GOODWIN

A GUIDE TO CORPORATE INTERNAL INVESTIGATIONS

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In-house teams at public and private companies are confronted almost daily with evidence or allegations of potential internal wrongdoing. These scenarios may vary widely in severity and magnitude—from notification of a government investigation into potential violations of federal law by a member of senior management, to a routine internal complaint of violations of the company code of conduct or employee policy. In most instances, the company would be best served by conducting some type of internal review into the allegations. However, deciding whether and how to conduct an internal investigation requires consideration of a variety of factors. These typically include the nature of the corporation, the specific conduct, subject matter, and alleged actor(s) at issue, the applicable law, and, where appropriate, the government's enforcement priorities. And if an internal investigation is undertaken, there are a number of decisions that should be made at the outset, including who should conduct the investigation, the goals and parameters of the review, and whether a report—written or oral—will be issued. This article sets forth a framework of best practices and considerations for conducting effective internal investigations, as well as the most common pitfalls to avoid.

I. DECIDING WHETHER TO INVESTIGATE

The threshold issue to be considered upon learning of potential wrongdoing is whether to initiate an internal investigation at all. On balance, most scenarios warrant *some* kind of internal investigation, both for business purposes and in the event of scrutiny by government regulators or potential private litigants. U.S. regulators increasingly expect that companies will monitor their own conduct and report potential wrongdoing to the appropriate enforcement agencies. Likewise, private plaintiffs are filing more cases with significant allegations that attempt to call corporations' conduct into question. Under the right circumstances, conducting an effective internal investigation protected by the attorney-client privilege can benefit the company in a number of ways:

- Developing a comprehensive understanding of the facts necessary to assess a company's potential criminal and civil exposure;
- Remedying the conduct to prevent further violations;
- Memorializing the company's good faith response to the facts as they become known;
- Insulating senior management and/or the company board against allegations of complicity; and
- Promoting a culture of transparency and compliance.

If it appears that the government has already initiated an investigation into the alleged conduct or that one is probable, then the case for initiating an internal investigation is even stronger. It is almost always in the best interests of the company to gather information to allow it to respond effectively to the government. By controlling the facts, counsel is best equipped to argue against prosecution and to respond to government requests. An internal investigation also reduces surprises that may arise during a government investigation, allowing

the company's legal advisors to stay ahead of the outside investigators.

The incentive for a company to conduct an internal investigation in order to stay ahead of the government and gather the information necessary to respond effectively and promptly to government inquiries has only increased in recent years, in light of the so-called "Yates Memo." In September 2015, former Deputy Attorney General Sally Yates issued a memorandum to prosecutors within the Department of Justice regarding "Individual Accountability for Corporate Wrongdoing," commonly referred to as the "Yates Memo." The Yates Memo reflects the Department of Justice's increased focus on individual wrongdoing in the context of corporate investigations following the perceived shortcomings of enforcement actions during the financial crises that resulted in billions of dollars in penalties but no individual prosecutions. It therefore requires that a company under investigation "provide to the Department all relevant facts about the individuals involved in corporate misconduct" in order to qualify for any cooperation credit.[2] Under the Yates Memo, a company is encouraged to "do investigations that are timely, appropriately thorough and independent, and report to the government all relevant facts about all individuals involved, no matter where they fall in the corporate hierarchy."

Depending on the nature of conduct at issue, the Yates Memo raises the stakes for a company deciding whether to conduct an internal investigation when faced with allegations of wrongdoing. As Ms. Yates said at the time: "If they [companies] want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals."[3] By "cooperation credit," Ms. Yates was referring to the United States Federal Sentencing Guidelines (the "Guidelines") for corporations, which affect a corporation's civil or criminal penalty and is determined not just by the underlying crime, but by the conduct of a corporation before and during any government investigation.

For example, the Guidelines provide for an increase in criminal fines to be imposed on corporations in connection with criminal violations of federal law if senior corporate personnel "participated in, condoned, or [were] willfully ignorant of the offense" or if "tolerance of the offense by substantial authority personnel was pervasive throughout the corporation." U.S.S.G. § 8C2.5(b)(1)(A)(i)-(ii). On the other hand, the Guidelines provide for a reduction in a corporate criminal fine under certain circumstances, such as if the criminal offense occurred despite "an effective program to prevent and detect violations of law." § 8C2.5(f)(1). There is a presumption that the program was not effective if senior management participated in, condoned, or were willfully ignorant of the offensive conduct. § 8C2.5(f)(3)(B).

If, however, upon learning of potential misconduct, a company promptly undertook an internal investigation and implemented appropriate remedial action, this can assist a company in arguing against the imposition of criminal or civil penalties. Previously, a company could receive partial credit for "significant" cooperation in an investigation. However, the Yates Memo made clear that a company must provide the Department of Justice with facts regarding individual wrongdoing as a threshold requirement in order to be considered for cooperation credit. As such, under this policy, the incentives for a company to conduct a thorough, independent, and properly scoped and documented investigation at the outset are more compelling than ever.[4]

The results of an internal investigation also can help the company determine how to proceed in its discussions with the government during a government investigation. Among other things, it will help a company decide whether it should seek to settle the government investigation or persuade the government to agree to a favorable settlement. In the event that a government investigation is threatened but has not yet been initiated, disclosing the results of an internal investigation may assist the company in persuading the government that no government investigation is necessary, or that the government investigation need not be as far-reaching as it might otherwise be.

A careful internal investigation also allows the corporation to discuss the subject matter of the investigation with employees and potentially mitigate unnecessarily harmful testimony down the road. It may provide an opportunity to help lock in the testimony of witnesses at an early stage. An internal investigation is also particularly prudent if private litigation has been commenced or is probable. A prompt and effective internal investigation and appropriate

remediation of certain allegations of misconduct may assist a company in mounting a successful affirmative defense in private litigation. Finally, an internal investigation allows a company to assess its systems and controls, and to develop an appropriate system of remedial measures to address any deficiencies.

Whether to initiate an internal investigation may be a more difficult decision when the government has not yet initiated an investigation or is unlikely to do so. Despite its many benefits, an internal investigation does have certain costs. They generally do not override the need for an internal investigation, but the potential costs of such a review must nevertheless be addressed. For instance, if the investigation is not privileged, it could create a roadmap for government officials and private (perhaps class action) litigants. Even if counsel has faithfully cloaked an investigation with layers of privilege, the company may be forced (or, at least, strongly encouraged) to waive that privilege and share all aspects of its internal investigation with the government. Finally, an internal investigation can be disruptive and costly in terms of fees and lost business opportunities. Document collection, e-mail review, and difficult questions in interviews may be distracting and impact employee morale. Ideally, the internal review remains privileged and confidential from the public, but there also could be reputational concerns if the investigation becomes known to the public.

But despite the potential costs, it is almost always preferable to get to the bottom of the matter. For one thing, a company's willingness and capacity to conduct an effective internal investigation is an important component of an effective compliance program. And senior management has an obligation to take appropriate steps when confronted with indications of potential misconduct. Conducting an internal review *now* also can avoid exposing the company and board to risk of regulatory action or private litigation later—if, for instance, the problem goes undetected or is not remediated and, ultimately, recurs.

II. STAFFING THE INVESTIGATION

Despite the potential costs, in most instances an internal investigation is necessary. The next decision is who should conduct the investigation. Generally speaking, the answer to this question depends on the nature and seriousness of the allegations, as well as the strength of the evidence suggesting misconduct has occurred.

Counsel, auditors, or human resources

Allowing internal auditors, compliance personnel, or human resources staff to conduct the investigation (as opposed to in-house or outside counsel) may be less disruptive and could decrease the employees' level of concern over the seriousness of the situation. Such internal reviewers may also be the most economical solution. In-house or retained counsel, however, may be more experienced or better skilled at conducting an investigation. Counsel may also have greater objectivity and independence in assessing the progress and results of the investigation. Further, attorneys are often asked to provide legal services based on the results of the investigation. For instance, it is possible that there will be the need for company counsel to deal with law enforcement or regulatory agencies in connection with the subject matter under review, and it may be most advantageous for these attorneys to be intimately familiar with the facts and results of the internal investigation. Most important, counsel will cloak the investigation with the attorney-client and work product privilege.

In-house counsel or outside counsel

If counsel is selected to lead the internal investigation, the next question is whether the company should use in-house or outside counsel. The following general factors should be considered in determining whether the investigation is sufficiently serious to warrant the retention of outside counsel: the seniority and prominence of the individuals who will likely be the subject of the investigation; the potential financial exposure to the company; and the extent to which the subject matter of the review is likely to result in law enforcement activity.

Outside counsel present a number of benefits. For instance, in most cases, outside counsel will be more objective and, perhaps more important, will *appear* more objective to outsiders, including the government. Such independence may be important to prosecutors who may seek to rely on reports or presentations provided by counsel conducting the investigation. If the subject matter of the investigation implicates senior management or the legal department, the independence of the outside law firm might provide the board of directors additional comfort in relying on the results of the investigation.

Outside counsel also frequently have greater resources and more experience in conducting internal investigations.

In-house corporate counsel are busy running a business or managing disparate litigations. Outside counsel, on the other hand, are in the business of conducting investigations.

Outside counsel also may provide a greater degree of privilege protection. While the attorney-client privilege and attorney work product doctrine can apply to the work of in-house attorneys, courts have applied stricter standards to in-house counsel in determining whether material is protected. The work of in-house counsel is more likely to be viewed as "business" in nature, whereas courts are less likely to find that a business purpose was the primary purpose of an internal investigation if that investigation is conducted by outside counsel.

On the other hand, in-house counsel have a greater familiarity with their own organization and will not have to spend time learning the industry. And the presence of outside counsel may increase the level of concern among employees. Depending on the circumstances, it may make the most sense to implement a staged approach, with in-house counsel handling the investigation during its early stages, consulting with outside counsel as needed, and ultimately turning the investigation over if it escalates. For one thing, the expense of outside counsel cannot be undertaken every time a company needs to conduct an inquiry into potential wrongdoing. In addition, especially at the early stages, it may make the most sense to leverage in-house counsel's superior knowledge of the company's business, procedures, and personnel.

In the event the decision is made that outside counsel should lead the investigation, additional consideration should be given to whether the company's existing outside counsel or an unaffiliated law firm should conduct the investigation. This decision turns in large part on the need for a truly "independent" review. For instance, if the allegations involve the board as a whole, it may make the most sense to form a committee of new directors or independent directors, who should retain an unaffiliated law firm to assist. If the allegations implicate high-level executive officers, the investigation most likely should be overseen by the Audit Committee or other independent directors, which typically will choose an unaffiliated law firm to assist. If the allegations involved non-executive managers or other employees, in-house counsel or other regular outside counsel generally should oversee the investigation.

Other outside consultants or forensic investigators

Internal investigations often require the assistance of private investigators, forensic accountants, technology experts, and other specialized consultants who can be helpful in fact-finding and analysis of data. One of the decisions that must be made early in an investigation is whether to rely on in-house expertise or outside experts for that expertise. Although personnel who are already familiar with the matters at issue may be most efficient in many cases, this may put these personnel at risk of having to testify regarding the factual analysis performed in connection with the investigation.[5]

Steps also must be taken when using non-attorney consultants or investigators to protect the privileged nature of the work. Among other things, counsel, preferably outside counsel, should retain the consultant. Retainer letters should state that the consultant is retained by counsel in anticipation of litigation, subjecting all consulting work to the attorney-client privilege and work product doctrine. Reports, if any, should be created only upon request of counsel, and, if created, such reports should state at the outset that they were created at the direction of counsel. All documents should be addressed and sent to counsel with the usual and appropriate "Privileged and Confidential; Attorney Work Product" label.

Cross-Border Issues

The company should pay special consideration to issues that may arise if the internal investigation involves operations, subsidiaries or employees located in another country, and plan accordingly at the outset. Such cross-border investigations are becoming increasingly common and can raise thorny issues for an investigation. The laws of the foreign jurisdiction may impact how the investigation proceeds. For example, the company should be aware of data privacy concerns when gathering data and documents for review. Countries as varied as Germany, Turkey and Russia have data privacy laws that are more protective over employee emails and personal data than the laws in the U.S. These laws can impact the ability to collect, the ability to review, the location where review can occur, and how the data can be stored. For example, in many countries, written employee consent is required to access employee company email accounts and personnel data.

In addition, depending on the laws of a particular jurisdiction, there may be mandatory disclosure requirements if the investigation uncovers evidence of particular misconduct or a crime in that jurisdiction. Issues may also arise if the company chooses to discipline or terminate employees in a foreign country. Decisions such as those involving severance to a discharged employee or concerns about discrimination can implicate local employment laws.

In order to prepare for and respond to these types of issues, the company should consider engaging local counsel and local forensic resources to assist with the internal review. While U.S. companies will likely want to retain an experienced, U.S. based law firm to oversee the investigation to ensure compliance with U.S. law, the U.S. firm may not have any expertise in the laws of the relevant jurisdiction. As such, depending on the nature of the allegations at issue, it may be prudent to engage a qualified local counsel at the outset of the investigation. That way, the investigative team in the U.S. will know in advance what issues may arise during the investigation and what legal factors must be considered. Local counsel can also be on hand to assist with witness interviews, potential employment actions or other remedial measures. Local counsel advice can provide a company with comfort that it is making an informed decision based on the interests of the client and the likely legal consequences with the assistance of experienced local counsel.

III. GOALS AND PARAMETERS OF THE INVESTIGATION

Once decisions are made to investigate and regarding who will handle the investigation, the company must set the goals and parameters of its work. A typical internal investigation can accomplish a number of goals, including: (i) developing the facts and evidence; (ii) determining the extent of potential civil and criminal liability; (iii) formulating a strategy for future compliance; and (iv) remedying past misconduct.

Once the goals are established, the team should determine the appropriate scope of the review. Internal investigations of every size require balancing efficiency with quality, thoroughness, and completeness, and one of the biggest challenges to any investigation is designing the scope of the review so that it is sufficiently thorough, while not overly broad. This effort can have critical implications on the credibility of the investigation, as well as the costs.

Approaching an investigation in phases and staying focused on specific issues or allegations can help manage costs and avoid "mission creep." Likewise, it is generally sensible to start with a set of preliminary investigative steps to identify supporting evidence that would help the company determine the need to probe further. While a broad investigation will likely produce more information and will put the company in a better position to assess its overall exposure, the more detailed the investigation, the greater the internal disruption and the more likely the investigation will open the proverbial "Pandora's box." When the U.S. government is involved, companies also must make sure they reach an agreement with authorities on a reasonable strategy.

A related point to consider at the outset is the timing of the investigation. Depending on the nature of the investigation, this could be dictated by outside factors, most notably, the government. The length of the investigation is, of course, also contingent on its scope: how much information needs to be gathered and reviewed. But an extended investigation risks information leaks and further disrupts business.

To ensure the effectiveness of the investigation, a control group should be established and be involved in developing a strategy for the investigation. Among other things, this group will determine who needs to be informed about the investigation. Although confidentiality must be considered and carefully preserved, certain supervisors and managers will need to know what is happening in order to facilitate the collection of documents and the scheduling of employee interviews.

Clear direction also must be provided to employees and managers as to the confidentiality of the investigation. Employees should be instructed as to how they should respond to inquiries from the government, media, or other outside parties. Cooperation of employees should be expected and received, but employees, of course, have competing concerns: if an employee is a subject or target of a criminal investigation, the employee may choose to invoke the Fifth Amendment and refuse to cooperate, regardless of the employment ramifications.

The investigative team should identify key documents, employees, and other information to be evaluated during the investigation at the outset. Finally, the team should consider how the results of the investigation will ultimately be reported. Beginning with the end in mind will save time

and help the investigation stay more organized as it moves ahead.

IV. DOCUMENT REVIEW

Document review is a critical component of any internal investigation. Among other things, documents can assist counsel in obtaining information from witnesses, and in educating law enforcement officials on the issues under review. That being said, the most expensive aspect of an internal investigation is usually the review of documents and associated technology costs. While this is often an unavoidable reality of an investigation, care should be taken by the investigative team to scope document review reasonably, and not overly broad unless the initial findings warrant a deeper dive.

As soon as the company becomes aware of allegations or evidence of misconduct, it should suspend normal document retention procedures and preserve all relevant documents relevant to the subject matter of the investigation, including e-mails. If the company has become a target or subject of an investigation, potentially responsive documents cannot be destroyed, regardless of general document retention policies. A diligent search should be conducted to locate and secure documents that relate to the subject transaction or incident.

It is important to review and become familiar with all documents potentially relevant to the investigation, even those that are not responsive to any pending document requests or subpoenas, including:

- Policies, procedures, and manuals;
- All emails and other electronic data, including, if economically feasible, archived emails;
- Personnel files;
- Minutes from Board of Directors meetings and related Board materials; and
- Privileged documents that are not subject to production.

If the government has opened its own investigation, it may request that the company produce documents on certain topics. A thorough document review gives investigators a preliminary understanding of the factual landscape so that it may position the company in the best light while remaining forthcoming to the government. It also provides context for the next step of the investigation—witness interviews—and helps the investigators develop the facts and questions for each interview.

V. WITNESS INTERVIEWS

Witness interviews are a key part of the investigative process and, along with documents, are generally the primary source of information that will be gathered during the investigation. While interviews have great potential to provide useful information, they come with significant challenges. Thoughtful planning and execution are critical to maximize the former and minimize the latter. Careful consideration should be given to who should conduct the interviews and whether anyone from the company should be present.

It generally is best if attorneys conduct the interviews. For one thing, having an attorney conduct the interview strengthens the argument that what is said during the interview is covered by the attorney-client privilege and that notes or memoranda documenting the interview are similarly privileged.[6] Further, counsel generally have more training and experience in synthesizing relevant facts and questioning witnesses.

Other logistical factors also play a significant role in conducting effective interviews. The timing and location of the interviews should be convenient for the employee. The interviewer should make the employee feel comfortable. If the employee is “on guard,” it is less likely that he or she will be candid during the interview.

Interviews should be conducted of all company personnel likely to have knowledge regarding the relevant transaction or the alleged violation. Before interviewing personnel, counsel should review the relevant documents and interviews, prepare an outline of topics to be covered with the witness, and select the documents that should be shown to the witness during the interview. The interviews should be prioritized, as the order in which they are conducted makes a difference. The investigative team also should be alert to sensitivities in interviewing directors and senior management, and consider whether senior management really needs to be interviewed. On the other hand, it is important to ensure that all necessary interviews are conducted and that there is no perception of favoritism shown to senior management.

When considering whom to interview, the investigative team should also look beyond current employees. Former employees may have knowledge of the alleged wrongdoing. If that is the case, assess whether they are willing to cooperate. An employee's willingness may be influenced by the circumstances under which she or he left the company. If the employee left on unfavorable terms, she or he may be less likely to assist the company. And if particularly disgruntled, the employee may pose a risk of disclosing unfavorable information to the government or the media. By diligently researching these matters, investigators increase the likelihood of gaining useful information and simultaneously reinforce another benefit of internal investigations: reducing surprises.

Conducting the Interview

Suffice to say, it is critical to preserve the attorney-client privilege and the work product doctrine at each stage of an internal investigation. Employee interviews are subject to the attorney-client privilege. Recordings of interviews, however, may be considered purely factual communications that, as verbatim transcriptions, are not subject to the attorney work product doctrine.[7] Accordingly, it is best not to record interviews and instead have the interviewer (or, more likely, another attorney in the room) take written notes which include his or her thoughts and mental impressions. Because opinion work product receives greater protection than fact work product, it is more likely that written notes including an attorney's thoughts and impressions will be protected.[8]

Counsel also should give the employee an *Upjohn* warning. In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court held that communications between company counsel and company employees are privileged, but the privilege belongs to the company, not to the employee. Providing the warning makes clear that counsel represents only the company. Anything the employee states in the interview is privileged only between counsel and the company. The company may choose to waive the privilege in the future, and in that event, the employee's statements may be disclosed to the government. If clearly given, an *Upjohn* warning sets the boundaries of the interview and removes any doubt about whether counsel represents the employee. This is also particularly important in light of the Yates Memo, which also highlights the potential tension between the interests of the company and the interests of employees.[9]

Of course, if employees know that they will not control the fate of their own statements, they may be less likely to speak candidly with the interviewer. But given the ethical consequences posed by an ambiguous or altogether omitted *Upjohn* warning, some loss of candor is a necessary risk.

After giving the *Upjohn* warning, counsel should clarify his or her role. Inform the employee about the scope of counsel's representation and the general purpose of the investigation. But stick to generalities. It is best not to discuss strategies and theories of the case with people who do not need to know them. In the same vein, consider whether anyone from the company should be present during the interviews. Sometimes this may be preferable, but usually it is best to minimize the presence of observers in the room. Think twice about addressing sensitive topics with employees. The employee may repeat the information the interviewer discloses to the government or become otherwise unfavorable to the company's case. These tips are small parts of a bigger objective: carefully controlling what information is disclosed, and to whom.

Separate Counsel, Joint Defense Agreements, and Indemnification[10]

In some circumstances, it may be appropriate to recommend that a current or former employee hire separate counsel. This may be advisable if, for example, the employee's interests may become adverse to the company's interests at some time in the future. In today's climate, this has the potential to happen sooner rather than later, given the company's incentive to provide information to the government that may be detrimental to the interest of a particular employee. The same holds true if the government may interview the employee down the road. So, too, if counsel representing the company faces a conflict of interest. Even if there is no current conflict, counsel may potentially be forced to withdraw if a conflict becomes evident at a later date.

If an employee does obtain separate counsel, company counsel should explore the possibility of a joint defense agreement ("JDA") between the company and the employee. The joint defense privilege, sometimes a "common interest privilege," was recognized by courts as early as 1964 as an exception to the normal rule that attorney-client privilege and attorney work product protections are waived whether otherwise

privileged communications or materials are disclosed to a third party.[11] Pursuant to this exception, privileged communications between a client and his attorney, and that attorney's work product, remained protected even if disclosed to certain third parties. In essence, pursuant to the joint defense privilege, information is permitted to be shared among defendants as if they were represented by joint counsel, but with each defendant having the benefit of individual counsel to fully protect and advocate for its own separate interests.

The privilege can be asserted defensively, to avoid having to disclose information to the government, and also offensively, to prevent another party to the joint defense group from disclosing joint defense information. The party seeking to establish the existence of a joint defense privilege and assert its protections must demonstrate that (1) the communications were made in the course of a joint defense effort; (2) the communications were designed to further the joint defense effort; (3) the communications were intended to be kept confidential; and (4) the privilege has not otherwise been waived.[12] JDAs need not be written and can be formed by anything from simple oral undertakings to detailed written agreements.[13] Some attorneys choose not to reduce agreements to writing so that the agreements are not subject to production.[14] Others wish to avoid lengthy negotiations regarding nuanced waiver and limitations concerning issues that may or may not ever come into play.

At the same time, there are risks to JDAs. It is important for counsel to remember that, even though they are preparing a joint defense, they still owe an independent professional duty to their individual clients. Company counsel must do what is best for the company; the employee's counsel must do what is best for the employee. If counsel anticipate that their clients' interests may diverge in the future, they should structure the JDA accordingly. One solution is to restrict the JDA to a limited issue on which the parties have common interests. Furthermore, the common interest privilege only protects the confidentiality of information exchanged to further the joint defense.

Companies may also want to consider indemnifying their current and former employees and advancing their legal fees, if they have separate counsel. In some cases, company executives may be entitled to such indemnification by agreement with the corporation, while other employees may need to negotiate a form of undertaking. From the company's perspective, providing such indemnification may improve employee cooperation, save time, and improve the company's control over the litigation. The government, however, may view indemnification as inconsistent with cooperation or as an endorsement of misconduct. Companies should compare the perceived benefit from indemnification with the risk that the government will adopt this view, and the consequences if it does so.

Preemptive Disciplinary Action

Not surprisingly, investigations often identify misconduct. In these instances, the company may consider taking preemptive disciplinary action against the responsible individuals. Whether or not this is advisable will depend on a variety of factors, including the seriousness of the employee's conduct and strength of evidence against him or her, the need to stop further misconduct, and the company's obligations under federal and state employment laws. For instance, while discipline may be helpful in that it stops or limits the actions of people who are damaging the company's interests, it may also be harmful by creating discontented, disloyal employees who become more willing to cooperate with the government *against* the company. However, sometimes the wrongdoers' actions are so egregious that there is no question discipline will be administered; it is just a matter of timing. If discipline is inevitable, the company may wish to put the matter behind it by addressing it early. The company also should consider what will happen if the company *does not* discipline the wrongdoers. If the company must discipline someone to prevent future harm from occurring, the case for preemptive action becomes stronger.

The company needs to consider how the government will interpret discipline. Depending on the circumstances, the government could plausibly interpret it as a good faith effort to remedy the problem, or as an admission of wrongdoing. Finally, depending on the seniority of the personnel and the nature of the conduct warranting discipline, such employment actions could trigger some reporting requirement, which could cause the subject of the investigation to become known outside the company earlier than anticipated.

VI. ESTABLISH A PUBLIC RELATIONS STRATEGY

Corporate misconduct can damage a company's reputation. Controlling the timing and content of the information disseminated to the public is important. Companies, in conjunction with counsel, should designate a spokesperson to whom all outside inquiries should be directed. In-house or outside counsel may be adept at handling these inquiries. Another option is hiring a public relations firm. Companies should be aware that disclosure of investigation reports to the public may waive attorney-client privilege merely by referencing protected information. Mandatory disclosures made in the normal course of business—including, for example, quarterly reports—should conform to the public relations strategy. The goal is to control the message to the greatest extent possible. But at no point should the public relations message trump the litigation strategy. And, indeed, public relations mistakes can adversely impact the investigation itself. Early public denials, pronouncements of innocence, or, worse yet, statements of questionable veracity may provoke the government into a more vigorous investigation than it would otherwise undertake. Above all, the goal of an investigation is to resolve the alleged misconduct in the way that best suits the company's interests. Public relations should not be ignored, but it also should not distract from that goal.

VII. CONCLUDING THE INVESTIGATION

The final consideration after the investigative team's workplan is complete are (1) how to report out the investigative team's findings, and (2) how to proceed with the information that has been ascertained. While the company's next steps and decisions about possible disclosures will ultimately be dictated by the investigative team's substantive findings, decisions regarding the form of the investigative report to senior management and the company's boards should be considered at the outset of the investigation.

Reports

At the conclusion of the investigation, counsel may wish to prepare a written report which summarizes the investigation, predicts risk of liability, presents arguments against prosecution, and recommends corrective action the company can take. There are many reasons why counsel may do this. A written report can be a useful tool to present the investigative team's findings to management or the company board. This is particularly the case if the factual evidence is voluminous or the issues are particularly complex. A report may be necessary to justify and document employee disciplinary actions that arise out of the investigation. It may also be used as the basis for an eventual oral or written submission to the government, if the company chooses to do so. The report can highlight the remedial measures the company takes to prevent similar misconduct in the future, and the report may be necessary proof of the thoroughness of the investigation. Whatever the reason, counsel should consider the benefits and risks of drafting a written report before beginning the task.

A report can demonstrate the thoroughness of the investigation, setting forth the company's goals in opening the investigation, as well as the steps it has taken to achieve those goals. Indeed, if a report is not prepared, the government may suspect the investigation was cursory. The company should understand, however, that a report, if prepared, may have to be disclosed. If a written report is prepared, it may be inevitable that the government will request a copy once the investigation becomes known to them. And once privilege has been waived, the report can be obtained for use by private litigants. Thus, counsel and consultants should anticipate the risk of having to produce the report when they draft it.

As counsel consider the question whether to prepare a report at the end of an investigation, it is worthwhile to return to the beginning: the goals of the investigation. Will an oral report, rather than a written one, accomplish the goals and objectives of the investigation? If a written report will not further the goals, it may be better to avoid it. But if a report will meaningfully address the investigation's goals, it may be worth producing one.

Whether the report of the investigative findings is delivered orally or in written form, it usually includes: (1) identification of the evidence or allegations that prompted the investigation and a statement that the investigation was conducted in anticipation of litigation and for the purpose of providing legal advice; (2) a description of the work plan that was implemented; (3) a summary of the relevant background facts; (4) analysis of the key evidence; (5) an outline of the pertinent law; (6) an application of the law to the evidence; (7) a description of the remedial measures that should be considered (or have been taken) as a result of any issues identified during the investigation; and

(8) a recommendation as to whether there should be a self-report or disclosure to the government.

Disclosure to the Government

Depending on the circumstances, at the end of an investigation the company may be forced to decide whether to voluntarily disclose the contents of the investigation to the government. As with producing a report, voluntary disclosure may persuade the government that the company has greater transparency and integrity. In other words, the company is not hiding anything from the government; it is simply investigating an alleged problem and reporting what it found. This, in turn, may lead to a more favorable resolution of the issue. Of course, self-reporting will not necessarily prevent prosecution, but it may lead to better settlement terms by demonstrating cooperation and good faith. And, at a minimum, voluntary disclosure provides the government with the company's version of the facts. The government may use these facts to structure its own investigation, allowing the company to shape the matter as it moves forward.

Disclosure also has significant risks that the company should consider before it proceeds. First, disclosure to the government may waive the attorney-client privilege and work product protection in all other contexts. And by waiving privilege, the company may provide a roadmap for liability to civil litigants, including class action litigants. Although the case law is not uniform, courts typically do not uphold non-waiver or selective waiver agreements.[15] To reduce the possibility of waiver, the company should frame disclosures in terms of possible settlement negotiations with the government. Settlement discussions generally receive greater protection, but even these ultimately may not remain privileged. The company also should consider entering into a confidentiality agreement with the government, in which the government agrees not to disclose company information to third parties.

Second, disclosure can chill future discussions between company employees and attorneys and may thereby impair the corporation's ability to detect and prevent future wrongdoing. If employees believe that the company will report misconduct to the authorities, they are less likely to cooperate with the company's investigation. The company does not want to develop an "us vs. them" relationship with its own employees.

Third, the company should be careful about preemptively disclosing materials. It should time the disclosures so as not to interfere with the ongoing investigation (if indeed it is ongoing) and to ensure that unnecessary materials are not disclosed. To do so, it may seek to limit the disclosure to a limited issue or subject matter.

Sometimes, an internal investigation uncovers misconduct that is not yet on the government's radar screen. Should the company disclose this misconduct? Here again, the government may view voluntary disclosure as forthcoming, but disclosure may not prevent prosecution. At the same time, if the government is already conducting its own investigation, and if it is likely to discover the misconduct anyway, self-reporting may be the preferred course.

Following the Yates Memo, and consistent with its goal of incentivizing companies to provide the government with information concerning culpable individuals, the Department of Justice has recently issued more concrete guidance to companies regarding self-disclosure and its effect on cooperation credit. In April 2016, for example, the Department of Justice issued an "FCPA Enforcement Pilot Program" with the goal of motivating companies to self-disclose FCPA related misconduct. The credit awarded to a company under the pilot program depends on how closely it follows the issued guidance. As stated by the Department of Justice:

> [I]f a company chooses not to voluntarily disclose its FCPA misconduct, it may receive limited credit if it later fully cooperates and timely and appropriately remediates – but any such credit will be markedly less than that afforded to companies that do self-disclose wrongdoing. By contrast, when a company not only cooperates and remediates, but also voluntarily self-discloses misconduct, it is eligible for the full range of potential mitigation credit.

Similarly, the Department of Justice released additional guidance in November 2016 encouraging companies to self-disclose criminal export control and sanctions violations before the company perceives an imminent threat of disclosure or a government investigation has been initiated. The Guidance also confirmed that full cooperation and/or self-disclosure can earn the company a more lenient penalty or the possibility of

entering into a non-prosecution agreement with the government regarding such export violations. As in all areas, a company must balance any benefit of potential government leniency following self-disclosure against the costs associated with any government investigation.

Remedial Measures

Based on the information gathered during the investigation, the investigative team should recommend and the company should decide what remedial measures, if any, should be undertaken. Disciplining employees tends to demonstrate that the company takes wrongdoing seriously. Some discipline may be necessary from a business standpoint to ensure that employees do not continue to cause trouble. There is a risk that employee discipline could be viewed as an admission of wrongdoing. And, if disciplined, employees could refuse to cooperate with the company and instead cooperate with the government. Unwarranted or overly severe discipline may also damage morale. Employees who feel a connection to their colleagues may take the discipline personally. If the company does decide to discipline an employee, it may have to create a memorandum or report to justify its action. That record, though, may be deemed part of the employee's personnel file and may need to be disclosed.

If the investigation revealed evidence of potential ongoing or recurring violations, the company also should consider taking procedures necessary to prevent any further violations. This might include instituting new procedures, instituting new training sessions, revising compliance materials or developing new internal audits or oversight committees to review compliance on a periodic basis. Policing internal misconduct through an investigation is, in many ways, no different than other business matters. It is best to be thorough in preparation and action, learn from mistakes, and make improvements when necessary.

* * *

An internal investigation can be a critical tool when allegations or evidence of misconduct within a company, or within a company's industry, arise. Internal investigations of every size require balancing efficiency with quality, thoroughness, and completeness. And above all else, an effective internal review requires careful planning at the outset. While the best compliance program and training regime cannot completely prevent some types of misconduct—or, at the very least, allegations of misconduct—from occurring, practical preparedness and a carefully scoped internal review of the situation is the best defense.

ENDNOTES

[1] Ms. Chunias and Ms. Luz would like to thank Matthew Harrington, associate at Goodwin Procter LLP, for his assistance preparing this article.

[2] To some commentators, the Yates Memo signaled a potentially dramatic shift in the Department of Justice's approach to investigating and prosecuting corporate wrongdoing. In reality, the Yates Memo largely streamlined and emphasized long-standing Department of Justice guidance directing prosecutors to investigate individual wrongdoing as zealously and diligently as corporate wrongdoing, and to bring civil or criminal charges against individual defendants where warranted. A significant increase in the prosecutions of individual defendants in the wake of the Yates Memo is not yet apparent.

[3] Yates, Sally. "Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing," Thursday, September 10, 2015, available at https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

[4] Since the Yates Memo was issued 19 months ago, there are signs that the Department of Justice is placing pressure on companies to help hold executives accountable. For instance, on June 3, 2016 the Criminal Division of the Department of Justice closed its investigation of Nortek, Inc. for possible violations of the Foreign Corrupt Practices Act ("FCPA") due to, among other factors, Nortek's "full cooperation in this matter (including by identifying all individuals involved in or responsible for the misconduct and by providing all facts relating to that misconduct," Nortek's "agreement to continue to cooperate in any ongoing investigations of individuals," and Nortek's remediation which "include[ed] terminating the employment of all five individuals involved in the [FCPA] misconduct, which included two high-level executives of the China subsidiary." Letter from Daniel Kahn, Deputy Chief of Fraud Division at the Department of Justice, dated June 3, 2016, available at https://www.justice.gov/criminal-fraud/pilot-program/declinations. On the civil side, in September 2016 the Department of Justice included two senior executives of North American Health Care Inc., its chairman of the board and its senior vice president, in a civil settlement agreement for potential False Claims Act violations, in which the executives agreed to pay $1.5 million out of the $28.5 million settlement. https://www.justice.gov/opa/pr/north-american-health-care-inc-pay-285-million-settle-claims-medically-unnecessary. It is still an open question whether the new administration will continue to prioritize the policies of the Yates Memo as vigorously as the prior administration, but comments from

Attorney General Sessions and President Trump indicate that there is unlikely to be any sea change in this area for the time being.

[5] *See, e.g., In re Six Grand Jury Witnesses*, 979 F.2d 939 (2d Cir. 1992).

[6] *Upjohn Co. v. United States*, 449 U.S. 383, 394-399 (1981) (attorney-client privilege protects attorney notes taken during interviews with employees during internal investigation).

[7] The Federal Rules of Criminal Procedure also require production of contemporaneously recorded statements after the witness has testified on direct examination at trial. Fed. R. Crim. P. 26.2.

[8] However, counsel should be aware that the fact that interview memoranda contain mental impressions can result in complexities later if the memoranda are disclosed to the government as part of a company's cooperation efforts.

[9] The position of the Yates Memo on cooperation credit creates a tension for companies. On the one hand, it incentivizes the company to investigate immediately and disclose information relating to individual wrongdoers as soon as it becomes aware in order to qualify for cooperation credit and receive more favorable settlement terms. On the other hand, employees' knowledge that information shared during the investigation may be promptly be shared with the government may discourage honesty and forthrightness for fear that the employee will be implicated. The policy also increases the tension between a Board, who must keep the best interests of the corporation first, and management, who may themselves be implicated of wrongdoing in information provided to the government. Executives may hire their own counsel more quickly, which may complicate the timing and logistics of the investigation and increase the need for complicated joint defense agreements.

[10] This section is intended to provide general information regarding the use of JDAs, with a focus on federal law. Courts' recognition of the existence and scope of the joint defense privilege varies across federal and state jurisdictions, and practitioners should research local law to confirm applicability to their particular circumstances.

[11] *See Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964).

[12] *See, e.g., Continental Oil Co.*, 330 F.2d at 350.

[13] *Id.*

[14] Some courts have held that JDAs are not privileged and are subject to production for at least *in camera* review. S*ee, e.g., United States v. Stepney*, 246 F. Supp.2d 1069, 1074-75 (N.D. Cal. 2003).

[15] *Compare Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (holding that a company's disclosure of witness interview memoranda to SEC constituted limited waiver and allowing company to withhold memoranda in subsequent third party lawsuit) *with In re Pacific Pictures Corporation*, 679 F.3d 1121, 1127 (9th Cir. 2012) (rejecting limited waiver doctrine); *In re Qwest Communications International Inc.*, 450 F.3d 1179, 1192 (10th Cir. 2006) (same); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 297 (6th Cir. 2002) (same).

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