$45 Million to End Lawsuit over Bribery* (Sept. 27, 2011), available at <http://blogs.wsj.com/corruption-currents/2011/09/27/innospec-to-pay-45-million-to-end-lawsuit-over-bribery>.
60. See, e.g., Warin, Compliance in China, supra note 1; F. Joseph Warin, et al., The Foreign Corrupt Practices Act: Recent Developments, Trends, and Guidance, 21 *Insights* 2 (2007).
61. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319, 127 S. Ct. 2499, 168 L. Ed. 2d 179, Fed. Sec. L. Rep. (CCH) P 94335 (2007).
62. 15 U.S.C.A. § 78u-4(b)(2)(A),
63. *Tellabs*, 551 U.S. at 314, 323.
64. Fourth Amended Complaint ¶ 145, *In re UTStarcom, Inc., Sec. Litig.*, Master File No. C-04-4908-JW(PVT) (N.D. Cal. May 14, 2008).
65. The absence of any opposing inference can make it difficult to overcome scienter allegations. See *In re Faro*, 534 F. Supp. 2d at 1264 ("In spite of a direct invitation to do so, the FARO Defendants do not provide the Court with a 'plausible opposing inference' sufficient to counter the significant weight of the scienter inference that arises from the totality of the allegations. In fact, the absence of any suggested counter inference strengthens the contention that there can be but one conclusion drawn from the facts, as pled.").
66. *In re Caremark Intern. Inc. Derivative Litigation*, 698 A.2d 959, 970 (Del. Ch. 1996) ("[A] director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and... failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.").
67. *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (citing *Caremark*).
68. *In re Dow Chemical Co. Derivative Litigation*, 36 Del. J. Corp. L. 241, 2010 WL 66769, at \*12 (Del. Ch. 2010).
69. *In re Dow*, 2010 WL 66769, at \*13 n.85.



70. *In re Immucor Inc. Securities Litigation*, 2006 WL 3000133, at \*13 (N.D. Ga. 2006).
71. *In re Immucor*, 2006 WL 3000133, at \*12.
72. Gibson, Dunn & Crutcher LLP, *The FCPA Enforcement Explosion Continues: Nine New Enforcement Actions in 2007 and Approximately 100 Active Investigations* (July 26, 2007), available at <http://www.gibsondunn.com/publications/pages/FCPAEnforcementExplosionContinues.aspx>.
73. Fourth Amended Complaint, *In re UTStarcom, Inc., Sec. Litig.*, Master File No. C-04-4908-JW(PVT) (N.D. Cal. May 14, 2008).
74. Gibson, Dunn & Crutcher LLP, *2010 Year-End FCPA Update* (Jan. 3, 2011), available at <http://www.gibsondunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx>.
75. Complaint, *Policemen & Firemen Ret. Sys. of Detroit v. Halliburton Co. & KBR Inc.*, No. 4:09-cv-01918 (S.D. Tex. 2009)(remanded to District Court of Harris County, Texas on September 8, 2009).
76. *In re Immucor Inc. Sec. Litig.*, No. 1:05-CV-2276-WSD, 2006 WL 3000133, at \*3-6 (N.D. Ga. Oct. 4, 2006).
77. *In re Immucor*, 2006 WL 3000133, at \*13-16.
78. *In re Immucor*, 2006 WL 3000133, at \*16.
79. *Glazer Capital Management, LP v. Magistri*, 549 F.3d 736, 742, Fed. Sec. L. Rep. (CCH) P 95008 (9th Cir. 2008).
80. *Glazer Capital* at 749.
81. See *supra* note 38.
82. *Upjohn Co. v. U.S.*, 1981-1 C.B. 591, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584, Fed. Sec. L. Rep. (CCH) P 97817, 1980-81 Trade Cas. (CCH) ¶ 63797, 81-1 U.S. Tax Cas. (CCH) P 9138, 7 Fed. R. Evid. Serv. 785, 30 Fed. R. Serv. 2d 1101, 47 A.F.T.R.2d 81-523 (1981).
83. See *U.S. v. Deloitte LLP*, 610 F.3d 129, 139-40, 2010-1 U.S. Tax Cas. (CCH) P 50487, 76 Fed. R. Serv. 3d 1367, 106 A.F.T.R.2d 2010-5053 (D.C. Cir. 2010) (“[T]he attorney-client and the work-product doctrine serve different purposes: the former protects the attorney-client relationship by safeguarding confidential communications, whereas the latter promotes the adversary process by insulating an attorney’s litigation preparation from discovery.”).
84. Fed. R. Civ. P. 26(b)(3)(A)-(B). While an opposing party can discover factual material prepared in anticipation of litigation by demonstrating a substantial need for the materials, an attorney’s mental impressions, conclusions, opinions or legal theories receive absolute immunity. See *U.S. v. Deloitte*.
85. *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 91 L. Ed. 451, 1947 A.M.C. 1 (1947).
86. *Hickman*, 329 U.S. at 511.
87. See *supra* 18-25 (discussing follow-on exposure based on a company’s admissions and omissions).
88. See, e.g., *In re Qwest Communications Intern. Inc.*, 450 F.3d 1179, 1185, 70 Fed. R. Evid. Serv. 492 (10th Cir. 2006); *U.S. v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002), as amended on denial of reh’g, (Mar. 13, 2002); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 602, 1977-2 Trade Cas. (CCH) ¶ 61591, 1978-1 Trade Cas. (CCH) ¶ 61879, 23 Fed. R. Serv. 2d 1473, 24 Fed. R. Serv. 2d 1201 (8th Cir. 1977) (rejected by, *Republic of Philippines v. Westinghouse Elec. Corp.*, 132 F.R.D. 384, 17 Fed. R. Serv. 3d 1476 (D.N.J. 1990)) and (disapproved of by, *U.S. v. Massachusetts Institute of Technology*, 957 F. Supp. 301, 97-1 U.S. Tax Cas. (CCH) P 50269, 37 Fed. R. Serv. 3d 711, 79 A.F.T.R.2d 97-595 (D. Mass. 1997)) and (rejected by, *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)); *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973).
89. See Securities and Exchange Commission: Division of Enforcement, Enforcement Manual at § 6.2 (February 8, 2011), available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf> (SEC Enforcement Manual); Release No. 44969, 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 (October 23, 2001) (Seaboard Opinion); United States Attorneys’ Manual, Title 9, §§ 28.300, 28.700-760 (August 2008), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm#9-28.710](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.710) (US Attorneys’ Manual).
90. Seaboard Opinion, *supra* note 89 (determining that the company “gave complete cooperation” to enforcement staff by “produc[ing] the details of its internal investigation... and [] not invok[ing] the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation”); Deferred Prosecution Agreement, *United States v. BankAtlantic*, No. 0:06-cr-60126-JIC (Apr. 27, 2006) (requiring a company cooperating with a DOJ investigation to “provide... any relevant document, electronic data, or other object”) (emphasis added).
91. *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236, Fed. Sec. L. Rep. (CCH) P 97818, 27 Fed. R. Serv. 3d 726 (2d Cir. 1993) (rejected by, *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002

FED App. 0201P (6th Cir. 2002)) (holding that disclosure to the SEC waived work product protection); see also *In re Qwest Communications Intern. Inc.*, 450 F.3d 1179, 1192, 70 Fed. R. Evid. Serv. 492 (10th Cir. 2006) (refusing to adopt selective waiver doctrine where there was no evidence establishing a "need for a rule of selective waiver to assure cooperation with law enforcement, to further the purposes of the attorney-client privilege or work-product doctrine, or to avoid unfairness to the disclosing party"); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 304, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002) ("The decision to... disclose otherwise confidential information... is a tactical one made by the client and his or her attorney. All litigation-related tactical decisions have an upside and a downside."); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425, 35 Fed. R. Evid. Serv. 1070, 22 Fed. R. Serv. 3d 377 (3d Cir. 1991) (rejecting selective waiver doctrine as not "encouraging full disclosure to one's attorneys" and unnecessary to encourage voluntary cooperation with government investigations); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988) ("The Fourth Circuit has not embraced the concept of limited waiver of the attorney-client privilege."); *In re John Doe Corp.*, 675 F.2d 482, 489, Fed. Sec. L. Rep. (CCH) P 98648, 10 Fed. R. Evid. Serv. 1390 (2d Cir. 1982) ("A claim that a need for confidentiality must be respected in order to facilitate the seeking and rendering of informed legal advice is not consistent with selective disclosure when the claimant decides that the confidential materials can be put to other beneficial purposes."); *Permian Corp. v. U.S.*, 665 F.2d 1214, 1216-17, Fed. Sec. L. Rep. (CCH) P 98280, 8 Fed. R. Evid. Serv. 1424, 32 Fed. R. Serv. 2d 429 (D.C. Cir. 1981) ("The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit."); *Mainstay High Yield Corporate Bond Fund v. Heartland Industrial Partners, L.P.*, 263 F.R.D. 478, 479-81 (E.D. Mich. 2009) (holding that disclosure of attorney-client privileged information constituted a waiver); *S.E.C. v. Microtune, Inc.*, 258 F.R.D. 310, 314-17, 73 Fed. R. Serv. 3d 1034 (N.D. Tex. 2009) (same). But see *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (*en banc*) (holding disclosure to the SEC effected only a limited waiver of the attorney-client privilege and explaining

that "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers").

92. See *Mainstay*, 263 F.R.D. at 479-81 (holding an attorney's production of a document aimed at convincing the U.S. Attorney not to indict a corporation's officer would operate as a waiver of privilege "as to not only the White Paper, but as to undisclosed communications between [the officer] and his attorneys regarding the same subject matter" if the officer authorized the attorney's production); *Microtune, Inc.*, 258 F.R.D. at 317 (voluntary production of documents relating to stock options backdating investigation, "waiv[ed] the attorney-client privilege with respect to all documents relating to the internal investigation of the company's stock option practices").

93. Although these manuals reflect policies and procedures employed by the respective agencies, they are not legally binding on the agencies. See U.S. Attorneys' Manual at § 1-1.100; SEC Enforcement Manual at § 1.1. Moreover, they are subject to change. For example, the DOJ's policies with regard to privilege waiver changed four times in the span of less than 10 years. See Memorandum from Deputy Attorney General Eric H. Holder, Jr. to Heads of Department Components and U.S. Attorneys, Bringing Criminal Charges Against Corporations at VI(B) (June 16, 1999); Memorandum from Deputy Attorney General Larry Thompson to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (Thompson Memo); Memorandum from Deputy Attorney General Paul J. McNulty to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) (McNulty Memo); U.S. Attorneys' Manual at Title 9-28.710.

94. SEC Enforcement Manual at § 4.3 ("As a matter of public policy, the SEC wants to encourage individuals, corporate officers and employees to consult counsel about potential violations of the securities laws... **The staff should not ask a party to waive the attorney-client privilege or work product protection without prior approval of the Director of the Deputy Director.**") (emphasis in original); U.S. Attorneys' Manual at Title 9-28.710 ("[W]hile a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors

- should not ask for such waivers and are directed not to do so.”).
95. SEC Enforcement Manual at § 4.3 (“A party’s decision to assert a legitimate claim of attorney-client privilege or work product protection will not negatively affect their claim to credit for cooperation. The appropriate inquiry in this regard is whether, notwithstanding a legitimate claim of attorney-client privilege or work product protection, the party has disclosed all relevant underlying facts within its knowledge.”); U.S. Attorneys’ Manual at 9-28.710 (“In short, so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work product protection in the process.”).
  96. SEC Enforcement Manual at § 4.3; U.S. Attorneys’ Manual at 9-28.710.
  97. SEC Enforcement Manual at § 4.3.1; DOJ, Antitrust Division, Grand Jury Manual at II-59.
  98. *Police and Fire Retirement System of City of Detroit v. SafeNet, Inc.*, Fed. Sec. L. Rep. (CCH) P 95635, 2010 WL 935317 (S.D. N.Y. 2010); *S.E.C. v. Bank of America Corp.*, 2009 WL 3297493 (S.D. N.Y. 2009); *c.f. In re Steinhardt Partners*, 9 F.3d at 236 (“Establishing a rigid rule [against selective waiver] would fail to anticipate situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information, or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials.”).
  99. See *In re Steinhardt Partners*, 9 F.3d at 236; see also Patrick Emery, *The Death of Selective Waiver: How New Federal Rule of Evidence 502 Ends the Nationalization Debate*, 27 J.L. & COM. 231, 295-96 (2009) (“Most confidentiality agreements only require an agency to keep quiet until it must disclose the privileged information to fulfill its statutory duties, which means that the public can obtain the information as soon as the investigation is unsealed or when demands for the information are registered with the agency.”).
  100. Compare *In re Qwest Communications Intern. Inc.*, 450 F.3d 1179, 1194, 70 Fed. R. Evid. Serv. 492 (10th Cir. 2006) (holding standard confidentiality agreements entered into with the SEC and DOJ did not support selective waiver, where they did “little to restrict the agencies’ use of the materials they received from Qwest”) with *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 303, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002) (explaining that the “attorney-client privilege is a matter of common law right... not a creature of contract, arranged between the parties to suit the whim of the moment”).
  101. See *U.S. v. Deloitte LLP*, 610 F.3d 129, 133-34, 2010-1 U.S. Tax Cas. (CCH) P 50487, 76 Fed. R. Serv. 3d 1367, 106 A.F.T.R.2d 2010-5053 (D.C. Cir. 2010) (considering whether tax opinion, memorandum and a flow chart prepared by company’s counsel in anticipation of litigation with the Internal Revenue Service (IRS) and in response to the auditor’s demand was privileged).
  102. Compare *U.S. v. Deloitte LLP*, 610 F.3d 129, 142-43, 2010-1 U.S. Tax Cas. (CCH) P 50487, 76 Fed. R. Serv. 3d 1367, 106 A.F.T.R.2d 2010-5053 (D.C. Cir. 2010) (holding that voluntary disclosure of work product to auditors was consistent with the maintenance of secrecy from the disclosing party’s adversary, because the disclosing party prepared the documents in anticipation of litigation with the IRS, not the auditor, and because the disclosing party had a “reasonable expectation of confidentiality because Deloitte, as an independent auditor, has an obligation to refrain from disclosing confidential client information”), and *S.E.C. v. Roberts*, 254 F.R.D. 371, 381-82, Fed. Sec. L. Rep. (CCH) P 94817 (N.D. Cal. 2008) (holding voluntary disclosure of an attorney’s mental impressions, opinions and conclusions to auditors did not effect a waiver because the interests of the auditor and the special committee were aligned and because selective waiver “further the strong public policy of encouraging critical self-policing by corporations”), and *Lawrence E. Jaffe Pension Plan v. Household Intern., Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006) (“Disclosing documents to an auditor does not substantially increase the opportunity for potential adversaries to obtain the information.”), with *United States v. Hatfield*, No. 06-CR-0550(JS), 2010 WL 3806300, at \*4 (E.D.N.Y. Jan. 8, 2010) (holding that sharing information with an independent auditor waived any applicable work product protection), and *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 116 (S.D. N.Y. 2002) (holding that disclosure to auditor waived work product protection and explaining that “in order for auditors to properly do their job, they *must* not share common interests with the company they audit”), and *In re Disonics Securities Litigation*, Fed. Sec. L. Rep. (CCH) P 92817, 1986 WL 53402, at \*1 (N.D. Cal. 1986) (“While disclosure to one with a common interest does not necessarily waive the protection... the relationship between public accountant and client is at odds with such

- a guarantee because the public accountant has responsibilities to creditors, stockholders, and the investing public which transcend the relationship with the client.”).
103. See *supra* note 102 (citing cases).
  104. See *supra* note 102 (citing cases).
  105. See *Vacco v. Harrah's Operating Co., Inc.*, 2008 WL 4793719, at \*7 (N.D. N.Y. 2008) (recognizing trend and citing cases).
  106. In *U.S. v. Textron Inc. and Subsidiaries*, 577 F.3d 21, 30, 2009-2 U.S. Tax Cas. (CCH) P 50574, 104 A.F.T.R.2d 2009-5719 (1st Cir. 2009), cert. denied, 130 S. Ct. 3320, 176 L. Ed. 2d 1219 (2010), the First Circuit rejected Textron's argument that papers prepared by tax lawyers detailing Textron's potential tax liabilities were protected by the work product doctrine, where there was no evidence that the work papers were prepared for litigation or “would serve any useful purpose for Textron in conducting litigation if it arose.” “Textron's work papers were prepared to support financial findings and gain auditor approval.” *Textron*, 577 F.3d at 31. “[T]he work product privilege is aimed at protecting work done for litigation, not in preparing financial statements.” *Textron*, 577 F.3d at 31.
  107. See, e.g., *U.S. v. Goodapple*, 958 F.2d 1402, 1409, 35 Fed. R. Evid. Serv. 422 (7th Cir. 1992) (holding that communications between attorney and client while in the presence of government agents were not privileged); *S.E.C. v. Microtune, Inc.*, 258 F.R.D. 310, 317, 73 Fed. R. Serv. 3d 1034 (N.D. Tex. 2009) (holding that corporation waived privilege with respect to all documents relating to an internal investigation, based in part on the fact that the audit committee held meetings to discuss the internal investigation which were “regularly attended” by an outside auditing firm); *Larson v. Harrington*, 11 F. Supp. 2d 1198, 1200-01 (E.D. Cal. 1998) (holding that discussions of board of supervisors made in the presence of county counsel were not privileged where the record did not “show who was present at the meetings”).
  108. See, *supra* note 107 (citing cases).
  109. See, e.g., *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 797 (E.D. La. 2007).
  110. *In re Vioxx*, 501 F. Supp. 2d at 797 (quoting PAUL R. RICE, 1 ATTORNEY CLIENT PRIVILEGE IN THE UNITED STATES § 7:2, at 24-25 (Thomson West 2d ed. 1999)); see, e.g., *In re Sealed Case*, 737 F.2d 94, 99, 1984-1 Trade Cas. (CCH) ¶ 66062, 15 Fed. R. Evid. Serv. 1811 (D.C. Cir. 1984) (holding that, because the lawyer whose testimony was sought was an in-house attorney with “certain responsibilities outside the lawyers sphere... [t]he company can shelter [his] advice only upon a clear showing that [he] gave it in a professional legal capacity”); *AHF Community Development, LLC v. City of Dallas*, 258 F.R.D. 143, 147-48 (N.D. Tex. 2009) (“Because in-house attorneys are not retained by the client for a specific matter, they often become involved with the broader goals of the organization, blurring the line between legal and nonlegal communications. This calls for careful consideration of each communication to determine whether it should be protected from disclosure to further the purpose of the privilege.”); *U.S. v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076, 91 A.F.T.R.2d 2003-664 (N.D. Cal. 2002) (“Because in-house counsel may operate in a purely or primarily business capacity in connection with many corporate endeavors, the presumption that attaches to communications with outside counsel does not extend to communications with in-house counsel. With respect to communications involving in-house counsel, Chevron must make a ‘clear showing’ that the ‘speaker’ made the communications for the purpose of obtaining or providing legal advice.”); *Borase v. MIA COM, Inc.*, 171 F.R.D. 10, 14, 37 Fed. R. Serv. 3d 428 (D. Mass. 1997) (“[I]f an in-house counsel has other nonlegal responsibilities, the party invoking the privilege has the burden of producing evidence in support of its contention that in-house counsel was engaged in giving legal advice and not in some other capacity at the time of the disputed conversations.”).
  111. See, e.g., *AHF Cmty. Dev., LLC*, 258 F.R.D. at 147-48 (holding that defendants did not establish that the disputed documents involving in-house counsel were “related to specific legal advice or services that the City sought from [him]”); *Borase*, 171 F.R.D. at 14 (holding that proponent had failed to sustain its burden of demonstrating that in-house counsel was acting as an attorney rather than a businessman); *Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 43 (D. Conn. 1996) (holding that defendants had not sustained their burden of showing that the attorney-client privilege should apply, where they failed to demonstrate that the contested memorandum related to in-house counsel's status as a legal advisor and where the information contained therein was primarily business related).
  112. *In re Vioxx*, 501 F. Supp. 2d at 799 (explaining that, when compared to materials generated by or sent to outside counsel, courts have “increased the burden that must be borne by the proponent of corporate privilege claims relative to in-house counsel”); *Chevron Texaco Corp.*, 241 F. Supp. 2d at 1076; *Boca Investors Partnership v. U.S.*, 31 F. Supp. 2d 9, 12, 99-1 U.S. Tax Cas. (CCH) P 50182, 51 Fed. R. Evid.



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| <p>Serv. 106, 83 A.F.T.R.2d 99-2312 (D.D.C. 1998) (“Because an in-house lawyer often has other functions in addition to providing legal advice, the lawyer’s role on a particular occasion will not be self-evident as it usually is in the case of outside counsel.”).</p> <p>113. See <i>supra</i> note 23 (discussing SciClone Pharmaceuticals).</p> <p>114. Document collection may implicate the strict privacy laws adopted by various countries. See, e.g., John Reed Stark, <i>Preparing for the Perfect Storm: What Every Foreign Corrupt Practices Act Lawyer Should Know About E-Discovery</i>, 9 BNA PRIVACY &amp; SEC. L. REP. 1517 (Nov. 1, 2010) (discussing restrictions imposed by the European Union and the Asia-Pacific Economic Cooperation Privacy Framework).</p> | <p>115. SEC Enforcement Manual at § 4.3; U.S. Attorneys’ Manual at § 9-28.720.</p> <p>116. See <i>supra</i> note 91 (discussing the rejection of the selective waiver doctrine by many courts).</p> <p>117. See SEC Enforcement Manual at § 4.2 (“If a document is not privileged, but is non-responsive, staff should consider whether the information may be useful as a basis for an inquiry or investigation. In addition, staff may want to alert other regulators or law enforcement authorities if staff discovers evidence of non-securities-related violations”).</p> <p>118. When considering whether an inadvertent disclosure of protected material operates as a waiver, courts must consider whether “the holder of the privilege or protection took reasonable steps to prevent disclosure.” Fed. R. Evid. 502(b).</p> |
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