THE GENERAL COUNSEL'S GUIDE TO GOVERNMENT INVESTIGATIONS
SECOND EDITION

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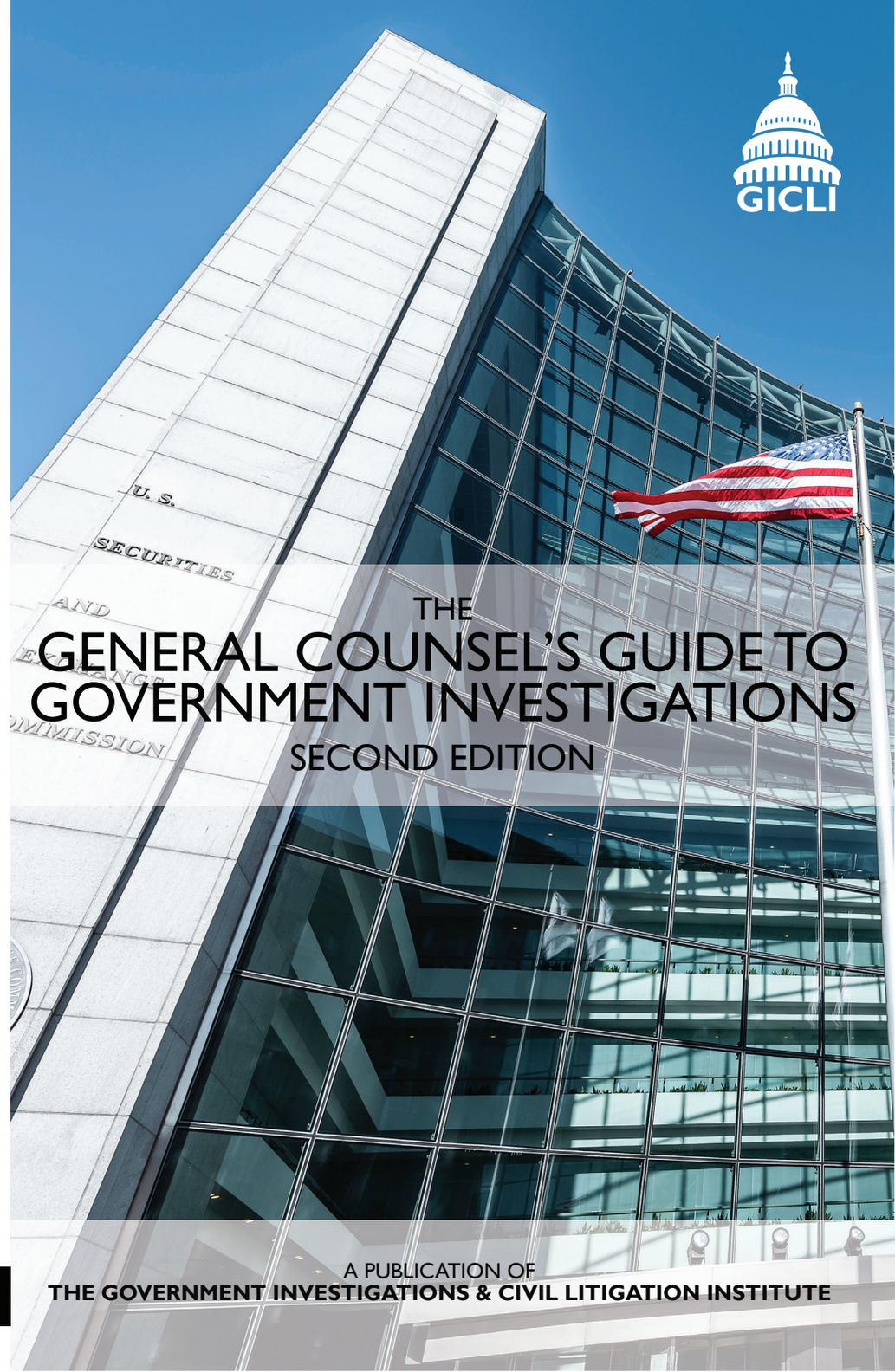

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THE GENERAL COUNSEL'S GUIDE TO GOVERNMENT INVESTIGATIONS

SECOND EDITION

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The General Counsel's Guide to Government Investigations

Chapter 21

Board of Director and Audit Committee Issues

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I. INTRODUCTION

Following our first edition in 2017, we continue to witness an enforcement age of intense scrutiny on corporate governance issues, as well as financial transparency, as evidenced by passage of Dodd-Frank.[783] In May 2018, a decade after the 2008 financial crisis, Congress approved and President Trump signed the Economic Growth, Regulatory Relief, and Consumer Protection Act (the "Reform Law"), the first major reform bill since the passage of Dodd Frank. The Reform Law signaled a regulatory rollback and significant dilution of Obama-era rules. As indicated in the 2017 edition of this chapter, it is unlikely that we will be headed back to pre-2008 recession practices. Increased attention toward these issues from lawmakers and regulators alike have amplified the need for public companies to be prepared to initiate prompt, timely, accurate and objective investigations of allegations of wrongdoing by the company, its officers, senior management or employees.

In this 2018 edition, we discuss issues confronting Boards of Directors ("Boards") and Audit Committees in connection with mitigating and minimizing risk exposure. Such measures should

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[783] Dodd-Frank Wall Street Reform and Consumer Protection Act, July 21, 2010, 124 Stat 1376.

be one of the top agenda items at any Board or Audit Committee because discussion leads to self-awareness which, in turn, facilitates self-improvement.

Despite best efforts by Boards and management, misconduct persists. Boards and Audit Committees must respond appropriately including determining how to best structure and conduct an investigation, and specific best practices considerations for executing any investigation. Because investigations do not occur in a vacuum, we also discuss considerations for Boards and Audit Committees regarding what, if anything, should be done with respect to reporting on an investigation's findings and recommendations (mandatory or voluntary disclosure, for instance), and the central driving force behind such considerations – cooperation credit.

As discussed herein, while management-directed investigations may suffice for low-grade or isolated allegations of wrongdoing, allegations involving potential wrongdoing by officers, senior management or issues having or potentially having a material impact on a company's financials or posing risk of harm to consumers and/or the general public, militate in favor of entrusting the investigation to Boards or outside advisors. Board- or Audit Committee-initiated and managed investigations, particularly those led by outside counsel, while typically costlier and more time-intensive, are more likely to be viewed favorably as objective and independent and afforded greater weight by courts, government regulators, auditors and other third parties when assessing the effectiveness of remedial action and contemplating enforcement, litigation or punitive measures.[784]

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[784] *See* American College of Trial Lawyers, Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations, 46 Am. Crim. L. Rev. 73, 84 (2009) ("choosing independent counsel with few, if any, prior ties to the Company . . . has become commonplace and is generally regarded as the first step in convincing governmental authorities of the 'authenticity' of its cooperation."); Brian & McNeil, Internal Corporate Investigations at 12 (3d ed. 2007) ("Although the government will not perceive outside counsel as totally independent, outside counsel is presumptively more independent than inside counsel. Inside counsel, after all, has only one client—

II. MITIGATING RISK: CORPORATE BOARD AND AUDIT COMMITTEE RESPONSIBILITIES

As the adage goes, "[a]n ounce of prevention is worth a pound of cure."[785] There is no adequate substitute for routine, proactive planning, preparation and training to avoid situations in which a company must embark on an internal investigation to sort out allegations of misconduct.

Boards must regularly examine internal controls, assess the effectiveness and relevance of compliance programs and identify prophylactic measures to mitigate the risk of compliance failings. Such assessments would include the hiring of an in-house compliance officer that is independent and has a direct reporting relationship to the Board, CEO, or President, or conducting a thorough review and upgrade of the current compliance policy and training manuals at regular intervals and as needed following changes or deviation in corporate business model and relationships.

A. Corporate Board Responsibilities

Board responsibilities with respect to proactive action designed to mitigate risk and exposure for a corporate entity include, among other things, strengthening and tightening internal controls, and ensuring and overseeing management's efforts regarding compliance and ethics programs. Regarding internal controls, Boards must understand and oversee internal controls and

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the company"); Richmond, Law Firm Internal Investigations: Principles and Perils, 54 Syracuse L. Rev. 69, 106 (2004) (noting that the hiring of outside counsel to conduct an internal investigation best insulates a firm against all claims of conflict of interest or common interest); Gideon Mark, The Yates Memorandum, 51 U.C. Davis L. Rev. 1589, 1611–12 (2018). *See also, e.g.*, *Madvig v. Gaither*, 461 F. Supp. 2d 398, 410 (W.D.N.C. 2006), which shows the benefits of using independent counsel hired by either independent Board members or by an independent committee – a company's decision to deny a demand or request to pursue a derivative lawsuit is more easily justified when any investigation into the allegations at issue are conducted by independent counsel hired by independent directors or an independent committee.

[785] Benjamin Franklin, circa 1736.

procedures that management has implemented to assure accuracy of financial reporting. Boards must also take "ownership" for the relevance and efficacy of the company's compliance policies and programs, including: (1) overseeing management's efforts to educate personnel about the corporate code of conduct and ethical standards, fraud or abuse reporting (including but not limited to whistleblower reporting), and identifying pitfalls and problem areas; (2) exercising reasonable care to ensure the company is managed in compliance with law, regulations and corporate policies; (3) working to foster and encourage a corporate culture that values ethical behavior, fair dealing and integrity; (4) knowing and/or taking reasonable steps to learn how to identify related party transactions and conflicts of interests, especially those involving board members or senior management; and (5) depending on its size and scope of operations, considering establishing a corporate compliance department.

In attending to the foregoing responsibilities, the Board must necessarily assess whether the company has a robust compliance program that would pass muster under the U.S. Sentencing Guidelines ("USSG" or the "Sentencing Guidelines"), § 8B2.1 (Effective Compliance/Ethics Program).[786] USSG § 8B2.1, typically viewed as the benchmark by which the efficacy of compliance programs are measured,[787] provides detailed guidance to rely on in the design and implementation of "effective" compliance programs, and is also used by the government to evaluate the efficacy of compliance programs. Other industry specific guidance may also be found. For organizations falling

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[786] U.S.S.G. 8B2.1 and Application Note 2 ("Each of the requirements set forth in this guideline shall be met by an organization; however, in determining what specific actions are necessary to meet those requirements, factors that shall be considered include: (i) Applicable industry practice or the standards called for by any applicable governmental regulation; (ii) the size of the organization; and (iii) similar misconduct.").

[787] *See In re Caremark Int'l Inc. Deriv. Litig*., 698 A.2d 959, 970 (Del. Ch. 1996) ("Caremark") ("[a]ny rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account [the framework of the Sentencing Guidelines and guidance derived from prosecutorial activity] and the enhanced penalties and the opportunities for reduced sanctions that it offers.").

under supervision of the Consumer Financial Protection Bureau ("CFPB" or "the Bureau"), for example, resources also include the CFPB examination manuals designed to guide CFPB supervision of the design and effectiveness of compliance management systems as well as supervisory highlights.[788] To be sure, there are no formulaic requirements and no "one size fits all" solution for a compliance program. An effective program must be tailored to the particular company, which should engage in periodic risk assessments to determine what sorts of criminal conduct pose the greatest exposure, and then implement controls to prevent, detect and address such misconduct.

Several common-sense hallmarks of an "effective" compliance program that should be considered include whether the program: (1) is well-designed and dynamic; (2) is applied in good faith; and (3) actually works in (has a track record of) detecting misconduct. Implementation of such programs should be designed to deter, identify and remediate violations of laws and regulations, coupled with equally robust employee training and issue reporting mechanisms. The Board should examine the company's decision-making approach to self-report or cooperate, and ensure the company maintains documentation and records that will allow company executives to demonstrate they are working in good faith to operate the company in an ethical and compliant fashion. Boards should therefore be proactive participants in formulating, updating, upgrading, and ensuring proper testing of corporate compliance programs.[789] In other words, Boards must heed the framework of the Sentencing Guidelines when assessing whether the compliance program is designed to address the particularized issues confronting that company.

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[788] See CFPB Supervision and Examination Manual (V.2), at: https://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf (last accessed (last accessed Aug. 28, 2018).

[789] Dep't. of Justice, Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the Second Annual Global Investigations Review Conference, https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0 (last visited August 28, 2018).

The Criminal Division, Fraud Section of the U.S. Department of Justice ("DOJ") recently released its *Evaluation of Corporate Compliance Programs* (Feb. 8, 2017) ("Compliance Program Guidance"). The Compliance Program Guidance is but the latest by the Fraud Section setting out DOJ's expectations for effective 739 Mar. 9, 2017); *see also* CFPB Supervisory corporate compliance programs with which Boards (and Audit Committees) must be familiar. It outlines 11 key compliance program topics along with a number of related "questions" that the Fraud Section considers when evaluating corporate compliance programs in the wake of criminal misconduct. These are not novel topics, but rather an encapsulation of considerations appearing in other DOJ guidance, including the US Attorney's Manual, the U.S. Sentencing guidelines, DOJ's and the Securities and Exchange's ("SEC") Foreign Corrupt Practices Act ("FCPA") Guide,[790] among others. The "questions" posed in the Compliance Program Guidance also make clear that a prominent piece of that exercise is robust data compilation, retention and accessibility. For instance, important data metrics useful for persuading DOJ that a company has an effective and appropriate compliance program include, but are not limited to: (1) the number of transactions halted or more closely scrutinized due to compliance concerns, (2) the number of internal audits performed related to allegations of misconduct, (3) the number of "red flags" identified during an audit or investigation, and (4) what types of audit findings and remediation progress were reported to management and the Board.[791] In short, issuance of the Compliance Program Guidance provides visibility into DOJ's views on compliance best practices. It also creates a valuable opportunity for a Board to examine, assess and, as necessary, revamp a company's compliance program to be responsive to changing business models and expansions in operations.

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[790] *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 2012). The Compliance Program Guidance also supplements portions of the FCPA Pilot Program.

[791] For further information about the Compliance Program Guidance, Boards should consult the Guidance itself, which can be found at https://www.justice.gov/criminal-fraud/page/file/937501/download.

In sum, the foregoing provides only a general overview of issues Boards must be mindful of. Audit Committees, too, are held to a heightened standard, as discussed below.

B. Audit Committee Responsibilities

For 15 years, the Sarbanes-Oxley Act of 2002 ("SOX" or "the Act")[792] has directed that Audit Committees are responsible for (1) obtaining and reviewing independent auditor reports on internal controls and procedures, (2) meeting and discussing quarterly and annual audited financial statements with management and the independent auditor, (3) reviewing, assessing and discussing a company's earnings and press releases, (4) evaluating a company's risk assessment and risk management policies, (5) periodically meeting with a company's management, and internal and independent auditors and discussing, among other things, potential problems encountered during the audit or management's response thereto, and (6) reporting regularly to the company's Board.

Audit Committees must also maintain required independence under Section 301 of the Act. In particular, committee members must not be affiliated with the company or any affiliated entities and, other than compensation for serving as Board members, must not receive any direct or indirect compensation from the company. Section 301 of the Act also makes Audit Committees responsible for appointment and compensation of the company's independent auditors and for overseeing the independent auditor's work. Audit Committees cannot be passive bystanders in this process: They must require the independent auditors to report regularly on the company's accounting principles, policies and practices, alternative treatment of financial information within generally accepted accounting principles ("GAAP") that have been previously discussed with management and other issues materially impacting the company's financial statements or auditor reports.

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[792] *See* Sarbanes-Oxley Act of 2002, PL 107–204, July 30, 2002, 116 Stat 745 (current version at 15 U.S.C. § 78j–1).

Such communications are themselves regulated and must comply with standards established by the Public Company Accounting Oversight Board (PCAOB),[793] including Ethics and Independence Rule 3526 ("Communication with Audit Committees Concerning Independence") (April 2008) which governs pre-engagement communications, the PCAOB's *Information for Audit Committees about the PCAOB Inspection Process*, and the PCAOB's Accounting Standard No. 16 ("*Communications with Audit Committees*") ("AS 16"). AS 16 requires, among other things, the independent auditor must annually acknowledge the terms of the audit, inquire about and gather from Audit Committees information that would be relevant to the audit, provide details about the audit strategy, comment on the company's specific accounting policies and practices, unusual transactions, and financial reporting.

Audit Committees also fulfill a critical oversight role.[794] While Boards are generally charged with overseeing operational risks, Audit Committees focus on risks that affect a company's financial statements, including the strength of internal controls over financial reporting and those designed to prevent and detect fraud. Audit Committees are often called upon to assist Boards in monitoring legal or regulatory compliance including, for instance, the "books and records" provisions under the FCPA.

Finally, SOX calls upon audit committees to receive and investigate complaints of wrongdoing, including financial fraud

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[793] According to its own website, the PCAOB "is a nonprofit corporation established by Congress to oversee the audits of public companies in order to protect investors and the public interest by promoting informative, accurate, and independent audit reports. The PCAOB also oversees the audits of brokers and dealers, including compliance reports filed pursuant to federal securities laws, to promote investor protection." https://pcaobus.org/About.

[794] Peter Ferola, The Role of Audit Committees in the Wake of Corporate Federalism, 7 J. Bus. & Sec. L. 143, 151 (2007); Michael Klausner, Fact and Fiction in Corporate Law and Governance, 65 Stan. L. Rev. 1325, 1360 (2013).

involving auditing, accounting or internal controls issues,[795] discussed more extensively below.

C. Board and Audit Committee Oversight and Investigative Responsibilities

All of the foregoing are key proactive steps to mitigate and control against the proliferation of misconduct that so often gives rise to the need for internal investigations. When such proactive measures are ineffective in preventing or mitigating misconduct, Boards must then be prepared and equipped to identify and appropriately respond to complaints or concerns about corporate misconduct or statutory or regulatory violations. This would include initiating, managing and/or overseeing internal investigations.

When a Board becomes aware of potential misconduct, companies and their Boards must take immediate steps to determine whether any employees may have violated federal or state laws or regulations and impose appropriate sanctions on any offending employees. At that time, the Board must determine **whether** an internal investigation should be conducted in any event – that is, do circumstances warrant or require the company to commence an internal investigation? If it is decided that circumstances do require or warrant an internal investigation, then the company must decide who conducts or directs and oversees the investigation – that is, management, the Board, a special committee created by the Board, or an independent committee? Finally, once it is decided who the most appropriate party is to conduct the investigation, how to best structure and conduct the investigation is of paramount importance.

III. *WHETHER* TO CONDUCT AN INVESTIGATION?

If the company learns of improper or illegal conduct by an officer, employee, board member, or other person acting on behalf of the

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[795] 15 U.S.C. § 78j-1(m)(4) (2006) (also requiring that audit committees be empowered to retain independent counsel or experts to fulfill such duties).

company, the company must act promptly to investigate the allegations. For instance, Boards should consider conducting an internal investigation in the event of whistleblower allegations of wrongdoing, which has become more commonplace given the increased incentives for and protection of whistleblowers under Section 301 of the Act, and Dodd-Frank. Complaints of wrongdoing involving financial fraud involving auditing, accounting or internal controls issues are precisely the types of issues within the province of an audit committee for investigation.[796]

Additionally, pending and ongoing government or regulatory investigations, such as an SEC, DOJ, or congressional investigation, may trigger the need for an internal investigation. Once a company is aware of a government investigation, it should take prompt steps to understand the scope of the investigation and seriously consider conducting its own internal investigation to determine potential exposure. Finally, shareholder allegations of wrongdoing, including written demands by shareholders to investigate wrongdoing of Board or management, trigger an obligation to investigate.

IV. *WHO* SHOULD CONDUCT AN INVESTIGATION

Internal investigations and more informal inquiries have, traditionally, been conducted by in-house counsel. Allegations of widespread misconduct, however militate in favor of an independent investigation, i.e. one that cannot or should not be conducted or overseen by in-house counsel or even the company's usual outside counsel.[797] Categories of misconduct warranting an independent investigation may include repeat conduct, conduct that implicates senior or executive officers, directors, or senior management, or implicates issues having or potentially having a

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[796] *See id*.

[797] One exception to this may be if the company has regular investigation counsel whose scope of work would be limited to conducting investigations. The touchstone is "independence" – the counsel called in to conduct the investigation must be genuinely viewed as independent and capable of objectively conducting an investigation.

material impact on a company's financials, suggests potential illegal conduct, or which is currently under investigation by a government regulator. It must also separately be considered, even absent any strong factor above, whether the optics, perception, and credibility of the investigation will improve in the eyes of prosecutors or government regulators by having the Board direct the investigation, thereby creating an air of independence and objectivity.

If an investigation is indeed warranted, it must be "independent." Independent investigations are led by or overseen by the Board (or an independent committee or special committee of the disinterested Board members). Board driven investigations can be delegated to an existing or special committee with specific oversight responsibilities (for example, allegations of improper revenue recognition practices, or other accounting irregularities). If no such special committee exists at the time of the alleged misconduct to be investigated, it may become necessary to establish a special committee of independent directors to oversee and direct the investigation. Special committees are typically formed if no existing committee structure would support such an obligation or if vesting responsibility in an existing committee could create an actual or apparent conflict. Establishing the independence of members of a special committee charged with conducting the investigation is absolutely critical, particularly when a company must demonstrate not only that the conclusions reached by the committee were supportable and sound, but also that the committee itself was independent.

Additionally, selection of counsel in board-driven investigations reflects on the degree of independence (and, thus, credibility and ultimate success) of an investigation. In cases of isolated and low-grade misconduct allegations, in-house counsel may appropriately conduct the investigation. It makes sense in some cases to do so, given the generally steep knowledge in-house counsel would have about the company's business, operations, controls and organization. Such a move also has implications for protection of privilege and work product.

Courts have, on many occasions, permitted the discovery of sensitive corporate files related to internal investigations where in-house counsel does not follow best practices for such investigations. When conducting internal investigations, it is important for in-house counsel to clearly act in the capacity as legal counsel for the company rather than offering business advice or management advice. The reason is simple: the attorney-client privilege only attaches to communications made for the purpose of obtaining legal advice or assistance.[798] Therefore, for example, the company's in-house counsel should refrain from combining its communications about internal investigations with other business advice, and the company should not use lawyers who have a significant business or management role for internal investigations. It is also important for documents related to any internal investigation to be kept strictly confidential. This means documents collected or prepared during an investigation by an in-house counsel performing the investigations should only be shared

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[798] *See, e.g.*, *Owens v. Stifel, Nicolaus & Co*., *Inc*., No. 7:12-CV-144 HL, 2013 WL 6389035, at *7 (M.D. Ga. Dec. 6, 2013) (ruling email with in-house counsel not privileged because "it does not seek or contain legal advice."); *Lindley v. Life Investors Ins. Co. of Am*., 267 F.R.D. 382, 390 (N.D. Okla. 2010), *aff'd* in part as modified, No. 08-CV-0379-CVE-PJC, 2010 WL 1741407 (N.D. Okla. Apr. 28, 2010) ("the unstated operating presumption in situations involving outside retained counsel with limited responsibilities to the client (*e.g.*, strictly legal capacity as opposed to business responsibilities because of a corporate position that he holds), is that the consultations were held for the purpose of obtaining legal advice or assistance. The same presumption does not apply to in-house counsel because of the many non-legal responsibilities in-house counsel assumes (whether given a separate position and title or not)."); *AIU Ins. Co. v. TIG Ins. Co*., No. 07CIV.7052SHSHBP, 2008 WL 4067437, at *6 (S.D.N.Y. Aug. 28, 2008), *modified on reconsideration*, No. 07 CIV. 7052 SHSHBP, 2009 WL 1953039 (S.D.N.Y. July 8, 2009) ("However, where in-house counsel also serves as a business advisor within the corporation, only those communications related to legal, as contrasted with business, advice are protected.") (internal quotations omitted); *Am. Nat. Bank & Trust Co. of Chicago v. AXA Client Solutions*, LLC., No. 00 C 6786, 2002 WL 1058776, at *2 (N.D. Ill. Mar. 22, 2002) (ruling that a draft letter and notes written by in-house counsel were not privileged when letter was not sent to any other party and notes were not disclosed to anyone for the purpose of obtaining legal advice);; *Anderson Energy Grp. (Ohio), LLC v. Endeavor Ohio, LLC*, No. 3:13-CV-1784-P-BK, 2014 WL 12580471, at *1 (N.D. Tex. Sept. 4, 2014) (observing that "the line between legal and non-legal communications of in-house counsel can sometimes be blurred.")

with persons within the company, and only on a "need-to-know" basis.[799] Absent some recognized privilege – including joint defense or common interest privilege – privileged information should not be shared outside of the company.[800] Accordingly, as any seasoned attorney well knows, and any junior attorney quickly learns, at the outset of employee interviews, document collection, or other activities related to an internal investigation, in-house counsel must clearly communicate to subjects of the investigation or company employees that are assisting in the investigation that such activities are in aid of an internal investigation and for the purposes of assisting the company in obtaining legal advice or assistance. Additionally, such employees being interviewed or assisting with an internal investigation should be made aware of the company's attorney-client privilege, that all communications and documents relating to the internal investigation are not to be

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[799] *See, e.g.*, *In re Allen*, 106 F.3d 582, 606 (4th Cir. 1997) ("the attorney-client privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.") (internal quotations omitted) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981)); *Norton v. Town of Islip*, No. CV 04-3079 PKC SIL, 2015 WL 5542543, at *4 (E.D.N.Y. Sept. 18, 2015) ("Defendants have presented no reason, however, why all or even most Building Department personnel have a need to know confidential legal communications in order to perform their jobs. As Defendants have failed to carry their burden, the Court finds that they have waived attorney-client privilege as to the Memos."); *In re N.Y. Renu with Moistureloc Prod. Liab. Litig*., No. CA 2:06-MN-77777-DCN, 2008 WL 2338552, at *1 (D.S.C. May 8, 2008) ("Intra-corporate communications to and from counsel can retain a privilege if disclosure is limited to those who have a 'need to know' the advice of counsel") (citations omitted); *Carolina Elec. Membership Corp. v. Carolina Power & Light Co*., 110 F.R.D. 511, 516 (M.D.N.C. 1986) (ruling that documents were not privileged because, among other reasons, they were sent to in-house counsel that also held important management positions and the documents also constituted updates on ongoing business developments).

[800] *Cavallaro v. United States*, 284 F.3d 236, 246–47 (1st Cir. 2002) ("Generally, disclosing attorney-client communications to a third party undermines the privilege."); *Roe v. Catholic Health Initiatives Colorado*, 281 F.R.D. 632, 636 (D. Colo. 2012) ("disclosing attorney-client communications to a third-party results in a waiver of the attorney-client privilege."); *Allied Irish Banks v. Bank of Am., N.A*., 240 F.R.D. 96, 104 (S.D.N.Y. 2007) ("Courts routinely find waiver where otherwise attorney-client privileged materials are shared with outsiders to whom privileged materials were shown unnecessarily.").

disclosed to third parties or those within the company lacking any need to know about the investigation in order to render legal advice to the company. The foregoing raise issues of profound importance when determining the critical involvement of Boards in determining who should be responsible for directing the conduct and course of an internal investigation.

Where there are allegations of material or widespread misconduct, outside counsel should be engaged to conduct the investigation. Even if a Board makes the right decision to engage outside counsel to conduct an investigation rather than entrust its course and conduct to in-house counsel, there are also considerations about which outside counsel should be engaged. "Regular" outside counsel, that is, counsel that handles corporate and compliance matters for the company, may be appropriate in certain circumstances. Except in cases where the company has regular investigation counsel that is deemed to be independent and capable of objectively conducting an appropriately scoped investigation, regular counsel may not be appropriate for a particular investigation whether because counsel lacks expertise or has potential conflicts (for instance, the investigation centers on or touches on matters outside counsel may have been involved with), and might not be viewed as sufficiently independent to lead a more significant or sensitive investigation. In such cases, the company must engage truly independent counsel. When allegations involve fraud or other misconduct by senior management, employees or officers, or board members, fully independent outside counsel should be engaged, even if doing so is more costly or onerous. Likewise, in relation to pending shareholder or derivative litigation, or if the company is subject of a government investigation, lawyers conducting the investigation must be truly independent and unbiased. At a minimum, a Board's investigation will naturally stand a greater chance of being successful, and will likely be afforded greater weight by government regulators, if outside counsel is not only independent,[801] but is experienced in conducting internal investigations, well-versed in spotting

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criminal behavior or telltale signs of private misconduct, and knowledgeable in the particular area being investigated.

Ultimately, the Board must be independent when conducting, or directing the conduct of, an internal investigation – free from divided loyalties or conflicts of interest, real or perceived. The Board also has a duty conduct the investigation with the level of care that a reasonable person would exercise in like circumstances.[802]

V. *HOW* TO STRUCTURE AND CONDUCT A "CREDIBLE" INVESTIGATION

A Board-directed investigation, including its scope, proposed methodology (including selection of counsel), and execution, must be credible. Otherwise, a company will have wasted precious time and resources on an evaluation of limited utility. The investigation must inspire confidence and mitigate skepticism (principally among third parties such as government regulators, courts or potential private litigants) about the manner in which the investigation was conducted and factual findings formulated. Because there is no script, each investigation will differ based on its particular facts and circumstances. When structuring and conducting an investigation, Boards and Audit Committees alike should ensure that it is: (i) independent and objective; (ii) prompt and timely; (iii) prudent and careful; (iv) appropriately scoped, yet always flexible; and (v) thorough, comprehensive and accurate.

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[802] *See In re Lemington Home for Aged*, 659 F.3d 282, 290 (3d Cir. 2011), as amended (Oct. 20, 2011), *subsequent mandamus proceeding sub nom*. *See also In re Baldwin*, 700 F.3d 122 (3d Cir. 2012) ("It is likewise material whether the officers have exercised reasonable inquiry, skill and diligence" in performing their duties.) (internal quotations omitted); *Higgins v. N.Y. Stock Exch., Inc*., 10 Misc. 3d 257, 285, 806 N.Y.S.2d 339, 362 (N.Y. Sup. 2005) ("directors may be liable to shareholders for failing reasonably to obtain material information or to make a reasonable inquiry into material matters.") (internal quotations omitted); *Stockbridge v. Gemini Air Cargo, Inc*., 269 Va. 609, 620, 611 S.E. 2d 600, 606 (2005) ("A failure to make reasonable inquiry or inadequate monitoring by a director may constitute a breach of duty.")

A. Independent and Objective

To ensure independence and proper objectivity, an investigation must be conducted by an individual or body that is not constrained in the search for truth. The investigation must be viewed as unencumbered so that potentially unfavorable facts are scrutinized. Board-driven or -directed investigations have an air of objectivity. But, the Board itself should typically not *conduct* the investigation. Appropriate outside counsel should be selected to conduct the investigation. Whether selected counsel is the company's usual outside counsel or an entirely new firm will depend on the facts of each case.

What the company's law firm of first resort offers in terms of economic benefit by virtue of its ability to leverage institutional knowledge and avoid the costs or expense attendant with bringing in new counsel may be outweighed by optics that the investigation lacks the requisite independence and objectivity. The reality is a law firm that has been engaged previously or on an ongoing basis with the company may have the same types of affinity and closeness to the company and its officers that would militate against entrusting the investigation to such counsel. On the other hand, the benefits of using a new firm are the immediate air of objectivity that comes from not having the trappings of prior business relationships with the company and senior executives of the company.

B. Prompt and Timely

The investigation must also commence promptly after a credible allegation of potential wrongdoing to avoid any appearance that the company failed to appreciate the gravity of the allegations, and to protect the integrity of the investigation and the company's response at the outset are key considerations.

C. Prudent and Careful

Boards directing investigations that are short-fused and involve matters of substantial sensitivity should be wary of developing impaired "vision," that is, a myopic mentality focused on prompt

"conclusion" rather than the thoughtful and prudent conduct of the investigation. Missteps during the investigation can have far reaching implications. The Board, as well as counsel conducting the investigation, should be ever vigilant in protecting privileged information and work product. Steps must be taken at the outset to protect information not only from spoliation but from waiver of a privilege, confidentiality, or protection through inadvertent disclosure. There must be a clear plan for preserving relevant documents – both hard copy and electronically stored information ("ESI") – and protecting against spoliation, as courts and enforcement agencies may impose steep fines or other consequences for a failure to preserve evidence.[803] Care should be taken to promptly preserve all potentially relevant records by, first, issuance of a litigation hold directive to all custodians of such records. Additionally, the Board should ensure that the company's IT point of contact is notified promptly of the need to preserve all ESI from being purged, either intentionally through the company's auto-delete functionality or inadvertently by an unsuspecting or absentminded custodian**.**

There must also be clear steps communicated to and understood by all involved directed to protecting the confidentiality and privileged nature of any communications or work product. At the outset of any witness interview, for instance, *Upjohn* warnings[804] should be given.

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[803] *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (ruling, with respect to back up tapes with computer files and deleted emails "[w]hile a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.") (*citing Turner v. Hudson Transit Lines, Inc*., 142 F.R.D. 68, 72 (S.D.N.Y. 1991); *see also Genger v. TR Inv'rs, LLC*, 26 A.3d 180, 192 (Del. 2011) (affirming trial court's imposition of sanctions of $3.2 million in fees when "trial court rested its spoliation and contempt findings on more specific and narrow factual grounds— that Genger, despite knowing he had a duty to preserve documents, intentionally took affirmative actions to destroy several relevant documents on his work computer.")

[804] *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). Despite being a rote staple of any internal investigation, the *Upjohn* warning remains a critical

This involves warning any employees of the company that counsel represents the company or organization only, and that counsel does not represent the employee or other party subject to the interview.[805] Such a warning not only clarifies the nature of counsel's representation, but also solidifies and creates a record to establish privilege, namely, it establishes that any witness interviews are for the purpose of and in furtherance of providing legal advice to the company.[806] In order to ensure the broadest possible work product protection,[807] witness interview memos should not be a verbatim recitation of the interview, but rather a summary with attorney notes, perceptions, and opinions interspersed throughout.[808] And, there must be concerted efforts

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component of any witness interview to ensure the witness being interviewed fully understands counsel's role at the interview, who (or what) is the client (in this scenario, either the Board, or the special committee, or audit committee) and who (or what) owns the privilege attaching to the communications during that interview.

[805] *See, e.g.,* United States v. Connolly, No. 1:16-CR-00370 (CM), 2018 WL 2411216, at *9 n.4 (S.D.N.Y. May 15, 2018) (describing the *Upjohn* warning as "[t]he notice an attorney (in-house or outside counsel) provides a company employee to inform her that the attorney represents only the company and not the employee individually").

[806] *See* Sandra T.E. v. S. Berwyn Sch. Dist. 100, 600 F.3d 612, 622 (7th Cir. 2010); *Buck v. Indian Mountain Sch.*, No. 3:15-CV-00123 (JBA), 2017 WL 421648, at *7 (D. Conn. Jan. 31, 2017); Lerman v. Turner, No. 1:10-CV-02169, 2011 WL 62124, at *7 (N.D. Ill. Jan. 6, 2011), *objections overruled*, 2011 WL 494623 (N.D. Ill. Feb. 4, 2011)..

[807] There are necessarily two types of work product entitled to protection: (1) fact work product, and (2) opinion work product. "Fact" work product refers to documents containing factual information and, while protected, can be discoverable upon a showing of "substantial need." *See* Fed. R. Civ. P. 26(b)(3). "Opinion" work product is that which contains an attorney's opinions, legal analysis, and mental impressions and, for that reason, enjoys near absolute protection from disclosure.

[808] Indeed, any written interview memo that is prepared should conspicuously note that it is not a verbatim recitation but rather a summary that contains attorney mental impressions and opinions. *See* United States ex rel. Landis v. Tailwind Sports Corp., 303 F.R.D. 419, 425 (D.D.C. 2014) ("Other courts in this district have held substantially verbatim witness statements contained in interview memoranda that have not been 'sharply focused or weeded' by an attorney to be 'fact' rather than 'opinion' work-product." (citations omitted)). Moreover, to enhance the likelihood that such memos are considered as work product, attorneys

made in conjunction with the human resources and other corporate departments to ensure any known or suspected whistleblower does not become the subject of any actual or perceived retaliation.[809]

D. Appropriately Scoped and Flexible

At the outset, the investigation work plan must also be appropriately scoped based on the circumstances of the alleged wrongdoing, but remain flexible throughout in order to adjust, adapt and address new information and allegations that may come to light during the course of the investigation. The Board should anticipate and embrace that its work plan, in execution, will not be static, but rather dynamic in order to account for new or unanticipated facts and information. "Scope" as defined for each investigation necessarily considers the nature and severity of the allegations at issue. Therefore, the Board must define the scope and subject matter of the investigation but not define it too narrowly (in which case, facts or information germane to the investigation may be overlooked), nor too broadly (in which case, the investigation may become obtrusive or cost prohibitive).

Where the Board delegates authority to an independent Board committee or the Audit Committee, it should do so by formal resolution or other formal writing. The written delegation becomes the charter from which the investigating body's authority flows. It must be crystal clear during the course of any

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involved in the interview process should be active participants in the interview and be careful about using non-lawyers to transcribe the interview or prepare the interview memo. *See id.* at 432-33 (finding witness interview memos to be "fact" work product because it did "not appear that these attorneys focused the content of the memoranda themselves or participated in drafting them").

[809] This is due to the several federal and state statutory provisions that give rise to liability against companies that take adverse employment action against a whistleblower. *See, e.g.*, 31 U.S.C. § 3730(h) (False Claims Act protection and remedy for whistleblower experiencing retaliation by company); 18 U.S.C. § 1514A (anti-retaliation provisions of Sarbanes-Oxley Act); 15 U.S.C. § 78u-6 (same but for Dodd-Frank Act); 29 U.S.C. § 218c (same but for Affordable Care Act); 10 U.S.C. § 2409 (providing whistleblower protections to employees of Department of Defense contractors and subcontractors); N.Y. Lab. Law § 740 (McKinney)

investigation that the body conducting the investigation has the full authority of the Board, which would include the power to exact some punitive measures (such as suspension or termination, or at least the power to make the recommendation for such action). Note, however, that the Board, or the Board committee acting on a proper and formal delegation of authority, should retain flexibility to redefine the contours of the scope of work as facts develop and the Board's or committee's understanding of the facts crystallizes. In addition to formalizing in writing the authority or delegation of authority to act, a detailed **work plan** which provides a road map for the investigation should be prepared by counsel for the Board's consideration and approval.

E. Thorough, Comprehensive and Accurate

The investigation must obviously be sufficiently thorough to either substantiate or refute the actual allegations of wrongdoing. It must be sufficiently comprehensive to address all potential allegations and not be viewed as artificially limited. Thus, as stated above, the work plan should serve as a road map, at least initially, defining the alleged misconduct or wrongdoing that serves as the trigger for the investigation, the context in which that allegation arose, and the scope of the proposed investigation including but not limited to what documents or document categories will be gathered and what individuals will need to be interviewed. If wrongdoing is discovered, the investigation must identify what went wrong, that is, failures of internal controls or the compliance program. The investigation must lend itself to identifying appropriate remedial and/or disciplinary action, thereby providing the company an opportunity to strengthen its internal controls and compliance program. The findings and recommendations will need to be internally reported, either through oral presentation or by written report.

Consideration must also be given to whether any findings are the subject of SEC public disclosure (a question on which each company should seek guidance from its own disclosure counsel). Finally, the Board will need to examine any self-reporting to government regulators which, if constructed and executed

correctly, will go far as a show of good faith cooperation and will serve as a basis to mitigate civil liability or criminal punishment.[810] Any report should be based on sound and supportable factual findings. Any dissonance between information and factual findings will call into question the credibility of an investigation, thereby undermining its success.

VI. AUDIT COMMITTEE OVERSIGHT AND INVESTIGATIVE RESPONSIBILITIES

Audit Committees also have a critical role where investigations involve financial or other matters within the audit committee's province. Audit Committees are typically responsible for, among

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[810] Further below, we discuss DOJ's formal policy pronouncement in place as of the drafting of this Chapter - the DOJ Memorandum of September 2015 by then-Deputy Attorney General Sally Quillian Yates, *Individual Accountability for Corporate Wrongdoing* (the "Yates Memo"). The Yates Memo was said to echo and reaffirm DOJ's best practices guidance memorialized in the U.S. Attorney's Manual that governs criminal and civil corporate investigations. It has long been DOJ's practice to pursue individual wrongdoers and seek the entity's cooperation in facilitating that effort by offering "cooperation credit." The Yates Memo, since inception, has been the subject of voluminous commentary and not an insubstantial amount of "clarification" by DOJ. It goes beyond long-standing practice by seeking to "up the ante" on corporate entities as set forth in "six key steps" or guiding principles. The Yates Memo was originally predicted to have a short shelf-life during the Trump Administration. In an October 6, 2017 speech, Deputy Attorney General Rod Rosenstein stated that the Yates Memo is one of multiple formal policy memos that are under review by the new Administration. *See* Deputy Attorney General Rod J. Rosenstein, Keynote Address: NYU Program on Corporate Compliance & Enforcement (Oct. 26, 2017), *available at* http://www.law.nyu.edu/sites/default/files/upload_documents/Rosenstein%2C%20Rod%20J.%20Keynote%20Address_2017.10.6.pdf. Rosenstein indicated that individual accountability will remain a DOJ priority; however, he did not directly address whether the cooperation component of the Yates Memo, which arguably requires a company seeking credit to carry out their own investigation and identify culpable employees or executives, would remain part of DOJ policy. In a February 27, 2018 speech to the Financial Services Roundtable, a lobbying group, Rosenstein said any changes will be "modest" but DOJ was trying to "streamline it, clarify it" and incorporate the new policy into the U.S. Attorney's Manual. Kelly Swanson, "DOJ looking to clarify Yates Memo ambiguities," Global Investigations Review (Feb. 27, 2018), https://globalinvestigationsreview.com/article/jac/1166160/doj-looking-to-clarify-yates-memo-ambiguities.

other things, receiving and investigating complaints (including whistleblower complaints) of wrongdoing, including financial fraud involving auditing, accounting or internal controls issues.[811] Section 301 of the Act, and now Dodd-Frank[812] increased incentives for and protection of whistleblowers to report potential financial misconduct.

In the wake of Dodd-Frank,[813] Audit Committees find themselves tasked with oversight and management of an increasing number of internal investigations.[814] Audit committee investigations may be directed to examining suspected financial or accounting improprieties, FCPA bribery or other improper payment issues, financial crimes (embezzlement or theft), practices related to certain products or services offered by the company, or conflict or related party transactions. Like Board-directed investigations, Audit Committee directed investigations must be prompt and timely and have all other indicia of a credible and comprehensive investigation in order to be successful. And, as with Boards, questions about who conducts the investigation (usual outside counsel or independent counsel), measures to preserve data, ensuring the investigation is appropriately scoped, protection of privileged communications and work product, recommending appropriate remedial or corrective action and making a

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[811] 15 U.S.C. § 78j-1(m)(4) (2006) (also requiring that audit committees be empowered to retain independent counsel or experts to fulfill such duties).

[812] *See* 15 U.S.C. §§ 78u-6, 78u-7.

[813] 15 U.S.C. § 78u-6.

[814] *See* 17 C.F.R. §§ 240.21F-1-240.21F-17, regulations promulgated under Dodd-Frank which greatly enhance incentives for whistleblowers to uncover a company's violation of federal securities laws and report such wrongdoing to the SEC. *See also* 15 U.S.C. § 78u-6 (same). On July 20, 2018, the SEC proposed for public comment several amendments to the Dodd-Frank whistleblower regulations. Whistleblower Program Rules, 83 Fed. Reg. 34702-01 (proposed July 20, 2018) (to be codified at 17 C.F.R, pts. 240 and 249). Among other things, the amendments would clarify that the SEC may pay whistleblower awards when a company enters into a deferred-prosecution agreement or non-prosecution agreement. The amendments would also provide the SEC additional flexibility to adjust upward or downward exceedingly large or small whistleblower awards. *See id.* at 34703-05.

recommendation on self-reporting to the government drive Audit Committee considerations as well.

At the conclusion of an investigation, typically a report (or reporting) of the findings is made. The Board will then need to determine whether to disclose the findings, or the report itself, outside the company. That assessment necessarily turns, at least in part, on whether disclosure is mandatory or voluntary and, if voluntary, the benefit to the company from disclosure.

Disclosure may be mandatory in cases where, for instance, a publicly held company must disclose information that is deemed "material," that is, information the disclosure of which would make the company's public filings with the SEC not misleading.[815] Whether such disclosure is mandatory is a question that is not resolved here, but which should be raised with the Company's SEC disclosure counsel.

Even if not mandatory, disclosure of a report and its findings may be beneficial and advisable under certain circumstances. Aside from enabling the company to control the timing and placement of the information contained in the report, the Board may decide that it is beneficial to disclose a report and its findings to government authorities as a demonstration of good faith in order to obtain credit for this cooperation. Government agencies, whether the SEC, DOJ, the Commodity Futures Trading Commission ("CFTC"), CFPB, or others, encourage voluntary disclosures of misconduct.[816] Deputy Attorney General Rod Rosenstein, on May

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[815] *See generally* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

[816] *See, e.g.*, Dep't. of Justice, U.S. Attorney's Manual, § 9-47.120 (FCPA Corporate Enforcement Policy) (updated November 2017), *available at* https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977#9-47.120. In a November 29, 2017 speech, Deputy Attorney General Rosenstein announced a revised FCPA Corporate Enforcement Policy designed to further encourage voluntary disclosures of FCPA misconduct. Rosenstein disclosed that, under the Pilot Program in place since April 5, 2016, the number of voluntary disclosures nearly doubled compared to the previous 18-month period. Given this success, the DOJ now applies a presumption that it will resolve a company's case by declining to prosecute if the company satisfies the standards for voluntary self-disclosure, full cooperation, and timely and

9, 2018, announced a new policy to encourage cooperation among DOJ components and other enforcement agencies when imposing multiple penalties for the same conduct. When assessing whether multiple penalties are necessary to achieve justice, DOJ will, among other factors, consider the timeliness and adequacy of a company's disclosures to DOJ.[817] The question then becomes what must be disclosed in order to be eligible for cooperation credit.

The Yates Memo remains (at least until the Trump Administration publishes "modest" and clarifying revisions)[818] DOJ's standing written guidance on investigating and prosecuting individuals involved in alleged corporate wrongdoing. It set forth six guiding principles.[819] Of those, the first principle is the most relevant and significant to this analysis. It states:

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appropriate remediation. Deputy Attorney General Rod J. Rosenstein, Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign. *See also* CFPB Bulletin 2013-06 at 2-5 (2013), *available at* http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf

817 Deputy Attorney General Rod J. Rosenstein, Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), *available at* https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar.

818 *See* Deputy Attorney General Rod J. Rosenstein, Keynote Address: NYU Program on Corporate Compliance & Enforcement (Oct. 26, 2017), *available at* http://www.law.nyu.edu/sites/default/files/upload_documents/Rosenstein%2C%20Rod%20J.%20Keynote%20Address_2017.10.6.pdf; Kelly Swanson, "DOJ looking to clarify Yates Memo ambiguities," Global Investigations Review (Feb. 27, 2018), https://globalinvestigationsreview.com/article/jac/1166160/doj-looking-to-clarify-yates-memo-ambiguities.

819 Memorandum from Deputy Attorney General Sally Quillian Yates to all United States Attorneys (Sept. 9, 2015), *available at* https://www.justice.gov/dag/file/769036/download.

"To be eligible for <u>any</u> cooperation credit, corporations must provide the Department all relevant facts about the individuals involved in corporate misconduct." (Emphasis in original).[820]

A corporation that fails to disclose all relevant facts, or "declines" to learn of all relevant facts, would not be eligible for cooperation credit.[821] The guidance has impacted the manner in which internal investigations are conducted, from defining the scope of an investigation, to prioritizing and approaching witnesses and fact-gathering efforts, to preparing self-disclosures.

Assistant Attorney General Caldwell, speaking at the Global Investigations Review Conference in New York shortly after the Yates Memo, sought to provide clarification on disclosing corporate misconduct to the government: "Companies cannot just disclose facts relating to general corporate misconduct and withhold facts about the responsible individuals. And internal investigations cannot end with a conclusion of corporate liability, while stopping short of identifying those who committed the criminal conduct."[822]

Questions remain regarding how far must an entity go in its effort to collect "all relevant facts" and whether certain actions taken by an entity (provision of separate counsel for certain employees, for instance) which may hamper the government's collection of facts and testimony, will negatively affect an entity's ability to obtain cooperation credit under the DOJ's internal guidelines. Speaking at the Association of Corporate Counsel Conference, the Deputy Chief of the DOJ Fraud Section described cooperation as an "all or nothing" proposition and said that cooperation for companies is no

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[820] *Id*. at 3.

[821] *Id*.

[822] Dept. of Justice, Assistant Attorney General Leslie R. Caldwell Delivers Remarks at the Second Annual Global Investigations Review Conference, https://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-second-annual-global-0 (last visited Feb. 28, 2017).

different than for individuals under the Yates Memo.[823] Further, DOJ's revised FCPA Corporate Enforcement Policy announced November 29, 2017, also adds some helpful gloss to the meaning of "full cooperation":

- "[D]isclosure on a timely basis of all facts relevant to the wrongdoing at issue, including: all relevant facts gathered during a company's independent investigation; attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information; all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents);

- Proactive cooperation, rather than reactive; that is, the company must timely disclose facts that are relevant to the investigation, even when not specifically asked to do so, and, where the company is or should be aware of opportunities for the Department to obtain relevant evidence not in the company's possession and not otherwise known to the Department, it must identify those opportunities to the Department;

- Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents,

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[823] Liz Crampton, "Yates Memo Requires Total Cooperation, Official Says," Bloomberg BNA (Oct. 18, 2017), *available at* https://www.bna.com/yates-memo-requires-n73014471084/.

and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages;

- Where requested, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that the Department intends to take as part of its investigation; and

- Where requested, making available for interviews by the Department those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights), and, where possible, the facilitation of third-party production of witnesses."[824]

Although AAG Caldwell and then-Deputy AG Yates both proclaimed DOJ will not seek a waiver of the attorney-client privilege or work product protections as a condition of obtaining cooperation credit,[825] and the revised FCPA Enforcement Policy now reflected in the U.S. Attorneys' Manual says the same with respect to FCPA cases,[826] such a position would appear to be at

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[824] Dep't. of Justice, U.S. Attorney's Manual, § 9-47.120 (FCPA Corporate Enforcement Policy) (updated November 2017), *available at* https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977#9-47.120.

[825] *See, e.g.* Richard Smith, Caldwell Remarks Clarify Yates Memo's Purpose, https://www.law360.com/corporate/articles/708596/caldwell-remarks-clarify-yates-memo-s-purpose (last visited February 28, 2017) ("It is important to note that Caldwell said the memo did not change the DOJ's policy on attorney-client privilege or work product protection and the DOJ would not ask companies to waive privilege to receive cooperation credit, consistent with existing DOJ policy.")

[826] *Id.* ("As set forth in USAM 9-28.720, eligibility for full cooperation credit is not predicated upon waiver of the attorney-client privilege or work product protection, and none of the requirements above require such waiver. Nothing herein alters that policy, which remains in full force and effect.").

odds with the notion that *all* relevant facts regarding individual accountability and culpability must be disclosed and is a flashback to the Thompson Memo[827] before relevant portions were rejected as an unconstitutional overreach by prosecutors.[828] The risk of disclosing the report, beyond merely communicating the factual findings themselves is that such voluntary disclosure of arguably privileged information may be deemed to be a complete, subject matter waiver privilege, that is, a waiver of privilege as to any documents concerning the same subject matter of the report.[829] Indeed, the selective waiver theory has been rejected by a majority of federal circuits.[830]

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[827] *See* Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations to Heads of Department Components and United States Attorneys (Jan. 20, 2003). The Thompson Memo's aggressive pursuit of privilege disclosures was tempered with the McNulty Memorandum and the Filip Memorandum, both of which made clear that cooperation credit would be based on disclosure of "relevant facts" and not on waiver of any privilege or work product protection. *See also* Stewart Bishop, 'Yates Memo' Author Defends Policy, Says Shift is in Effect, Law360 (May 10, 2016), https://www.law360.com/articles/794679/yates-memo-author-defends-policy-says-shift-is-in-effect ("'I think we may see, although the Yates Memo says you are not actually required to waive the attorney-client privilege to satisfy the Yates Memo, the practical impact of how you give information to the government is really, at the end of the day, going to require in many instances that you waive privilege," said Cole, a former deputy attorney general.'").

[828] *See U.S. v. Stein*, et al, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (holding portion of Thompson Memo unconstitutional insofar as it compelled prosecutors to violate individuals' constitutional right to counsel; KPMG's decision to stop advancing legal fees for its "uncooperative" employees who had been indicted was the direct result of unconstitutional government pressure), *aff'd* U.S. v. Stein, 541 F.3d 130 (2d Cir. 2008).

[829] *See, e.g., In re Grand Jury Proceedings*, 219 F.3d 175, 183 (2d Cir. 2000) ("This type of waiver is also known as subject-matter waiver. As explained in Wigmore, '[t]he client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all other communications to the attorney on the same matter.' 8 J. Wigmore, Evidence § 2327, at 638 (McNaughton ed., 1961).").

[830] *See, e.g., Permian Corp. v. U.S.*, 665 F.2d 1214, 1219-22 (D.C. Cir. 1981); *U.S. v. Massachusetts Institute of Technology*, 129 F.3d 681, 685-86 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1424-27 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988); *Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d

All this to say that Boards will need to weigh the benefits of disclosure and obtaining cooperation credit against the drawbacks associated with a potential subject matter waiver, not to mention public airing of potentially criminal misconduct or, at a minimum, embarrassing facts.

A company's calculus, however, must constantly evolve. In addition to the new DOJ policies discussed above, the Trump Administration has also scaled back enforcement activity at the CFPB and Mick Mulvaney, Acting Director of the CFPB, has explained that the CFPB will now be more interested in a more collaborative approach than the Obama Administration, seeking to negotiate with companies to settle disputes and only pursuing litigation as a last resort.[831] This new approach followed Mulvaney's implementation of a months-long pause in enforcement activity, and it is consistent with the views of longtime critics of the CFPB who have argued it is overly bureaucratic, too powerful, not subject to appropriate oversight and outside the bounds of constitutional checks and balances.[832] Indeed, on April, 2, 2018, Acting Director Mulvaney

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289, 294– 310 (6th Cir. 2002); *In re Pacific Pictures Corp*., 679 F.3d 1121, 1127-28 (9th Cir. 2012); *In re Qwest Communications Intern. Inc*., 450 F.3d 1179, 1194 (10th Cir. 2006).

[831] *See, e.g.*, Yuka Hayashi, "CFPB Enforcement Is Back—With a Softer Touch," Wall Street Journal (July 26, 2018); Mick Mulvaney, "The CFPB Has Pushed its Last Envelope," Wall Street Journal (Jan. 23, 2018).

[832] Unlike other regulatory bodies, for instance, Congress does not set the Bureau's budget, which is instead funded through transfers from the Federal Reserve. In October 2016, in *PHH Corp. v. CFPB*, the D.C. Circuit Court of Appeals ruled that the Bureau's structure was unconstitutional - that it was a violation of Article II for the Bureau to lack the "critical check" of presidential control or the "substitute check" of a multi-member governance structure necessary to protect individual liberty against "arbitrary decision-making and abuse of power." The court remedied this constitutional defect by severing the removal-only-for-cause provision from the Dodd-Frank Act. *See PHH Corporation v. CFPB*, No. 15-1177, (D.C. Cir. Oct. 11, 2016). The CFPB petitioned for an en banc rehearing of the decision and the court had invited the DOJ to state its position. In a filing made prior to President Trump taking office, DOJ supported the CFPB's petition. After President Trump's inauguration, however, DOJ indicated it planned to file an amicus brief, which the DC Circuit permitted to be filed on or before March 17, 2017.

recommended in the CFPB's Semi-Annual Report that Congress adopt statutory changes to Dodd-Frank that would further circumscribe the CFPB's authority and make it more accountable to Congress.[833]

The takeaway, then, is that while certain policy initiatives may be shifting, and certain agencies may be more lenient and cooperative than under the prior Administration, the Trump Administration's overall enforcement posture is likely to remain aggressive. Recent policy announcements from the Department of Justice confirm as much. And, compliance and investigative best practices transcend politics and political agendas because they have (or are intended to have) an altruistic focus of striving for what truly serves the company's best interests in being a lawful, compliant corporate citizen. Regardless of what the future may hold, Boards and Audit Committees should remain vigilant and diligent in regularly examining and assessing internal controls and the efficacy of compliance programs and, when credible allegations are raised, identifying, investigating and promptly addressing potential misconduct within a company.

VII. CONCLUSION

Best practices for Board and Audit Committees are not likely to become more forgiving. Boards and Audit Committees will continue to have heightened responsibilities to proactively identify ways for companies to navigate the perils and pitfalls of conducting business in a global economy. While merely scratching the surface in this Chapter, the issues – both proactive and reactive – are profound for companies. Adhering to the guidance in this Chapter provides a starting point for any company . . . but *only* a starting point. What risk mitigation efforts are

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[833] Press Release, "CFPB Issues Semi-Annual Report: Acting Director Mulvaney Recommends Statutory Changes in His First Report to Congress" (April, 2, 2018), *available at* https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-semi-annual-report/ (recommending that Congress (1) fund CFPB through annual appropriations; (2) require Congress to approve significant regulations; (3) reduce the independence of the Director of the CFPB by making him answer to the President; (4) create an inspector general for the CFPB).

appropriate, and what investigative contours should be followed, are entirely dependent on the particular dynamic and need of each company.