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Internal Investigations While the SEC Is Investigating

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For the general counsel of any company regulated by or whose securities are registered with the United States Securities and Exchange Commission (SEC), it can start in many different ways. A newspaper article critical of an industry-wide practice ruins a quiet Sunday morning. A Monday morning call from the CFO or Head of Internal Audit, "I think we have a problem. . . ." A regular Tuesday staff meeting includes a report on a letter from a former employee's lawyer or a call to the whistleblower hotline reporting a detailed complaint about an important conflict of interest practice. Or the dreaded Friday afternoon call from an SEC Enforcement attorney, "Thank you for taking our call. We are conducting a nonpublic enforcement investigation about your company and want to ask a few questions before we send a subpoena for documents involving. . . ."

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The past twenty years demonstrate that large companies and financial institutions can be undone overnight by financial fraud, market upheavals, or the shining of embarrassing light on once settled industry practices. No company is immune from the sudden scrutiny of the SEC. The newspaper article, the calls from senior officers or the SEC, and the report from management all can present risk to the survival of the enterprise.

Importantly, one of the SEC's goals is that its "[E]nforcement program is—and is perceived to be—everywhere, pursuing all types of violations of our federal securities laws, big and small."[1] The SEC is attempting to re-invigorate its financial fraud enforcement efforts, and touts the success and impact of its whistleblower program. The whistleblower program is aimed at incentivizing individuals for providing the SEC with evidence of illicit conduct occurring at companies.[2]

In the face of these risks, once a company receives notice of problems, it is imperative to consider quickly conducting an internal investigation while the SEC may be starting or conducting its investigation. The reasons for doing so include federal imperatives,[3] state law fiduciary duties of officers and directors,[4] and the emergence of state attorneys general and securities regulators.[5] When the potential wrongdoing implicates laws of other countries, potential liability and the complexity of conducting the investigation can be multiplied.[6] Although dealt with primarily in chapters 2 and 3, it is important to also consider the location of the documents and/or witnesses. If either is located in non-U.S. jurisdictions, the company must also take into account the governing data privacy laws, such as those of the E.U. or the resident country involved.

Finally, there is the economic exposure to be considered. The prospect of a significant monetary settlement with government regulators poses meaningful financial risk to the company.[7] That risk is further compounded by the increased financial consequences to the company under the SEC's

reconsideration of its longstanding policy of allowing settling companies to "neither admit nor deny" the factual findings.[8] While Congress has rolled back the prospects of civil class action liability in federal securities cases,[9] and the Supreme Court appears to have limited liability further,[10] an admission of facts supporting federal securities law violations in an SEC settlement could dramatically change prospects for private civil class liability.[11]

The information gathered through an independent investigation about the potential problem helps to mitigate these risks. A well-executed investigation discharges important duties,[12] while enabling a thorough response to halt and remediate troublesome conduct.[13] A properly organized and executed investigation also provides the critical basis for seeking credit with the SEC for cooperating with its investigation when the time comes to resolve an investigation and potential violations of law. On the other hand, making a decision *not* to conduct an internal investigation places the enterprise in the high-risk position of allowing concealed misconduct to continue, and putting the company at risk of additional civil or, in the worst case, criminal, liability. Simply put, the company should carefully weigh the decision whether to conduct an independent investigation when confronted with credible allegations or evidence of serious misconduct.[14]

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Initial Decisions

Q 1.1 What are the benefits of conducting an internal investigation when the SEC is investigating?

There are multiple benefits to conducting an internal investigation. Importantly, the company learns the extent of the issues involved and the potential consequences for the company so that management can immediately halt any ongoing misconduct and commence remediation efforts. In addition, the SEC views officers and directors of a company to have "affirmative responsibilities . . . to ensure that the shareholders whom they serve receive accurate and complete disclosure of information required by the proxy solicitation and periodic reporting provisions of the federal securities laws."[15] The company's failure to investigate potential "red flags" can lead to SEC scrutiny and even enforcement actions against individual officers and directors for such failures.[16] Furthermore, state laws also require directors to "ensure that reasonable information and reporting systems exist that would put them on notice of fraudulent or criminal conduct within the company. Such oversight programs allow directors to intervene and prevent frauds or other wrongdoing that could expose the company to risk of loss as a result of such conduct."[17]

CASE STUDY: *SEC v. Raval*

The SEC's enforcement action against Vasant Raval, a former audit committee chair of a public company, illustrates the risk to board members confronted with questionable transactions. Raval allegedly received reports the company was paying personal expenses and undisclosed related party transactions totaling in excess of $9 million related to the CEO. The SEC alleged that Raval failed in his duty to take steps to ensure the accuracy and completeness of the company's disclosures by failing to take appropriate action in response to the red flags he received about the transactions.[18] Raval settled the case by consenting to the entry of a permanent antifraud injunction, paying a $50,000 penalty and agreeing to be barred from acting as an officer or director of a public company for five years.[19]

Gaining clarity with respect to what happened also allows the company to better position itself with respect to the SEC's investigation. The internal investigation could mitigate the chances the SEC brings an enforcement action against the company for its employee misconduct or lessen the sanctions imposed on the entity. In 2001, the SEC released a section 21(a) report that noted it was "not taking action against the parent company, [Seaboard Corporation,] given the nature of the conduct and the company's responses" to an SEC investigation into whether the company's controller "caused the parent company's books and records to be inaccurate and its periodic reports misstated."[20] The SEC identified broad standards that influenced the decision not to file charges against the company, now known as the "Seaboard standards."[21] Although the SEC explicitly stated that the Seaboard Report did not create a steadfast rule upon which companies could expect relief, the Seaboard standards provide companies with a basic framework for responding to potential misconduct, including whether the management:

(1) stopped the misconduct, and sanctioned or terminated the responsible employee(s);

(2) disclosed the misconduct to the public, regulators and/or self-regulators;

(3) cooperated completely with appropriate regulatory and law enforcement bodies;

(4) took steps to identify the extent of damage to investors the misconduct caused;

(5) informed the company's audit committee and the Board of Directors;

(6) made available to the Staff the results of its review and provided sufficient documentation reflecting its response to the situation, including a thorough and probing written report detailing the findings of its review;

(7) disclosed information not directly requested by the SEC that it might otherwise not have uncovered; and

(8) asked its employees to cooperate with the SEC and made all reasonable efforts to secure such cooperation.[22]

These factors, among others, highlight the SEC's views of what constitutes an effective internal investigation.

Since the release of the Seaboard Report, the SEC further refined and reaffirmed its commitment to offering companies and individuals an incentive to cooperate with SEC investigations. The SEC's "Cooperation Initiative" encourages companies and relevant employees to cooperate with the agency's investigations and enforcement actions by clarifying what can be gained by cooperation.[23] The Cooperation Initiative means "[t]o improve the quality, quantity, and timeliness of information and assistance it receives."[24] As part of the Cooperation Initiative, the Seaboard standards became the framework for evaluating cooperation by individuals.[25]

Moreover, the Cooperation Initiative borrowed concepts from the U.S. Department of Justice's (DOJ) toolkit to fashion various agreements to promote cooperation and to incentivize favorable resolutions of enforcement actions.[26] These tools include: (i) cooperation

agreements, which formalize terms for the company or individual to receive credit for cooperating; (ii) deferred prosecution agreements, under which the SEC will "forgo an enforcement action . . . if the individual or company agrees to cooperate fully and truthfully and comply with express prohibitions and undertakings during a period of deferred prosecution"; and (iii) non-prosecution agreements, under which the SEC "agrees not to pursue an enforcement action against a cooperator if the individual or company agrees to cooperate fully and truthfully and comply with express undertakings."[27]

When a company considers whether to conduct an investigation, time is of the essence. As the SEC points out, "for those thinking about cooperating, you should seriously consider contacting the SEC quickly, because the benefits of cooperation will be reserved for those whose assistance is both timely and necessary. Latecomers rarely will qualify . . . ."[28] The list of companies that choose to investigate swiftly and cooperate with the SEC in exchange for cooperation credit is growing.[29] At the time the SEC announced that it would refrain from suing these entities the SEC highlighted the companies' swift initiation of their internal investigations. Recently, the SEC announced the decision to not sue individuals based on cooperation credit as well.[30]

Q 1.2 Who is the client in an internal investigation?

The company that engages the lawyer to do the investigation is the client.[31] When outside counsel conducts the investigation, as discussed in more detail below in Q 1.8 and Q 1.9, the engagement letter with counsel should leave no doubt that the company is the client.[32]

But, at the outset, it may be unclear whether one or more members of senior management or even the general counsel may be implicated in the conduct under investigation.[33] If they are, it is imperative that the supervision of the investigation remains free from conflicts of interest in order to objectively ascertain the facts, halt the misconduct, remediate the problems, and receive appropriate credit for having done so from the SEC. Since such potential conflicts are often unknown at the outset, the identity of the persons at the client overseeing the investigation—management, the board, the audit committee or a special committee of disinterested directors—needs to be carefully and constantly reconsidered. As discussed in greater detail below in

Q 1.15 and Q 1.16, failing to make clear that the client is the company (rather than one or more individual employees) can lead to conflicts if individual employees believe they are represented by those charged with conducting the investigation.

Q 1.3 Who at the company should be charged with overseeing the investigation?

A company acts only through individuals, and, ultimately, the board remains responsible for oversight of significant problems affecting shareholder interests. The board can choose to delegate that responsibility to the audit committee or a special committee of directors when that would be more effective or appropriate. In addition, the company should consider whether an attorney should supervise the investigation and report to the designated corporate client, such as the audit committee. Structuring oversight of the investigation this way avoids the inherent conflicts for senior management to manage the investigation where inappropriate influence could be exerted over individual employees. Furthermore, tasking independent directors with overseeing the investigation can demonstrate to the SEC the board's resolve to conduct an impartial investigation, supervised by independent individuals.

CASE STUDY: *In re Kellogg Brown & Root*

In re Kellogg Brown & Root[34] illustrates the overarching principle that courts are more willing to extend attorney-client privilege when the company's in-house counsel is involved in the investigation. Here, the Court of Appeals—reversing a lower court's decision—held that an investigation report was privileged because, in part, the report was prepared by a department in the company that reports to its in-house legal department. The court focused on the fact that the legal department ultimately supervised the investigation and that "obtaining or providing legal advice was one of the significant purposes of the internal investigation."

Charging an attorney with conducting the investigation also allows the communications with lawyers and agents of the lawyers to be protected by attorney-client privilege.[35] Similarly, work product generated by the lawyers also will be protected by the work product doctrine. When attorneys are not conducting or overseeing the investigation, courts have refused to extend the privilege over materials created during the course of the investigation, such as the audit report an auditor prepared.[36] Recently, in *In re Kellogg Brown & Root*, the D.C. Circuit Court of Appeals held that "[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies . . . even if the investigation was mandated by regulation rather than simply an exercise of company discretion."[37] Like the Supreme Court in *Upjohn* (as discussed in Q 1.10 below), the D.C. Circuit Court focused on the fact that the company's "investigation was conducted under the auspices of [its] in-house legal department, acting in its legal capacity."[38] Thus, if the company expects to maintain the confidentiality of an internal investigation, it is imperative for the company to have lawyers involved in planning the investigation from the outset.

In addition to the protections afforded by the attorney-client privilege as noted above, an investigation usually requires the investigator to analyze whether violations of the law occurred and recommend a course of action to assist the company with both correcting the violation and minimizing the company's further exposure. This analysis of the facts and subsequent recommendations typically requires an attorney acting with company employees from internal audit, accounting, finance, and any additional departments required to assist the attorney.

Objectives of Conducting an Internal Investigation

Q 1.4 What are the main goals of the investigation?

When the company receives notice of an informal SEC investigation—or worse yet a subpoena pursuant to a formal SEC investigation—first and foremost the company must "stop the bleeding." Irrespective of whether the company intends to claim any "cooperation credit"

down the road, for the sake of the corporation's health, it must find out the extent and depth of the issues so it can begin remediation as soon as possible. The troublesome conduct at issue must cease, and those employees involved must be dealt with effectively. In essence, the tone at the top must reflect the company's desire to do the right thing. The Seaboard Report cited the fact that:

> [w]ithin a week of learning about the apparent misconduct, the company's internal auditors had conducted a preliminary review and had advised company management who, in turn, advised the Board's audit committee, that [the controller] had caused the company's books and records to be inaccurate and its financial reports to be misstated. The full board was advised and authorized the company to hire an outside law firm to conduct a thorough inquiry. Four days later, [the controller] was dismissed, as were two other employees who, in the company's view, had inadequately supervised [the controller].[39]

In addition to setting the correct tone at the top, the company's prompt response allows those conducting the internal investigation to meet individually with relevant employees to gain an understanding of the pertinent facts. These employee interviews allow the company to instill the importance of confidentiality in the employees being questioned. In light of potential whistleblowers seeking to capitalize on their knowledge of the investigation or obtain cooperation credit for themselves,[40] those charged with conducting the witness interviews should explain to interviewed employees the importance of the confidentiality of the investigation. Further, limiting those individuals with knowledge of the investigation enables the company to attempt to avoid any dip in morale from knowledge of issues and limit the likelihood of a leak outside the company.

Q 1.5 Is it necessary to document the investigation in order to build a record?

Documenting the investigation to build a record protects the company's long-term interests. Internal investigations do not occur in a vacuum. The typical issues plaguing companies—such as employee turnover, lack of recollection and misremembering facts—also affect

internal investigations. Witnesses leave the company naturally during the course of an investigation and memories fade. Documenting the evidence obtained during an investigation allows the company to crystallize a witness's impressions at the earliest possible time.

Regardless of the factors leading to the investigation, it is imperative that all potentially relevant documents should be maintained. Documents serve an important purpose during the investigation. When witnesses offer competing, self-serving statements, documents created at or around the time the alleged malfeasance took place serve as an important check. In addition, adequately preserving documents allows the company to further demonstrate its willingness to cooperate in a comprehensive way. The failure to take steps calculated to preserve documentary evidence impedes a thorough investigation and seriously compromises the company's legal position with regulators, or in any ensuing litigation stemming from the SEC investigation. Even worse, under some extreme circumstances, it might lead to allegations of obstruction of justice.[41]

The SEC's Data Delivery Standards[42] outline what types of data it expects to receive (and thus what the company should endeavor to preserve). Accordingly, at the outset of the investigation, the company should work with its legal and internal audit departments to preserve documentary evidence. Normally, the first action is the issuance of a "document preservation notice" or a "litigation hold." A robust and thorough internal investigation allows the company to understand who could potentially have information (for example, documents and/or emails) relevant to the alleged misconduct. A company's understanding of the facts and employees involved helps ensure the company preserves as much evidence as possible and provides further support for the company's cooperation with the SEC's investigation.

The Intersection of the Internal Investigation & SEC Investigation

Q 1.6 What impact does the internal investigation have on the SEC investigation?

Besides demonstrating the company's cooperation through action rather than mere words, conducting an internal investigation impacts

the SEC investigation in several ways. First, it allows the company to discuss the scope and methodology of document review with the Staff of the SEC Division of Enforcement (the "Staff"). This dialogue serves as an implicit way to convey what is achievable and realistic so the company can manage the expectations of the government with respect to document delivery dates and volume of materials to be produced. Furthermore, the internal investigation allows management to reap the benefits discussed in Q 1.1 above, which include: (i) ensuring shareholders receive accurate and complete disclosure of information; (ii) demonstrating potential "red flags" have been investigated; and (iii) providing evidence a reporting system is in place to put management on notice of potential fraudulent or criminal conduct within the company.

Q 1.7 How can the company's internal investigation allow the company to respond efficiently to the SEC investigation?

The company's internal investigation can yield benefits applicable to the SEC investigation. In particular, facts learned during the course of the internal investigation shape the company responses to the SEC subpoenas or requests for information. For example, employee interviews allow the company to assess which employees could potentially hold relevant documents responsive to the SEC's subpoenas. Similarly, any electronic document searches conducted in connection with the internal investigation potentially can be used for responding to the SEC investigation. The key is to document the search process (that is, custodians searched, date restrictions applied, and search terms applied) to demonstrate to the SEC that the methods the company already employed can satisfy the SEC requests. Although the collection might not quell additional requests from the SEC, engaging with the SEC and discussing the potential to use the initial document collection as a starting point will likely prove beneficial. It might cause the SEC to refine its document requests and allow the company to conduct a more tailored (and therefore more cost effective) review.

Ensuring Independence When Needed

Q 1.8 What does it mean to be "independent"? Why is it important?

When structuring the internal investigation, the company should focus on creating a reporting structure free from any potential conflict. Doing so greatly aids the company in describing the investigation as independent. Properly structuring the investigation, however, requires the individual or individuals charged with initiating the investigation to analyze who may be implicated in the alleged wrongdoing. For example, although the company might be predisposed to charge the company's internal audit team with investigating the alleged conduct, it is important to examine whether senior management—the individuals to whom the independent audit team reports—could be implicated in the wrongdoing. This same calculus concerning independence could potentially disqualify the company's in-house counsel as well as the company's usual external counsel if there is any implication that the investigators' results could be swayed. Courts have found so-called "independent" internal investigations are tainted when the individuals perpetrating the illegal conduct impact or have a role in the investigative process.[43]

The importance of ensuring appropriate independence so regulators and law enforcement agencies view the results of the internal investigation as credible, conflict-free, and effective cannot be overstated. If the SEC doubts the report's findings, the company may receive little or no credit for cooperation and may not even be able to reply upon the findings itself, despite spending considerable sums on an internal investigation.

Q 1.9 When should the company engage independent counsel to undertake the internal investigation?

Relying on its in-house counsel to conduct the internal investigation has advantages. For instance, in-house lawyers are more familiar with the company's organization, file systems and general operations.

In addition, the in-house lawyers might be familiar to the employees, which could help ease tension during the interviews. Further, utilizing in-house lawyers could be less expensive. However, using in-house counsel has disadvantages. In-house counsel will likely be perceived as less independent by regulators and auditors. Moreover, conflicts could arise in instances where senior management is involved in the alleged wrongdoing and the in-house lawyers report to those same individuals. In addition, if the company's in-house counsel is located outside of the United States, then it is possible that it will not be afforded the same protections and privileges available to outside counsel, such as attorney-client privilege.

While engaging the company's typical external counsel might seem like the adequate choice, similar problems persist as with relying on in-house counsel to conduct the investigation. For instance, the company's external counsel likely has significant ties to management due to the relationships forged throughout years of interaction. In addition, the company's external counsel could be perceived as being too lenient on the company in an attempt to ensure the company's future legal work continues to flow its way. Also regular external counsel could have been involved in the conduct under examination.

One remedy to the problems posed by both in-house counsel and the company's typical external counsel is for the company to engage external counsel who is free from any material ties to the company or the conduct in question. In addition, the SEC will likely perceive independent external counsel as more objective. An added benefit of choosing external counsel other than the firm the company typically retains is the ability to choose lawyers with greater experience conducting internal investigations. Ideally, the company should seek counsel with established credibility with the SEC who worked on prior investigations or previously worked at the SEC or similar government entity.

Privilege Considerations

Q 1.10 Who has the privilege?

Properly defining the client determines who holds the privilege, as the client (and the client alone) benefits from the attorney-client

privilege. In instances where the client is the corporate entity, it is imperative the investigative team demarcate which individual waives the privilege and makes other decisions. In the seminal case *Upjohn v. United States*,[44] a company objected to the production of materials prepared in connection with an internal investigation.[45] These materials included low-level employee questionnaires completed at the direction of the company's in-house and external counsel. The Supreme Court noted that, in addition to the corporate executives (that is, the "control group"), middle-level and lower-level employees "will possess the information needed by the corporation's lawyers."[46] Thus, the company successfully maintained the privilege over the communications with lower-level employees, which the Court noted would allow "full and frank communication between attorneys and their clients."[47]

As noted in Q 1.15 and Q 1.16 below, the company should ensure the individual employees being interviewed do not mistakenly believe that the interviewing counsel also represents them in addition to the corporate entity. To sustain a claim that the investigating counsel also represents individuals for purposes of asserting a personal claim of attorney-client privilege, the individuals must affirmatively show: (i) they were seeking legal advice; (ii) they told counsel they were seeking legal advice in their individual—not representative—capacities; (iii) counsel saw fit to communicate with them knowing there could be a potential conflict; (iv) their conversations were confidential; and (v) their conversations did not concern matters within the company or the "general affairs of the company."[48]

Q 1.11 Are employees assisting with the investigation covered under the work product doctrine or attorney-client privilege?

Oftentimes internal investigations led by counsel (either in-house or external) require the assistance of various employees who are not members of the legal staff, such as internal audit professionals, who can assist with understanding the documents provided and the facts at issue. Typically, internal investigations run by counsel are considered to be of a legal nature and therefore protected by the attorney-client privilege.[49] These attorney-client privilege protections even extend to non-lawyers who assist with issues concerning accounting, financial

reporting or other related issues not explicitly legal in nature.[50] In order to maintain the privilege, however, the company must be able to demonstrate the "predominant purpose" of the communications was to provide legal advice rather than business advice.[51]

In instances where the SEC is actively investigating the company prior to the internal investigation's commencement, it is likely that employees' work in assisting in the investigation will also be covered under the work product doctrine because of the anticipation of litigation. State laws, however, must be reviewed carefully to ascertain whether the initiation of an SEC investigation will serve as a basis for the company to assert it does, in fact, anticipate litigation as a result.[52] When the work product doctrine applies, non-attorney employees can enjoy the protections of the doctrine when assisting an attorney "if it is 'so intertwined with the legal analysis as to warrant protection.'"[53] Thus, employees assisting with the investigation should create materials specifically for the investigation rather than in the ordinary course of business.

Q 1.12 Who can waive the privilege?

When the company is the client, only the corporate entity can waive the privilege. As discussed above in Q 1.10, the privilege belongs to the company so only it is authorized to waive the privilege.[54] "[T]he power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors."[55] An individual employee, officer or director acting in his or her *individual* capacity, however, cannot waive the privilege without the corporation's consent.[56]

Q 1.13 Should the company waive privilege with respect to its investigative findings?

The SEC has stated in its Enforcement Manual that a company's failure to waive privilege protections will not negatively impact its claim for cooperation credit.[57] This policy mirrors the current DOJ policy.[58] The SEC Enforcement Manual notes, however, that "if a party seeks cooperation credit for timely disclosure of relevant facts, the party must disclose all such facts within the party's knowledge."[59] This includes factual information learned through

attorney interviews, which might be reflected in the attorneys' notes and/or memoranda generated as a result of those interviews.[60] Thus, if the factual evidence is obtainable only through the memoranda generated by counsel, the company may have to consider furnishing those materials or otherwise reporting their content to the SEC in order to receive credit. Of particular note is the Seaboard Report, where the SEC noted that the company "did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the [company's internal] investigation."[61] However, this decision cannot be made lightly. The company should take under advisement whether to waive the privilege in light of the potential for future liabilities, such as shareholder civil lawsuits and potential criminal exposure.

Q 1.14 Can the company maintain its privilege if it produces privileged materials to the SEC?

In addition to deciding whether to waive privilege as it relates to the SEC, as described further in Q 1.19 below, companies must also be aware of the impacts such waiver could have generally on subsequent litigation, including shareholder litigation. A review of plaintiffs' firm websites and press releases demonstrate they too investigate the same conduct. If producing privileged materials to the SEC, such as the written results of the company's internal investigation, waives the attorney-client privilege, then this could potentially provide plaintiffs' firms with an unvarnished review of the facts at issue. To complicate matters, the majority of federal circuit courts have held that voluntary production of privileged materials to the government waives the privilege for all subsequent litigation.[62] These circuits appear to follow the D.C. Circuit's reasoning that "[t]he 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."[63]

Despite this bleak outlook to retain the privilege over documents shared with the government, the Fifth, Seventh, Ninth and Eleventh Circuits have not addressed this issue to date, and the Eighth Circuit has bucked the trend, holding that producing privileged materials to

the government will not necessarily waive the privilege.[64] Furthermore, in the recent case of *SEC v. Vitesse Semiconductor Corp.*, Judge Rakoff of the Southern District of New York held that:

> [w]hether a party has waived privilege by disclosing confidential materials to a governmental agency must be analyzed on a "case-by-case" basis in light of the Second Circuit's determination [in *In re Steinhardt Partners, L.P.*] that "[e]stablishing a rigid rule 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 disclosed materials.[65]

Although the language in Judge Rakoff's opinion is promising, the decision to produce privileged materials should be considered at length in order to best position the company with the SEC and potential subject matter waiver arguments in subsequent private civil litigation.

If the company decides to produce privileged materials in support of its findings, best practices are to enter into a confidentiality agreement with the SEC. The SEC's confidentiality agreement is a standard form. It is Appendix 1A to this chapter. The Staff typically does not have discretion to agree to any substantive changes to it, which will limit a company's ability to seek any greater protections as a result. As noted above, courts have found these confidentiality agreements prevent third parties (for example, shareholder plaintiffs) from asserting waiver arguments.[66]

Employee Issues

Q 1.15 How does the company manage current employees in an investigation?

When the company decides to engage either in-house or external counsel to conduct the internal investigation, the investigative team should tell employees that counsel represents the company rather than the employees individually (that is, provide an "*Upjohn* warning").[67] The *Upjohn* warning consists of company counsel explaining clearly

to the employee that: (a) counsel represents the company in connection with this fact-finding investigation, not them individually; (b) although the interview is protected by the attorney-client privilege, this privilege belongs to the company, and the company can decide to waive it; and (c) the employee must maintain the confidentiality of the interview to maintain the privilege. Company counsel should document in the resulting interview memo that such *Upjohn* warnings were given to the witness. Courts have held that unless individual employees clearly seek dual representation by the corporation's attorneys, they cannot prevent the corporation from disclosing communications they make in the course of the investigation even if they retain independent legal counsel at the onset of the investigation.[68]

In addition to protecting the company's privilege, counsel should also stress the importance of telling the truth in connection with the investigation. In situations where the company intends to cooperate fully with the SEC and provide the investigation materials to the government, including interview memoranda, employees could be held accountable for any misstatements and/or omissions. The government has charged employees with obstruction of justice when there is evidence that they knew or should have known any false statement made during an interview would be shared with the government.[69] As a result, counsel should provide "Zar" warnings to the employees, which state that the information provided during the interviews may be turned over to the government, and that the employees may be subjected to obstruction of justice charges if they provide untruthful information.[70]

When interviewing current employees, it is also important for the investigators to be cognizant of the fine line between interviewing a witness to obtain facts versus improperly coaching a witness for subsequent government questioning. Improperly providing advance notice of government questions to enable the witness to shape his or her responses can raise concerns about what was discussed and expose the internal investigation team to questions about how witnesses were interviewed.[71] Further, such allegations could potentially allow the government to reach otherwise privileged materials, such as interview preparation binders and notebooks.[72]

Due to the SEC's whistleblower program, it is also imperative that the company be cognizant of those protections afforded to whistleblowers, which prevent the company from retaliating against the employee for blowing the whistle.[73] In fact, any such retaliation can expose the company to private civil actions brought by the employee, which would allow the employee to seek reinstatement, compensation and costs associated with bringing the action.[74] In addition, such retaliation could lead to an additional SEC enforcement action separate from the conduct underlying the initial SEC inquiry.[75] However, the Fifth Circuit found that an employee who only reports the wrongdoing internally—and not to the SEC—does not qualify for the SEC whistleblower protections.[76] The Second Circuit held that the anti-retaliation provisions of Dodd-Frank do not apply extraterritorially and declined to address whether an employee who only reports wrongdoing internally qualifies for whistleblower protections[77]

Q 1.16 How does the company manage former employees in an investigation?

During the course of an investigation, the investigation team may need to speak with former employees about a matter within their scope of employment at the company. In situations like this—where the employee discusses matters within the scope of her employment—courts are likely to find the company can consider these privileged communications.[78] Thus, the same *Upjohn* warnings should be provided to these individuals as well to ensure the company is able to waive or protect its privilege if it chooses to do so. It should also be noted that it is possible that the Staff had already spoken with former employees since the SEC's policy does not require the Staff to notify the company before communicating directly with former employees.[79]

Q 1.17 Should the company identify potentially culpable employees to government regulators?

Pursuing individual wrongdoers is one of the SEC's enforcement priorities. In a May 19, 2014, speech to the New York City Bar Association, SEC Chair Mary Jo White stated:

> I want to dispel any notion that the SEC does not charge individuals often enough or that we will settle with entities in lieu of charging individuals. The simple fact is that the SEC charges individuals in most of our cases, which is as it should be. . . . [T]he cases where individuals are *not* charged are by far the exception, not the rule. . . . It should also not be a surprise that we focus our investigations initially on the individuals closest to the wrongdoing and work outward and upward from there to determine who else should be charged, including whether to charge the corporation. A company, after all, can only act through its employees and if an enforcement program is to have a strong deterrent effect, it is critical that responsible individuals be charged, as high up as the evidence takes us. And we look for ways to innovate in order to further strengthen our ability to charge individuals.[80]

Accordingly, what should a company do if and when its internal investigation identifies culpable individuals?

If the company is seeking to benefit from cooperation credit with the SEC, then the company should strongly consider providing the Commission with all of the relevant facts and evidence, including material that implicates individuals. As recently stated by Andrew Ceresney, Director of the SEC's Enforcement Division,

> [w]hen a company commits to cooperation and expects credit for that assistance, the [SEC's] Enforcement Staff expects them to provide us with all relevant facts, including facts implicating senior officials and other individuals. In short, when something goes wrong, we want to know who is responsible so that we can hold them accountable. If a company helps us do that, they will benefit.[81]

Ms. White's and Mr. Ceresney's comments dovetail with the DOJ's recent memorandum entitled "Individual Accountability for Corporate Wrongdoing" (the "Yates Memo") released on September 9, 2015,[82] which outlined the DOJ's enforcement policies and practices and which reiterated the DOJ's focus on the prosecution of individuals involved in corporate wrongdoing. In particular, the Yates Memo indicates that a prerequisite for corporate cooperation "credit" is that a corporation must disclose all relevant facts "relating to the individuals responsible for the misconduct."[83] In a speech she delivered on

September 10, 2015, Deputy Attorney General Yates clarified this requirement by stating that a corporation must "provide all relevant facts" regarding individual misconduct to receive any cooperation credit from the DOJ:

> [I]f a company wants any credit for cooperation, any credit at all, it must identify all individuals involved in the wrongdoing, regardless of their position, status or seniority in the company and provide all relevant facts about their misconduct. It's all or nothing. No more picking and choosing what gets disclosed. No more partial credit for cooperation that doesn't include information about individuals.[84]

Given the DOJ's view that cooperation credit requires identification of culpable individuals and given the SEC's views that a cooperating company will disclose "facts implicating senior officials and other individuals," it seems that a company has a strong incentive to disclose all relevant, non-privileged facts relating to individuals to the government. However, it remains to be seen whether this results in an increase in individual prosecutions and, if so, whether in-house or outside counsel's ability to conduct an internal investigation will be frustrated. Indeed, employees and corporate officers now may have a decreased incentive to cooperate with internal investigations—for fear of their own prosecution—which, in turn, could increase the difficulty and complexity of conducting internal investigations.

Reporting the Findings

Q 1.18 How should investigative findings be reported?

Reporting the progress of the investigation to the client is an important aspect of the internal investigation. Timely updates allow the client to assess the impact the malfeasance potentially could have on the company. In addition, regular updates allow the company to begin focusing on how to deal with those employees involved and how to best remediate the impact of the conduct at issue. The form these reports take, however, must be carefully considered.

Although written materials allow the client to access the information in a concise format, the company needs to understand the effects a written report could have. For example, if the internal investigation is not supervised by an attorney, it is possible that the final written report could be discoverable in later litigation.[85] If the report is disseminated to those other than the client, a future adversary potentially could argue the attorney-client privilege was waived. Thus, the company would have to rely on the work product doctrine for protection of the written materials. In order for a company's assertion that these materials fall under the work product doctrine to be effective, the company may need to demonstrate that it was exposed to litigation at the time of creation of the report.[86] The work product doctrine requires the materials to be prepared in anticipation of litigation, even if the litigation concerns an unrelated matter.[87] No work product protection attaches for documents prepared in the ordinary course of business rather than for the purpose of litigation.[88] In instances where there is only a remote possibility of future litigation, or mere speculation, materials may not be subject to protection under the attorney work product doctrine.[89]

Q 1.19 How should investigative findings be reported to the SEC?

The company should be mindful that in addition to assisting the SEC in its investigation, reporting findings from an internal investigation to the SEC allows management to show it responded appropriately to red flags, and allows the company to demonstrate it is prepared to report adequately any material information to shareholders. Doing so helps the company satisfy its duties of oversight and its reporting requirements.[90]

If the company's goal is ultimately to receive cooperation credit from the SEC, the company needs to report any new developments learned during the course of the investigation. Similarly, the update needs to be made in a timely fashion, and the company must decide whether to report its findings to the SEC in written form or orally. As previously discussed, while written work product will allow the Staff to retain the information the company presents, it may impact privilege assertions in future civil litigation.[91]

There are, however, additional ways for the company to report its findings while reducing the risk of waiving its privilege. For example, rather than producing a written report drafted by counsel, the company can report its findings using underlying non-privileged documents the investigative team collects during the investigation presented in an organized way. The company can then request a meeting with the Staff to discuss the documents and walk through the conclusions the company reached based on the documents as well as any explanation individual employees provided during their witness interviews.

The company might also learn of unrelated wrongdoing throughout the course of the investigation. Thus, the question arises as to whether the company should self-report these findings to the SEC as well. This is a judgment call for the company. Not every issue of interest needs to be disclosed to the SEC. If the SEC were to uncover the same wrongdoing during the course of its own investigation, however, and were to determine the wrongdoing is significant, the failure to disclose the new misconduct to the SEC could undermine the company's and counsel's credibility.

Notes to Chapter 1

1. Mary Jo White, Chair, SEC, Remarks at the Securities Enforcement Forum (Oct. 9, 2013), www.sec.gov/News/Speech/Detail/Speech/1370539872100.

2. Andrew Ceresney, Director, Division of Enforcement, Speech at the Sixteenth Annual Taxpayers Against Fraud Conference (Sept. 14, 2016) ("The success of the program can be seen, in part, in the over $107 million we have paid to 33 whistleblowers for their valuable assistance, in cases with more than $500 million ordered in sanctions."), https://www.sec.gov/news/speech/ceresney-sec-whistle blower-program.html.

3. "Cooperation is a potential mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution." U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS, tit. 9, ch. 9-28.700 (2006), www.justice.gov/opa/documents/corp-charging-guidelines.pdf; *see also* 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, Exchange Act Release No. 44,969, 76 SEC Docket 296 (Oct. 23, 2001) [hereinafter Seaboard Report], https://www.sec.gov/litigation/investreport/34-44969.htm.

4. *See generally* Stone v. Ritter, 911 A.2d 362 (Del. 2006); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996) ("relevant and timely information is an essential predicate for satisfaction of the board's supervisory and monitoring role under Section 141 of the Delaware General Corporation Law").

5. *See, e.g.*, Stipulation of Settlement, People v. Bank of Am. Corp., No. 450115/2010 (N.Y. Sup. Ct. Apr. 17, 2014); Complaint, *In re* Putnam Advisory Co., LLC (Pyxis ABS CDOs), No. 2011-0035 (Commonwealth of Mass., Office of the Sec'y of the Commonwealth, Sec. Div. Oct. 17, 2011).

6. For example, Barclays paid $453 million to U.S. and British authorities to settle charges of manipulating the LIBOR lending rate. Siemens AG and its subsidiaries agreed to: (i) pay a fine of $450 million to resolve criminal charges brought by the DOJ for conspiracy to violate the FCPA and knowingly circumventing and failing to maintain adequate internal controls, (ii) disgorge approximately $350 million in ill-gotten gains in connection with an SEC action for violating the FCPA, and (iii) pay German authorities €596 million in connection with alleged FCPA violations and failure of its former managing board to fulfill its supervisory duties.

7. The following settlements demonstrate that the sums associated with wrongdoing can reach eye-popping totals: Teva Pharmaceutical ($519 million for paying bribes to foreign officials in Russia, Ukraine, and Mexico); Och-Ziff ($412 million for making illicit payments to high-level government officials in Africa);

LG Display, AU Optronics, and Toshiba ($571 million for artificially inflating the price of LCD panels); ING ($619 million for violating U.S. sanctions against Iran and Cuba).

8. In a speech given to institutional investors in 2013, Chair Mary Jo White outlined those cases that could potentially require a public admission of wrongdoing, including the following:

- Where a large number of investors have been harmed or the conduct was otherwise egregious;
- Where the conduct posed a significant risk to the market or investors;
- Where admissions would aid investors deciding whether to deal with a particular party in the future; and
- Where reciting unambiguous facts would send an important message to the market about a particular case.

Mary Jo White, Chair, SEC, Deploying the Full Enforcement Arsenal (Sept. 26, 2013), www.sec.gov/News/Speech/Detail/Speech/1370539841202. Chair White has noted that the SEC's shift toward requiring settling companies in some instances to publicly admit wrongdoing stems from her former work as a prosecutor. When she entered into the first deferred prosecution agreement with a company back in 1974, she decided "that a public admission of wrongdoing was required for the resolution to have sufficient teeth and public accountability." *Id.*

9. *See, e.g.*, Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227; Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

10. Although the U.S. Supreme Court upheld the fraud-on-the-market presumption as a means for securities-fraud class-action plaintiffs to establish reliance, the Court's decision gives securities-fraud defendants the ability to rebut this presumption at the class-certification stage using evidence to show the misrepresentations did not impact the company's stock price. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2417 (2014).

11. Historically, "[t]he persuasive weight of authority declines to ascribe preclusive effect to consent decrees when there has been no admission of liability and in the absence of clear evidence concerning the parties' intention to be bound collaterally. . . . The consent decree is an important weapon in the arsenal of the Securities and Exchange Commission in policing securities fraud and a holding that consent to the entry of a decree in one case automatically precludes a defendant from defending himself in subsequent litigation would diminish its use and effectiveness." *In re* Cenco, Inc. Sec. Litig., 529 F. Supp. 411, 416 (N.D. Ill. 1982). However, if a defendant were to admit to the allegations in the SEC's enforcement action, issue preclusion could be found in subsequent civil litigation.

12. *See supra* note 4.

13. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2016), www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8#NaN.

14. Management's conscious avoidance of red flags could translate into willful blindness in the eyes of the SEC Enforcement Staff (the "Staff"). Recently, the SEC bought fraud charges against a company and its directors for failure "to conduct or prompt the company to conduct any further meaningful investigation into [alleged] misconduct. . . . Even as additional red flags arose in June and July 2011, [management] failed to take appropriate actions." Press Release, SEC, SEC Charges Animal Feed Company and Top Executives in China and U.S. with Accounting Fraud (Mar. 11, 2014), www.sec.gov/News/PressRelease/Detail/PressRelease/1370541102314.

15. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Concerning the Conduct of Certain Former Officers and Directors of W.R. Grace & Co., Exchange Act Release No. 39,157 (Sept. 30, 1997) [hereinafter W.R. Grace Report], https://www.sec.gov/litigation/investreport/34-39157.txt.

16. On March 15, 2010, the SEC filed a settled action against Vasant Raval, former Chairman of the Audit Committee of infoUSA Inc. (now InfoGroup Inc.). At its core, the lawsuit alleged that Mr. Raval failed to sufficiently investigate certain "red flags" surrounding the company's former CEO and Chairman of the Board. *See* Complaint at 1, SEC v. Raval, No. 8:10-cv-00101 (D. Neb. Mar. 15, 2010).

17. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 131 (Del. Ch. 2009).

18. Complaint, SEC v. Raval, No. 8:10-cv-101, (D. Neb. Mar. 15, 2010), https://www.sec.gov/litigation/complaints/2010/comp21451-raval.pdf.

19. Press Release, SEC, SEC Charges Former Executives in Illegal Scheme to Enrich CEO With Perks (Mar. 15, 2010).

20. Seaboard Report, *supra* note 3.

21. *Id.*

22. *Id.*

23. *See* Press Release, SEC, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010) [hereinafter SEC Cooperation Initiative Press Release], www.sec.gov/news/press/2010/2010-6.htm. When this initiative was announced, the Director for the SEC's Division of Enforcement highlighted "[t]his is a potential game-changer for the Division of Enforcement." *Id.*

24. *Id.*

25. *See* SEC, ENFORCEMENT COOPERATION PROGRAM, www.sec.gov/spotlight/enfcoopinitiative.shtml [hereinafter SEC Cooperation Program]. In addition, the SEC has released a statement that suggests the company's prompt remedial actions and cooperation with the Staff are factors the SEC considers when determining whether or not to impose a penalty on the company. *See* Press Release, SEC, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), www.sec.gov/news/press/2006-4.htm. However, it is unclear whether the Commission is still applying the factors referenced within that 2006 press release. *See* Commissioner Daniel M. Gallagher, Remarks at Columbia Law School Conference (Hot Topics: Leading Current Issues in

Securities Regulation and Enforcement) (Nov. 15, 2013), www.sec.gov/News/Speech/Detail/Speech/1370540386071 ("Over the years, questions have been raised about whether the Penalties Statement is binding on the Commission. This issue is a red herring. The Penalties Statement is an analysis of the law conferring corporate penalty authority on the Commission, and it is that law that binds the Commissioners. Even if there were no Penalties Statement at all, that law would still guide the decision-making of the Commissioners.").

26. *See* SEC Cooperation Program, *supra* note 25.

27. *Id.*

28. Robert S. Khuzami, Director of Division of Enforcement, SEC, Speech by SEC Staff: Remarks at News Conference Announcing Enforcement Cooperation Initiative and New Senior Leaders (Jan. 13, 2010), www.sec.gov/news/speech/2010/spch011310rsk.htm.

29. Apple, Inc., Putnam Fiduciary Trust, Electro Scientific, Morgan Stanley, First Solar, Tenaris S.A., Carter's Inc., and Ralph Lauren.

30. On November 12, 2013, the SEC announced it had also entered into its first deferred prosecution agreement with an individual. *See* Press Release, SEC, SEC Announces First Deferred Prosecution Agreement with Individual (Nov. 12, 2013), www.sec.gov/News/PressRelease/Detail/PressRelease/1370540345373.

31. *See In re* Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001) ("The default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption. . . . This makes perfect sense because an employee has a duty to assist his employer's counsel in the investigation and defense of matters pertaining to the employer's business.") (citations omitted).

32. For the importance of defining the "client" for purposes of asserting—and protecting—privilege, see *infra* QQ 1.10–1.14.

33. *See, e.g.*, Press Release, Siemens AG, Siemens: Pierer Paves the Way for Personnel Change (Apr. 19, 2007), www.siemens.com/press/en/pr_cc/2007/04_apr/axx20070470_1444601.htm.

34. *In re* Kellogg Brown & Root, Inc., 756 F.3d 754 (D.C. Cir. 2014).

35. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 401 (1981) (applying the attorney-client privilege to attorneys' notes generated during the course of an internal investigation).

36. *See* United States v. ISS Marine Servs., Inc., 905 F. Supp. 2d 121 (D.D.C. 2012).

> For the results of an internal investigation to enjoy the attorney-client privilege, the company must clearly structure the investigation as one seeking legal advice and *must ensure that attorneys themselves conduct or supervise the inquiries* and, at the very least, the company must make clear to the communicating employees that the information they provide will be transmitted to attorneys for the purpose of obtaining legal advice.

Id. at 131 (emphasis added).

37. *In re* Kellogg Brown & Root, 756 F.3d at 758–59.

38. *Id.* at 757.

39. Seaboard Report, *supra* note 3.

40. The SEC's Cooperation Initiative also set forth the factors it would consider when determining whether to bring an action against the individuals. In general, these include the following categories: (i) the assistance provided by the cooperating individual; (ii) the importance of the underlying matter in which the individual cooperated; (iii) the societal interest in ensuring the individual is held accountable for his or her misconduct; and (iv) the appropriateness of cooperation credit based upon the risk profile of the cooperating individual. SEC Cooperation Program, *supra* note 25; *see also* SEC, DIV. OF ENFORCEMENT, ENFORCEMENT MANUAL § 6.1.1 (Oct. 28, 2016) [hereinafter SEC ENFORCEMENT MANUAL], www.sec.gov/divisions/enforce/enforcementmanual.pdf.

41. *See, e.g.*, United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006). Frank Quattrone, a Credit Suisse executive, was charged with obstruction when he emailed other employees and urged them to delete documents in accordance with document retention policies once he heard about a government subpoena for documents. *Id.* at 167–68.

42. SEC, DATA DELIVERY STANDARDS (rev. July 2016), www.sec.gov/divisions/enforce/datadeliverystandards.pdf.

43. *See* Kirschner v. K&L Gates LLP, 46 A.3d 737, 758 (Pa. Super. Ct. 2012) (the plaintiff trustee asserted in its complaint that the team investigating the conduct provided the employee involved with a copy of the internal report, which ultimately found him to be engaged in no illicit conduct—a falsity that was later uncovered by the trustee).

44. Upjohn v. United States, 449 U.S. 383 (1981).

45. *Id.* at 388.

46. *Id.* at 391.

47. *Id.* at 389.

48. United States v. Graf, 610 F.3d 1148, 1159–60 (9th Cir. 2010); *see also In re* Grand Jury Subpoena, 274 F.3d 563, 571–72 (1st Cir. 2001); *In re* Grand Jury Subpoenas, 144 F.3d 653, 659 (10th Cir. 1998); *In re* Grand Jury Proceedings, 156 F.3d 1038, 1040–41 (10th Cir. 1998); United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 214–15 (2d Cir. 1997); Ross v. City of Memphis, 423 F.3d 596, 605 (6th Cir. 2005).

49. *See, e.g., Upjohn*, 449 U.S. at 390–91; Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1977).

50. *Diversified Indus.*, 572 F.2d at 610.

51. *See, e.g.*, *In re* County of Erie, 473 F.3d 413, 420 (2d Cir. 2007) ("We consider whether the predominant purpose of the communication is to render or solicit legal advice.").

52. *See* Guzzino v. Felterman, 174 F.R.D. 59, 63 (W.D. La. 1997).

> The fact that the activities of Jody Felterman ultimately resulted in extensive investigation by the SEC and the NASD and the filing of over a hundred civil lawsuits in federal and state court does

> not cloak the documents created by Dean Witter's investigation of the Morgan City office with work product immunity because the evidence does not establish that the primary motivating purpose behind the investigation and the creation of the withheld documents was to aid in possible future litigation. Instead, the evidence presented by Dean Witter indicates that the investigation was conducted in the ordinary course of business and/or to prepare for potential investigations by the SEC and NASD. This finding excludes the withheld documents from work product immunity.

Id.

53. United States v. ISS Marine Servs., Inc., 905 F. Supp. 2d 121, 134 (D.D.C. 2012) (citing United States v. Deloitte LLP, 610 F.3d 129, 139 (D.C. Cir. 2010)).

54. *See* Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985).

55. *Id.*

56. *See In re* Grand Jury Proceedings, 219 F.3d 175, 184–85 (2d Cir. 2000) (holding that "when a corporation decides to waive the privilege its officers or counsel must communicate this decision, it does not necessarily follow that a corporate officer testifying in his *individual* capacity can waive the corporate privilege without that entity's consent").

57. *See* SEC ENFORCEMENT MANUAL, *supra* note 40, § 4.3 ("Voluntary disclosure of information need not include a waiver of privilege to be an effective form of cooperation and a party's decision to assert a legitimate claim of privilege will not negatively affect their claim to credit for cooperation.").

58. *See* Memorandum from Mark Filip, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations, at 9-28.710 (Aug. 28, 2008) [hereinafter Filip Memo], www.justice.gov/dag/readingroom/dag-memo-08282008.pdf.

59. SEC ENFORCEMENT MANUAL, *supra* note 40, § 4.3; *cf.* Filip Memo, *supra* note 58, at 9-28.710 ("What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review.").

60. *See* SEC ENFORCEMENT MANUAL, *supra* note 40, § 4.3. The SEC Enforcement Manual explicitly provides that:

> Certain notes and memoranda generated from attorney interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product protection. To receive cooperation credit for providing factual information obtained from the interviews, the corporation need not necessarily produce, and the staff may not request without approval,

> protected notes or memoranda generated by the attorneys' interviews. *To earn such credit, however, the corporation must produce, and the staff always may request, relevant factual information—including relevant factual information acquired through those interviews.*

Id. (emphasis added).

61. Seaboard Report, *supra* note 3.

62. *See, e.g.*, *In re* Qwest Commc'ns Int'l, Inc. Sec. Litig., 450 F.3d 1179, 1181 (10th Cir. 2006); *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 291 (6th Cir. 2002); United States v. Mass. Inst. of Tech., 129 F.3d 681, 688 (1st Cir. 1997); *In re* Steinhardt Partners, L.P., 9 F.3d 230, 232 (2d Cir. 1993); Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1418 (3d Cir. 1991); Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

63. *Permian Corp.,* 665 F.2d at 1221.

64. *See Diversified Indus.*, 572 F.2d at 611.

65. SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 310, 313 (S.D.N.Y. 2011).

66. *See, e.g.*, *id.* at 313 (citing Police & Fire Ret. Sys. of Detroit v. Safenet, Inc., 2010 WL 935317 (S.D.N.Y. Mar. 12, 2010) and *In re* Nat. Gas Commodities Litig., 232 F.R.D. 208 (S.D.N.Y. 2005)).

67. For a description of the *Upjohn* case, from which the name of the warning derives, see *supra* Q 1.10.

68. *Cf.* United States v. Ruehle, 583 F.3d 600, 607, 611–12 (9th Cir. 2009).

69. *See, e.g.*, Press Release, Dep't of Justice, Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges (Sept. 22, 2004), www.justice.gov/opa/pr/2004/September/04_crm_642.htm.

> In February 2002, CA retained a law firm to represent it in connection with the government investigations. Shortly after being retained, the company's law firm met with Kumar, Richards, Woghin and other CA executives in order to inquire into their knowledge of the practices that were the subject of the government investigations. During these meetings, the defendants and others allegedly failed to disclose, falsely denied and concealed the existence of the 35-day month practice. Kumar, Richards, Woghin and others allegedly presented to the law firm an assortment of false justifications to explain away evidence of the 35-day month practice. The indictment alleges that Kumar, Richards and Woghin knew, and in fact intended, that the company's law firm would present these false justifications to the U.S. Attorney's Office, the SEC and the FBI in an attempt to persuade the government that the 35-day month practice never existed.

Id.

70. *See* Information at 10, 12, 16–17, United States v. Zar, No. 04-331 (ILG) (E.D.N.Y. Apr. 8, 2004) (charging a company's CFO with conspiracy to obstruct justice for providing false statements to the company's outside counsel, which the CFO knew would be shared with the government, during an internal investigation).

71. *Cf.* United States v. Scrushy, 2012 U.S. Dist. LEXIS 8332, at *36–38 (M.D. Ala. Jan. 24, 2012).

72. *Cf. id.* at *45–47.

73. *See* SEC, OFFICE OF THE WHISTLEBLOWER, FREQUENTLY ASKED QUESTIONS, www.sec.gov/about/offices/owb/owb-faq.shtml#P40_9612 ("Employers may not discharge, demote, suspend, harass, or in any way discriminate against you because of any lawful act done by you in providing information to [the SEC] under the whistleblower program or assisting [them] in any investigation or proceeding based on the information submitted. . . . Also, under the Sarbanes-Oxley Act, you may be entitled to file a complaint with the Department of Labor if you are retaliated against for reporting possible securities law violations, including making internal reports to your company.").

74. *Id.*

75. *Id.; see also* 17 C.F.R. § 240.21F-2 (2011).

76. *See* Asadi v. G.E. Energy U.S., L.L.C., 720 F.3d 620, 623 (5th Cir. 2013) ("For the reasons that follow, we hold that the plain language of the Dodd-Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC.").

77. Liu Meng-Lin v. Siemens AG, 763 F.3d 175 (2d Cir. 2014) (affirming dismissal of former employee's suit against his former employer).

78. *See, e.g.*, *Upjohn*, 449 U.S. at 403 (Burger, C.J., concurring in part and concurring in the judgment) (a former employee's communication is privileged when she "speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment"); *see also In re* Allen, 106 F.3d 582, 606 (4th Cir. 1997) (holding that privilege extends to former employees).

79. *See* SEC ENFORCEMENT MANUAL, *supra* note 40, § 3.3.6.1 ("Consent of the organization's lawyer is not required for communication with a former constituent").

80. Mary Jo White, Chair, SEC, Three Key Pressure Points in the Current Enforcement Environment, Remarks at the NYC Bar Association's Third Annual White Collar Crime Institute (May 19, 2014), www.sec.gov/News/Speech/Detail/Speech/1370541858285.

81. Andrew Ceresney, Director, Division of Enforcement, SEC, The SEC's Cooperation Program: Reflections on Five Years of Experience, Remarks at the University of Texas School of Law's Government Enforcement Institute in Dallas (May 13, 2015), www.sec.gov/news/speech/sec-cooperation-program.html.

82. Sally Q. Yates, Deputy Attorney General, DOJ, Individual Accountability for Corporate Wrongdoing, Memorandum (Sept. 9, 2015), www.justice.gov/dag/file/769036/download.

83. *Id.* at 2.

84. Sally Q. Yates, Deputy Attorney General, DOJ, Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

85. *See* United States v. ISS Marine Servs., Inc., 905 F. Supp. 2d 121, 138 (D.D.C. 2012) (quoting Janicker *ex rel.* Janicker v. George Wash. Univ., 94 F.R.D. 648, 650 (D.D.C. 1982) ("A more or less routine investigation of a possibly resistible claim is not sufficient to immunize an investigative report developed in the ordinary course of business.").

86. *See, e.g.*, Velsicol Chem. Corp. v. Parsons, 561 F.2d 671, 676–77 (7th Cir. 1977) (holding that documents prepared in connection with an earlier administrative proceeding were not protected in connection with the later criminal proceeding).

87. *See, e.g.*, United States v. Adlman, 134 F.3d 1194, 1996–2002 (2d Cir. 1998) (finding that "in anticipation of litigation" means "if 'in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained *because of* the prospect of litigation'"); *see also In re* Murphy, 560 F.2d 326, 335 (8th Cir. 1977); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 484–85 & n.15 (4th Cir. 1973).

88. *See Diversified Indus.*, 572 F.2d at 604.

89. *See In re* Special Sept. 1978 Grand Jury, 640 F.2d 49, 65 (7th Cir. 1980) ("[A] remote prospect of future litigation is not sufficient to invoke the work product doctrine.").

90. *See supra* notes 16–20.

91. *See supra* Q 1.14.