2020 UPDATE:

RECOMMENDED PRACTICES FOR COMPANIES AND THEIR COUNSEL IN CONDUCTING INTERNAL INVESTIGATIONS

Canadian Version

Federal Criminal Procedure Committee

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RECOMMENDED PRACTICES FOR COMPANIES AND THEIR COUNSEL IN CONDUCTING INTERNAL INVESTIGATIONS[1]

I. PURPOSE OF THE PAPER

The Federal Criminal Procedure Committee of the American College of Trial Lawyers ("Committee") has observed counsel implementing a wide variety of procedures and protocols in conducting corporate internal investigations for public and other companies. This has resulted in variances both in treatment of officers and employees and in the outcomes of the investigations for such officers and employees and the companies themselves. The Committee now recommends what it believes to be the most balanced and effective practices for conducting internal investigations of possible corporate wrongdoing. Although the principles articulated in this paper are tailored to corporate internal investigations relating to public companies, when significant allegations of malfeasance are alleged or suspected, corporate decision-makers and counsel who advise them may apply many of these principles to other entities and investigations of all breadths.

II. INITIAL ORGANIZATIONAL ISSUES

A. Factors to Consider When Evaluating Whether to Commence an Internal Investigation When Significant Corporate Malfeasance Has Been Alleged or When an Independent Auditor Suspects Illegality

Internal investigations typically result from discovery—by the company, the media, an external auditor, a whistleblower or some other third party (*e.g.*, short seller report)—of circumstances that raise a serious concern of potential liability or financial misconduct. The investigations are thus meant to determine the validity and seriousness of the circumstances alleged or disclosed and what action, if any, the company should take consistent with the best interests of its shareholders. Among the possible responsive actions are remediation, market disclosure, and preparation for, and defense of, potential prosecutorial and regulatory actions or civil lawsuits. Depending on whose conduct is the focus of the investigation, senior management, the Board of Directors ("Board"), an audit committee, a special committee of disinterested directors, or some combination of all these decision-makers may decide to commence an investigation.

Whether to commence an internal investigation may be a discretionary decision or in limited circumstances may be prescribed by statute. In the latter case, auditors' obligations with respect to possible illegal acts are dictated by both Generally Accepted Auditing Standards and Section 10A of the Securities Exchange Act of 1934, which was enacted in 1995 as part of the

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1 The principal draftsman of this paper when it was originally issued in 2008 was David M. Brodsky (New York City), a Fellow in American College of Trial Lawyers ("ACTL"). He was at that time assisted by a subcommittee of the Federal Criminal Procedure Committee ("Committee") of ACTL. This revised paper was similarly prepared by a subcommittee of the Committee consisting of Committee Chair William P. Keane (San Francisco), Vice Chair Sharon L. McCarthy (New York City), and Fellows Henry Asbill (Washington, D.C.), Robert M. Cary (Washington, D.C.), Richard S. Glaser, Jr. (Charlotte), Neil A. Kaplan (Salt Lake City), John J. Kenney (New York City), and Edward Swanson (San Francisco). The Committee recognizes and thanks Kyle A. McLorg of Farella Braun + Martel LLP (San Francisco) for his editing and research assistance.

Private Securities Litigation Reform Act. Section 10A requires independent auditors who detect or otherwise become aware that an illegal act has or may have occurred, whether or not "perceived to have a material effect on the financial statement," to determine whether it is likely that such an illegal act has occurred and the effect of any illegal act on the company's financial statements.[2] Auditors look to the company to investigate and evaluate such possible illegalities and then assess whether the company and the Board have taken "timely and appropriate remedial actions" regarding such possible illegalities.[3] In this regard, the methodology used in "10A investigations" is not materially different from an internal investigation commenced on the company's own initiative, and therefore, for the purposes of this paper they will be treated collectively.

In addition, the "reporting up" provisions of the Sarbanes-Oxley Act of 2002[4] require in-house and outside counsel to ensure that the company takes appropriate steps in response to allegations of wrongdoing, while the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[5] incentivizes companies to respond rapidly to internal reports of wrongdoing.

In Canada, there is no national securities regulator or securities legislation at the federal level, although the Supreme Court of Canada recently ruled that a proposed co-operative pan-Canadian securities regulator would be constitutional.[6] For now though, each province and territory has a securities commission, or similar authority, and its own piece of provincial or territorial legislation. The largest of the provincial regulators is the Ontario Securities Commission ("OSC"), and although Ontario's *Securities Act* does not specifically mention consequences in the event of an audit revealing illegal activity, it does impose auditor examination and reporting standards under Sections 21.9 and 21.10.[7]

The provincial and territorial regulators work together to coordinate and harmonize regulation of the Canadian capital markets through the Canadian Securities Administrators ("CSA"). This means that the securities markets are also governed by a number of largely aligned national or multi-lateral instruments, which apply to: efficiency of the securities market and trading rules, registration and related matters, the distribution of securities, continuous disclosure, take-over bids and special transactions, securities transactions outside the jurisdiction, mutual funds, and derivatives. Technically, Canadian securities law does not require companies to conduct or report internal investigations. That being said, failure to do either may negatively impact a company's eligibility for the credit for cooperate regime discussed further below.However, many provinces in Canada have statutes governing occupational health and safety that do require investigations in certain circumstances. These include requiring investigations into incidents and complaints of workplace harassment,[8] as well as into serious injuries and other incidents.[9]

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2 Securities Exchange Act of 1934 § 10A(b)(1), codified at 15 U.S.C. § 78j-1 ["Securities Exchange Act"].
3 *Id.* § 78j-1(b)(2)(B).
4 Sarbanes-Oxley Public Company Accounting Reform and Corporate Responsibility Act, codified at 15 U.S.C. §§ 7201-7266.
5 Dodd-Frank Wall Street Reform and Consumer Protection Act, codified at 12 U.S.C. §§ 5301-5641.
6 *See Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48.
7 *Securities Act*, RSO 1990, c S5, ss 21.9(5), 21.10(2).
8 See *Occupational Health and Safety Act,* RSO 1990, c O.1, s. 32.0.7.
9 See *Occupational Health and Safety Act*, SA 2017, cO-2.1, s. 40(5).

Outside of the statutory context, there are several circumstances that traditionally trigger the initiation of internal investigations by senior management, a Board, an audit committee, or a special committee:

a. Receipt of a whistleblower communication that raises allegations of misconduct by senior or significant members of management;

b. Shareholder demand in the nature of an actual or threatened derivative action against directors and officers, possibly leading to formation of an internal committee;

c. Allegations of misconduct raised by independent audit, internal audit, or compliance;

d. Board member suspicion of misconduct by officers or employees;

e. Receipt of a subpoena or informal request for information by a government or self-regulatory organization ("SRO"), or an announcement by a government agency or SRO of suspicions of misconduct by the company or industry; or

f. Allegations of misconduct by the media, watchdog groups, or academics.

Provincial and territorial whistleblower programs in Canada allow employees and external stakeholders to report suspicious activity for securities commissions to investigate. In 2016, the OSC launched a "Whistleblower Program", which provides protection for employees who come forward and report misconduct.[10] As part of this initiative, the *Securities Act* was amended to prohibit reprisals against whistleblowing employees by their employers and to void any confidentiality provision that prevents employees from reporting corporate misconduct.[11] The OSC has the power to enforce these anti-reprisal provisions through its public interest jurisdiction under the *Securities Act* and did so for the first time in July 2020.[12]

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10 *See also* ASC Policy 15-602, "Whistleblower Program" (20 November 2018), online: www.albertasecurities.com/News-and-Publications/News-Releases/2018/ASC-announces-the-addition-of-a-whistleblower-program. In October 2019, British Columbia introduced substantial amendments to its *Securities Act*, including a prohibition against taking retaliatory actions. The British Columbia Securities Commission has yet to implement a program for paying awards to whistleblowers who provide it with information on securities-related misconduct. *See* Bill 33, *Securities Amendment Act, 2019*, Legislative Assembly of British Columbia, online: www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov33-1.

11 *See* OSC Policy 15-601, "Whistleblower Program", online: www.osc.gov.on.ca/en/SecuritiesLaw_20160714_15-601_osc-notice-policy-adopted.htm.

12 The OSC brought its first enforcement action under the whistleblower reprisal rules against crypto asset trading platform, Coinsquare Ltd., and its former CEO. As part of the settlement agreement, the company admitted that its response to the employee following his internal reporting of the wash trading adversely affected his employment and constituted a prohibited reprisal. *See* OSC News Release, "OSC Panel approves settlement with Coinsquare, Cole Diamond, Virgile Rostand and Felix Mazer" (21 July 2020), online: www.osc.gov.on.ca/en/NewsEvents_nr_20200721_osc-panel-approves-settlement-with-coinsquare-diamond-rostand-mazer.htm.

B. External Factors, Such as the Existence or Anticipated Existence of a Parallel Government Investigation or Shareholder Lawsuit, Should Be Considered When Making Decisions about How to Conduct and Document an Internal Investigation

There is a reasonable likelihood that any major internal investigation will be followed by, or conducted parallel to, an actual (or anticipated) external investigation by one or more of the following: the U.S. Department of Justice ("DOJ"), including a U.S. Attorney's Office, the U.S. Securities and Exchange Commission ("SEC"), the New York Stock Exchange (or other SRO), a state attorney general or local district attorney's office, or other enforcement or regulatory authority. Among the various federal, state, and local law-enforcement agencies that can initiate such an investigation, district attorney offices have recently increased their focus on corporate wrongdoing.[13] The company and the Board may also be facing civil lawsuits, including shareholder class actions and derivative suits, pertaining to the alleged misconduct.

In Canada, investigation and enforcement are core CSA responsibilities. Enforcement personnel can bring matters before a specialized administrative tribunal which, in most jurisdictions, is the local securities commission. Other compliance monitors include SROs (*e.g.*, the Investment Industry Regulatory Organization of Canada, the Chambre de la sécurité financière, and the Mutual Fund Dealers Association of Canada), exchanges (*e.g.*, the Toronto Stock Exchange, the Montréal Exchange, the Canadian Securities Exchange, and so on), the Royal Canadian Mounted Police for enforcement of the securities-related provisions of the *Criminal Code*[14] (*e.g.*, market manipulation and insider trading), and courts for more extensive sanctions than those available to securities regulatory authorities.

A file may fall under the jurisdiction of more than one securities regulator, and there is no formal process to determine which one should take the lead. Coordination in such instances is key, which is why securities regulator staff of the relevant jurisdictions will often work together in producing a "joint investigation". The regulators of the four largest securities regulatory jurisdictions in Canada (*i.e.*, Alberta, British Columbia, Ontario, and Québec) are also party to the International Organization of Securities Commissions' *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* ("MMoU"),[15] which sets the international benchmark for cross-border cooperation.

As between securities regulators and law enforcement in Canada, securities regulators have the jurisdiction to pursue administrative and quasi-criminal infractions, but purely criminal charges fall under the domain of public prosecution. However, if securities regulator staff seek an investigation order from their respective Commission, turning an informal investigation into a formal

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13 *See, e.g.*, *D.A. Vance Announces $162.8 Million Payment From Société Générale to New York City and State* (19 November 2018), Manhattan District Attorney Press Release, online: www.manhattanda.org/d-a-vance-announces-162-8-million-payment-from-societe-generale-to-new-york-city-and-state/. In 2019, the Brooklyn District Attorney's Office announced expansions to its white-collar enforcement work in response to the borough's growing financial sector, adding experienced litigators whose private practice focused on internal corporate investigations. *See Brooklyn DA Adds White-Collar Litigator and Veteran Prosecutors to its Staff* (25 January 2019), Brooklyn Daily Eagle, online: brooklyneagle.com/articles/2019/01/25/brooklyn-da-adds-white-collar-litigator-and-veteran-prosecutors-to-staff.

14 *Criminal Code*, RSC 1985, c C-46.

15 *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (2002), International Organization of Securities Commissions, online: www.iosco.org/about/?subsection=mmou.

one, that formal investigation can no longer be referred to criminal law enforcement agencies due to Canada's constitutional protections against self-incrimination.[16] Further, securities regulators are prohibited from disclosing testimony that was compelled pursuant to their regulatory powers under their home statutes to criminal law enforcement authorities (absent consent; however, such protections do not extend to information that was voluntarily provided to regulatory authorities). The existence or threatened existence of any of these external events necessarily affects how the company, Board, audit or independent committee, and outside counsel conduct and document an internal investigation. As discussed more fully below, counsel and the company should anticipate that all documents created, facts uncovered, and witness statements may be disclosed to prosecutors or regulators, including those in other jurisdictions pursuant to the MMoU, and may also be discoverable by a private plaintiff, possibly necessitating requests for confidentiality orders from the officiating securities regulator. This assumption should be a factor in all major decisions about the procedure and protocol for any internal investigation. In particular, the company, the Board or its independent committees, and counsel may want, or may be forced, to make an early determination about whether and how they will "cooperate" with prosecutorial or regulatory investigations.

During the last quarter century, companies have placed an emphasis on expanding the scope of their cooperation with government investigations. Companies often initiate their own extensive internal investigations into perceived corporate misconduct in order to avoid or mitigate punishment by prosecutors or regulators. This emphasis has been driven by a number of factors, including regulatory policies promulgated by the DOJ,[17] the SEC and other regulators,[18] the

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16 See *Canadian Charter of Rights and Freedoms*, s 13, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ["*Charter*"].

17 *See, e.g.*, Memorandum from Eric Holder, Jr., Deputy Attorney General, to All Heads of Department Components and U.S. Attorneys (16 June 1999) (including attachment entitled "Federal Prosecution of Corporations"), *reprinted in* Criminal Resource Manual, arts. 161, 162, online: www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF. *See also* U.S. Department of Justice, "Principles of Federal Prosecution of Business Organizations" (20 January 2003), online: www.usdoj.gov/dag/cftf/business_organizations.pdf ["Thompson Memo"]; U.S. Department of Justice, "Principles of Federal Prosecution of Business Organizations" (12 December 2006), online: www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

18 S*ee* "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions," issued on October 23, 2001 as Release Nos. 44969, 1470, online: www.sec.gov/litigation/investreport/34-44969.htm ["Seaboard Report"]. The Seaboard Report is the SEC's current policy regarding waiver of privilege and work product, and sets forth the criteria that it will consider in determining the extent to which organizations will be granted credit for cooperating with the agency's staff by discovering, self-reporting, and remedying illegal conduct. Such cooperation, or lack thereof, in the eyes of the staff will be taken into consideration when the SEC decides what, if any, enforcement action to take. The Seaboard Report has been read by some practitioners as encouraging companies to waive their attorney-client privilege, work product, and other legal protections as a sign of full cooperation. See Jonathan K. Youngwood, "Should You Waive Privilege In Government Investigations?" (11 May 2015), Law360, online: www.law360.com/articles/651446.

The most recent Section 21(a) Report issued by the SEC signals a new area of emphasis for its Enforcement Division: cybersecurity. This investigative report, titled "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding Certain Cyber-Related Frauds Perpetrated Against Public Companies and Related Internal Accounting Controls Requirements," issued on October 16, 2018 as Release No. 84429 ["Report"], alerted public companies to the importance of considering cyber-related fraud threats when creating and implementing internal accounting controls and detailed its investigations of nine public companies that had recently fallen victim to "business email compromises." Although the Commission announced that it would not pursue enforcement actions against any of the companies under investigation, the Report put issuers and other market participants on notice of its heightened interest in financial cyber fraud and the evolving standards that internal accounting controls must meet to satisfy Section 13(b)(2)(B) of the Exchange Act. For additional information on this subject, see "Commission Statement and Guidance on Public Company Cybersecurity Disclosures" (26 February 2018), SEC Release Nos. 33-10459, 34-82746, online: www.sec.gov/rules/interp/2018/33-10459.pdf.

Another example of a regulatory agency promulgating similar policies is the Commodity Futures Trading Commission ("CFTC"), the Enforcement Division of which issued an Enforcement Advisory on August 11, 2004, entitled "Cooperation Factors in Enforcement Division Sanction Recommendations," promoting the waiver of appropriate privileges. The CFTC issued a revised Enforcement Advisory eliminating the waiver language on March 1, 2007. See online: www.abanet.org/poladv/priorities/ privilege waiver/acprivilege.html.

U.S. Sentencing Commission,[19] the passage of federal legislation mandating certain activities by independent auditors and audit committees,[20] and civil litigation.

Since the financial crisis of 2007-2008, the DOJ has emphasized the importance of cooperation that assists the DOJ in the prosecution of individual wrongdoers. In 2015, then-Deputy Attorney General Sally Q. Yates issued what has come to be known as the "Yates Memo," which significantly revised prior corporate prosecution guidance and outlined "six key steps" that should be taken in all internal investigations of corporate wrongdoing. Most importantly, the Yates Memo made clear that "[t]o be eligible for *any* cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct."[21] Much of the guidance from the Yates Memo remains operative today, though its binary approach to cooperation has since been modified by the Trump Administration. While there is no Canadian equivalent, the Yates Memo remains critical for Canadian companies conducting cross-border business.

In November 2018, then-Deputy Attorney General Rod J. Rosenstein announced that the DOJ was stepping away from certain aspects of the Yates Memo, including its "all or nothing" approach to cooperation.[22] Under the revised policy, contemporaneously incorporated into the Justice Manual (previously named the U.S. Attorneys' Manual), "for a company to receive any consideration for cooperation . . . the company must identify all individuals *substantially involved in or responsible for* the misconduct at issue . . . and provide to the Department all relevant facts relating to that misconduct."[23] This policy change was intended to ameliorate concerns that "[w]hen the government alleges violations that involved activities throughout the company over a long period of time, it is not practical to require the company to identify every employee who played any role in the conduct."[24] It also served to expand existing incentives for companies to cooperate with government investigations and to voluntarily self-disclose allegations of corporate misconduct.[25] The revised policy allows a company to receive cooperation credit even if it is "unable to identify all relevant individuals or provide complete factual information despite its good faith efforts to cooperate fully."[26]

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19 *See* U.S. Sentencing Commission Guidelines, "Chapter 8: Sentencing of Organizations" (2018), online: www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8.

20 *See* Sarbanes-Oxley Act of 2002, Pub. L. 107–204, 116 Stat. 745. For example, the Act requires that audit committees pre-approve all permitted services provided by the independent auditor and be directly responsible for overseeing the independent auditor's engagement with the company. It also forbids independent auditors from providing specific prohibited non-audit services, and sets guidelines for communications between the audit committee and the independent auditor. For a full discussion of the Act's requirements, *see* Office of the Chief Accountant, "Audit Committees and Auditor Independence" (17 April 2007), SEC, online: sec.gov/info/accountants/audit042707.htm.

21 *See* Memorandum from Sally Quillian Yates, Deputy Attorney General, to All Heads of Department Components and U.S. Attorneys titled "Individual Accountability for Corporate Wrongdoing" (9 September 2015), DOJ, online: www.justice.gov/archives/dag/file/769036/download ["Yates Memo"].

22 *See* Rod J. Rosenstein, "Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act", Oxin Hill, Maryland (29 November 2018), *DOJ Office of Public Affairs*, online: www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0 ["Rosenstein Speech"].

23 U.S. Department of Justice, *Justice Manual* § 9-28.700 [emphasis added] ["Justice Manual"].

24 *See* Rosenstein Speech, *supra*, note [•].

25 *See* Justice Manual, *supra*, note [•] § 9-47.120, "2017 Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy, on Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in FCPA Matters". On March 1, 2018, officials from the U.S. DOJ announced at the American Bar Association's annual white collar criminal defense conference that prosecutors in the Criminal Division will refer to the FCPA Corporate Enforcement Policy as nonbinding guidance in matters involving other financial crimes.

26 *Id*.

Under current DOJ policy, a company's "[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection."[27] This continues the move away from earlier policies that formally encouraged the waiver of privilege. Although waiver of privilege is not *required*, the baseline requirement that a company seeking cooperation credit disclose "the relevant facts of which it has knowledge" creates major incentives for the company to disclose all facts of which it has knowledge, even if those facts came to light in a privileged setting.[28] Moreover, although "eligibility" for cooperation credit does not turn on a waiver of privilege, as a practical matter, greater cooperation, including waiver, could lead to more favorable treatment.[29] Thus, the possibility of eventual waiver, with the attendant possibility that previously privileged documents may become available to civil litigants, should be a factor when deciding whether and how to carry out an internal investigation.

The incentive to assist government investigations raises new concerns over whether the availability of cooperation credit will turn private companies into government proxies during internal corporate investigations. This issue arose in 2018 in *United States v. Connolly* before S.D.N.Y. Chief Judge Colleen McMahon when a former Deutsche Bank employee accused of London Inter-bank Offered Rate ("LIBOR")-rigging sought to preclude the government from using "involuntary statements" he made to the bank's outside counsel during an internal investigation.[30] Deutsche Bank, after learning that the government was looking into its LIBOR-related practices, initiated an internal investigation in order to capitalize on corporate cooperation policies and compelled employee participation under the threat of termination. During the investigation, outside counsel obtained statements from employees, which it subsequently turned over to the government. The defendant argued that the DOJ had effectively deputized corporations and their outside counsel by issuing policies that amounted to a trade: cooperation credit and lenient sentences in exchange for companies compelling and turning over evidence to the government for use in prosecuting their employees. Though the government opted against using the contested statements at trial, the employee nonetheless argued that the statements helped the government learn about the LIBOR process and develop investigatory leads, thus tainting the subsequent investigation. In response, Judge McMahon recognized the corporation's "uniquely coercive position" over its employees and the "deeply troubling" possibility that the government was "outsourcing its investigations into complex financial matters to the targets of those investigations."[31] The court found that because the conduct of the company was "fairly attributable" to the government, the employee's statements during interviews with company counsel were compelled in violation of his Fifth Amendment right against self-incrimination.[32] However, the court ultimately held that the government did not violate *Kastigar*'s[33] ban on the use of such statements because the government did not actually use the employee's statements at trial.[34] Lawyers conducting internal corporate investigations, while also seeking full

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27 *Id*. § 9-28.720.

28 *Id*.

29 For example, a privilege waiver could very well allow for a more thorough presentation of the "relevant facts".

30 *United States v. Connolly*, *et al.*, No. 16-CR-00370 (S.D.N.Y. April 23, 2018), Defendant Gavin Campbell Black's Individual Motions In Limine (Dkt. No. 232) at 1, 8.

31 *United States v. Connolly, et al.*, No. 1:16-CR-00370-CM, 2019 WL 2125023 (S.D.N.Y. May 2, 2019) at *1 ["*Connolly*"].

32 *Id*. at *10.

33 *Kastigar v. United States*, 406 U.S. 441 at 444-445 (1972) (holding that the Fifth Amendment privilege against compulsory self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory … and protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used").

34 *Connolly*, *supra*, note [•] at *1. For a more in-depth discussion of the issues discussed in *Connolly*, *see* Erica Connolly & Jessica

cooperation credit on behalf of the company from the government, must be careful to design an internal review genuinely independent from the government.

The SEC announced its own cooperation policy in enforcement proceedings when it decided to take no action against Seaboard Corporation in 2001, despite evidence that Seaboard's former controller had caused the company's books and records to be inaccurate and its financial reports misstated. In what has come to be known as the "Seaboard Report," the Commission outlined thirteen factors it would consider in determining cooperation.[35] In 2006, the SEC updated its standards for imposing civil penalties on corporations.[36] As explained in the Commission's Statement on the updated standards:

> [W]hether, and if so to what extent, to impose civil penalties against a corporation . . . turns principally on two considerations: The presence or absence of a direct benefit to the corporation as a result of the violation . . . [and] [t]he degree to which the penalty will recompense or further harm the injured shareholders."[37]

The Commission's Statement also listed seven additional factors that it will take into account when deciding civil penalties, including cooperation:

(1) The need to deter the particular type of offense;

(2) The extent of injury to innocent parties;

(3) Whether complicity in the violation is widespread throughout the corporation;

(4) The level of intent on the part of the perpetrators;

(5) The degree of difficulty in detecting the particular type of offense;
(6) The presence or lack of remedial steps by the corporation; and

(7) The extent of cooperation with the Commission and other law enforcement agencies.[38]

Heim, "Becoming An Arm of the State: Recent Challenge to Statements Made in Internal Investigations Shines a Spotlight on the Role of the Government in Internal Investigations" (22 October 2018), *The V&E Report*, online: www.velaw.com/Insights/Becoming-an-Arm-of-the-State-Recent-Challenge-to-Statements-Made-in-Internal-Investigations-Shines-a-Spotlight-on-the-Role-of-the-Government-in-Internal-Investigations/. *See also* Jason Halperin & David Siegal, "Playing With Fire: When the Government and Outside Counsel Get Too Close in a Corporate Investigation" (7 December 2018), *New York Law Journal*, online: www.law.com/newyorklawjournal/2018/12/07/playing-with-fire-when-the-government-and-outside-counsel-get-too-close-in-a-corporate-investigation/.

35 Seaboard Report, *supra*, note [•].

36 *See* SEC Press Release, "Statement of the Securities and Exchange Commission Concerning Financial Penalties" (4 January 2006), SEC, online: www.sec.gov/news/press/2006-4.htm ["Financial Penalties Statement"]. *See also* Litigation Release No. 19520 (4 January 2006), *SEC v. McAfee, Inc.*, Civil Action No. 06-009 (PJH) (N.D. Cal. 2006); Baker & Holbrook, "SEC Statement Clarifies Corporate Penalties – A Bit" (13 March 2006), *National Law Journal*.

37 *See* Financial Penalties Statement, *supra*, note [•].

38 *Id*.

During a speech in October 2018, Steven Peikin, Co-Director of the SEC's Division of Enforcement, affirmed the continuing importance of the cooperation factors identified in the Seaboard Report, including "the nature of the remedial steps taken by the company, its own self-reporting and self-policing efforts, and the extent of its cooperation with the Commission and other law enforcement agencies."[39]

In Canada, the OSC has instituted a "credit for cooperation" policy pursuant to which market participants may be entitled to beneficial consideration (in terms of the regulatory response) in exchange for cooperating with regulators after discovering potential wrongdoing,[40] as have other provincial securities regulators.[41] Credit will most likely be given where a company has focused on "righting the wrong" done to the public. This includes, but is not limited to, prompt disclosure of improper or illegal conduct to regulators in full detail, compliance with production orders and interview requests, and taking internal corrective action.[42]

Credit for cooperation will not be provided where, during the course of an investigation, the market participant puts its own interests or the interests of its officers, directors, or employees ahead of its obligations to clients, shareholders, or the integrity of the capital markets. The OSC Staff Notice 15-702 ("Notice") sets out a list of circumstances in which credit for cooperation will not be given, such as where the market participant:

- Fails to promptly and fully report serious breaches of Ontario securities laws;
- Withholds information that, in light of the circumstances, should have been provided;
- Arranges its affairs to delay reporting a matter that should be reported or to claim a privilege to avoid providing details of potential breaches of Ontario securities laws;
- Undertakes to provide books, records or information and then fails to do so in a timely fashion;
- Misrepresents the facts of a situation;
- Destroys documents in an attempt to avoid production;
- Invokes legal advice as a defence, but refuses to disclose the advice;

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39 Steven Peikin, "Remedies and Relief in SEC Enforcement Actions", New York, New York (3 October 2018), online: www.sec.gov/news/speech/speech-peikin-100318.

40 The credit for cooperation program is outlined in the OSC Staff Notice 15-702 (a revised version of which was released on March 13, 2014).

41 *See, e.g.*, ASC Policy 15-601, "Credit for Exemplary Cooperation in Enforcement Matters", online: www.albertasecurities.com/News-and-Publications/News-Releases/2018/10/ASC-Announces-Credit-for-Exemplary-Cooperation-in-Enforcement-Matters-Policy ["Policy 15-601"]; BCN 2002/41, "Credit For Assistance In Investigations", online: www.bcsc.bc.ca/Securities_Law/Policies/PolicyBCN/BCN2002/41_Credit_For_Assistance_In_Investigations__BCN_/.

42 *See, e.g.*, MRRS Decision Document, "Matter of CP Ships Limited" (1 October 2003), OSC.

- Enters into settlement arrangements with employees, clients or shareholders that include an agreement not to disclose information to a regulator or to withdraw any complaints; and

- Continues inappropriate conduct or fails to correct internal control problems.

However, if parties that were originally uncooperative decide to fully cooperate, partial credit for cooperation may still be granted. While the OSC's program does not expressly request waiver of privilege, it is more likely to grant credit if a company discloses as much information as possible.[43] In the U.S., in order to encourage waivers of privilege, the SEC will often enter into confidentiality agreements to ensure no broader waiver of privilege. However, the OSC Notice remains silent on this issue, leaving corporations seeking to cooperate in a state of uncertainty as to whether they are breaking privilege by disclosing certain information.

Also addressed in the OSC Notice are "no contest" settlements, which allow the OSC to resolve an enforcement matter on the basis of a settlement agreement in which the respondent makes no admissions of fact or liability.[44] These settlements could prove very useful to companies and their directors as they may allow for cooperation with regulators while minimizing exposure to civil liability on the basis of admission of wrongdoing. The availability of a settlement on this basis may be another reason for pre-emptive disclosure of an investigation and its results. The Notice sets out eight factors that may be considered by OSC Staff in evaluating whether to recommend this sort of settlement: (1) cooperation with the investigation; (2) any self-reporting; (3) any remedial steps taken to address the misconduct; (4) the degree of investor harm; (5) any agreement to pay some sort of costs; (6) any agreement to stop committing the infraction; and (7) the deterrent effect of the settlement on the market.[45] A no-contest settlement is not available if the person has engaged in abusive, fraudulent, or criminal conduct; if the person's misconduct resulted in investor harm that has not been addressed in a satisfactory manner; or if the person misled or obstructed OSC Staff during its investigation.

Despite the guidance discussed above, in most cases the precise benefits of the company's cooperation, if any, are not ascertainable at the outset of an investigation. Indeed, many companies that have cooperated with the government have received stiff financial penalties, albeit perhaps lower than if no cooperation had been proffered.[46] In 2006, then-Assistant Attorney General

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43 *See* OSC Staff Notice 15-702, "Revised Credit for Cooperation Program", online: www.osc.gov.on.ca/en/SecuritiesLaw_sn_20140311_15-702_revised-credit-coop-program.htm ["Notice 15-702"].

44 *See also* Policy 15-601, *supra*, note [•], which was amended in 2018 to allow for no-contest settlement agreements in certain and limited circumstances; ASC News Release, "ASC Announces New Provision within the Credit for Exemplary Cooperation in Enforcement Matters Policy" (4 May 2018), online: www.albertasecurities.com/News-and-Publications/News-Releases/2018/10/ASC-announces-new-provision-within-the-Credit-for-Exemplary-Cooperation-in-Enforcement-Matters-Polic.

45 *See* Notice 15-702, *supra*, note [•].

46 For discussions regarding the benefits and potential pitfalls of cooperation, *see* Neal Marder, Peter Altman & Josh Rubin, "Four Steps of Cooperation During an SEC Investigation" (13 December 2016), *Corporate Counsel*, online: www.akingump.com/images/content/5/3/v2/53581/016121603-Akin.pdf. *See also* Junaid Zubairi & Brooke Conner, "Is SEC Cooperation Credit Worthwhile?" (30 August 2016), *Law360*, online: www.law360.com/articles/833392.

The cost for not cooperating can be severe. There is no better example of the extreme risks a company can face for rejecting the path of cooperation and fighting criminal charges than Enron's former Big Five accounting firm Arthur Andersen. Arthur Andersen, in 2002, voluntarily surrendered its licenses to serve as Chartered Professional Accountants in the U.S. after it was found guilty in a trial over its auditing of Enron. *See* News Roundup, "Andersen Surrenders Licenses to Practice Accounting in U.S." (2 September 2002), *The Wall Street Journal Online*, online: www.wsj.com/articles/SB1030845411754123835. The Supreme Court's reversal of the conviction in 2005 was too

Alice Fisher, in comments on DOJ policy still applicable today, extolled the upside of corporate cooperation:

> It…would not be in the best interests of law enforcement to make promises about lenient treatment in cases where the magnitude, duration, or high-level management involvement in the disclosed conduct may warrant a guilty plea and a significant penalty. But what I can say is that there is always a benefit to corporate cooperation, including voluntary disclosure . . . [I]f you are doing the things you should be doing—whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or cooperating with an investigation after it starts—you will get a benefit. It may not mean that you or your client will get a complete pass, but you will get a real, tangible benefit.[47]

Assistant Attorney General Fisher's comments are evidenced by the increasing number of DOJ-deferred prosecution or non-prosecution agreements in recent years.[48] Canada has only recently introduced a deferred prosecution agreements regime for corporate wrongdoing. Nevertheless, there are times when companies and their counsel believe the benefits of cooperation (*e.g.*, self-reporting) have not been tangible and have been too unclear. Information provided may at some point be disclosed publicly and could potentially be used as evidence against the company in civil proceedings and "follow on" class actions. As a result, some companies, after due consideration, decide not to self-report or otherwise cooperate with government authorities.[49]

The DOJ's Antitrust Division has its own standards for cooperation credit. The Division's Leniency Program allows corporations and individuals involved in antitrust crimes to self-report and avoid criminal prosecution and/or civil penalties if they cooperate *early* and *fully*.[50] Under its "First-in-the-Door" requirement, only the first qualifying corporation will be granted conditional leniency for a particular antitrust conspiracy.[51] All subsequent applicants to the Leniency Program will be subject to increased criminal penalties for antitrust violations in accordance with the Antitrust Criminal Penalty

late to save the accounting practice. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S. Ct. 2129 (2005); ABC News, "Arthur Andersen Goes Out of Business" (8 December 2009), *ABC News*, online: abcnews.go.com/Business/Decade/arthur-andersen-business/story?id=9279255.

47 Alice S. Fisher, Assistant Attorney General, "Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act", Washington, D.C. (16 October 2006), online: www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/10-16-06AAGFCPASpeech.pdf.

48 On February 15, 2019, the SEC issued its Twelfth Declination Letter under the FCPA Cooperation Policy to Cognizant Technology Solutions Corporation in exchange for its voluntary self-reporting and cooperation in the subsequent FCPA enforcement action. *See* SEC Press Release, "SEC Charges Cognizant and Two Former Executives With FCPA Violations" (15 February 2019), SEC, online: www.sec.gov/news/press-release/2019-12.

49 The decision whether or to what extent a company should cooperate with the government is a complex and involved one. A comprehensive discussion of this decision-making process is beyond the scope of this paper.

50 U.S. DOJ, "Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters" (26 January 2017), DOJ, online: www.justice.gov/atr/page/file/926521/download at 5 [emphasis added].

51 *Id*. at 5-6 The Leniency Program has separate criteria for individuals as well as for current/former employees of qualifying corporations.

Enhancement and Reform Act ("ACPERA").[52] ACPERA also limits the liability for civil damages claims in private, state, or federal antitrust actions against qualifying leniency applicants.[53] The legislation creates strong incentives for antitrust violators to be the first to self-report their violations and thus insulate themselves from criminal prosecution, though not from the likely civil litigation to follow.[54]

Canada's Immunity and Leniency Programs for unlawful acts committed in violation of the *Competition Act* are administered by the Director of Public Prosecutions and the Commissioner of Competition.[55] In addition, Section 718.21 of the *Criminal Code* allows courts to consider what measures an organization has taken to reduce the likelihood of its committing a subsequent offence when sentencing, which may include remedial measures coming out of a proper investigation.[56] Thus, companies are incentivized to take active policy measures to address and prevent criminal behavior.

C. The Role of the Board and Management in Conducting and Overseeing the Investigation

As a general matter, it is important that management, usually including the general counsel's office, not be—and not be perceived to be—in charge of the internal investigation. This is especially true when the alleged or suspected conduct involves upper management or serious employee misconduct that implicates whether upper management properly fulfilled its oversight duties, or when the corporate entity itself is the focal point of a government inquiry. Under these circumstances, government prosecutors and regulators will not afford sufficient credibility to investigations carried out by management or a corporate department (such as an internal audit department).

Furthermore, the continuing involvement in such an investigation by Board members and officers whose conduct is at issue may jeopardize the company's ability to preserve its attorney-client privilege.[57] As in other civil and criminal actions, securities regulators in Canada cannot compel the production of materials and investigation results protected by solicitor-client privilege or litigation privilege,[58] and if proper steps are taken, privilege may be claimed with respect to documents created during the investigation,[59] however, as will be discussed in further detail below, the scope

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52 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, title II, June 22, 2004, §§ 211-214, 118 Stat. 661 at 666-668 (set out as a note under 15 U.S.C. § 1).

53 *Id*. § 213(a).

54 *Id*. §§ 201-221. The benefits to the second, third, or fourth cooperating companies in Antitrust Division investigations are significantly less.

55 *See* Government of Canada, "Immunity and Leniency Programs under the *Competition Act*" (15 March 2019), online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04391.html.

56 *Criminal Code*, *supra*, note [•], s 718.21(j). *See also Canada v Maxzone Auto Parts (Canada) Corp*, 2012 FC 1117.

57 *See Ryan v. Gifford*, 2007 WL 4259557 at *3 (Del. Ch. November 30, 2007) ["*Ryan*"] (holding that company waived attorney-client privilege on communications between counsel and special committee because committee revealed communications concerning the investigation in a detailed final report to company's Board); *Ryan v. Gifford*, 2008 WL 43699 at *6 (Del. Ch. January 2, 2008) (affirming "that privilege was waived by disclosure to the director defendants, who attended the . . . meeting in their individual—not fiduciary—capacities along with their individual, outside counsel").

58 *See Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 (holding that a statutory power to compel documents does not abrogate litigation privilege absent "clear, explicit and unequivocal language"). *See also Alberta v Suncor Energy Inc*, 2017 ABCA 221 at para 23 ["*Suncor Energy*"].

59 *See Canada v Solosky*, [1980] 1 SCR 821 at para 21 (SCC); *R v McClure*, 2001 SCC 14; *Shell Canada Ltd v Canada (Director of Investigation & Research)*, [1975] FCJ No 38 at para 5 (FCA).

of protection that courts and regulators will provide to those claims is uncertain. Further, companies should not rely on the mere existence of an internal investigation as a method to protect documents because such claims will be scrutinized. The Board should appoint a committee of independent Board members ("Independent Committee"), often the audit committee, to oversee such an investigation, and the Independent Committee should retain counsel to conduct the investigation ("Investigatory Counsel").[60] No director, officer, or employee whose conduct is being investigated should participate in the investigation except as a witness. Canadian courts have recognized the appointment of an independent special committee as a key criterion to be satisfied in order to rely on the indoor management rule. Further, Canadian case law suggests that acting on the advice of an independent special committee will contribute to the appearance of reasonableness of a decision and therefore serves to insulate directors from potential liability and judicial second-guessing.[61]

D. Independent Outside Counsel Should Be Retained to Conduct Internal Investigations of High-Level or Sensitive-Alleged Misconduct

Government prosecutors and regulators might be skeptical of an internal investigation of high-level or sensitive wrongdoing conducted by outside counsel regularly retained by the company.[62] This skepticism is based on the fear that regular counsel may have a motive to avoid criticizing, and thus alienating, senior management, the source of past and future law firm revenues. Regular counsel also may have given advice on matters related to the subject of the investigation and members of the firm may become witnesses in the internal, or subsequent external, investigation. Similarly, the government may be concerned that the company's regular outside counsel's business and social familiarity with the company's management or implicated directors will impact counsel's objectivity—or, also importantly, the appearance of objectivity—towards clients and friends. However, there may be circumstances when regular outside counsel's knowledge of the company's business, special expertise, and distance from the core investigation issues and subjects permit it to conduct an objective investigation.[63] In some cases, in fact, the government agency most interested in the investigation may agree in advance that regular counsel is the best choice to conduct the investigation so long as the objectivity of the effort is assured. A key point for outside counsel to remember is that the company is who is being represented, not any particular individuals with whom outside counsel may usually communicate.

The company is best served by portraying to the government, its independent auditors, the investment community, and the media that its internal investigation has complete integrity and a commitment to uncovering the facts. Thus, companies should give special attention

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60 For the purposes of this paper, it is assumed that the decision-makers supervising Investigatory Counsel will be a subcommittee of the Board. This is usually the case for any investigation of significance for a public company. There are circumstances when a company's general counsel, however, might appropriately supervise an investigation of limited significance involving a relatively minor issue that does not implicate management or the financial statements.

61 *Pente Investment Management Ltd v Schneider Corp*, 42 OR (3d) 177.

62 *See, e.g.*, *YBM Magnex International Inc, Re* (2003), 26 OSCB 5285, in which the OSC criticized a decision to rely on regular company counsel instead of retaining independent outside counsel. A special committee was formed to investigate allegations of illegitimate business practices within the company, potentially fraudulent accounting practices, and rumored connections to organized crime. One of the company's directors also served as chairman of the law firm regularly used as the company's external counsel. The special committee retained a partner from the same firm for purposes of its investigation. This decision was inconsistent with good process.

63 *See* Katia Bloom, Jessica K. Nall & Joshua W. Malone, *Rethinking Independence in Internal Investigations* (May 2018), *Association of Corporate Counsel*, online: www.fbm.com/content/uploads/2019/01/may-2018-acc-docket-rethinking-independence-in-internal-investigations-bloom_nall-and-malone.pdf at 66-72.

to the choice of Investigatory Counsel. The company's decision about whom to retain will be scrutinized, and choosing counsel with even a perceived conflict of interest may reflect poorly on the company.

It is worth noting that Investigatory Counsel should avoid any bias—its own or the Independent Committee's—towards finding wrongdoing in order to justify the Independent Committee's judgment that wrongdoing might have occurred. In this regard, it is incumbent on the Independent Committee, as well as Investigatory Counsel, to ensure that Investigatory Counsel's mandate is to investigate the validity of the allegations and not to ferret out some perceived concerns for the sake of justifying what inevitably is the significant cost of the investigation.

It should be the goal of the Independent Committee—in seeking to determine the truth of the underlying allegations—to safeguard and act in the best interests of the shareholders, and to prevent the internal investigation from impairing the reputations of employees, officers, and directors of the company not found to have engaged in wrongdoing. To those ends, Investigatory Counsel should be instructed to engage in investigative tactics designed to get at the truth, including using their investigative, technological, and professional capabilities.

The Independent Committee should be aware that Investigatory Counsel, left unchecked, could succumb to the abuses that are an occupational hazard of special prosecutors as described by then-Attorney General Robert Jackson, and cited by Justice Scalia:

> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.[64]

The more objective, transparent, and straightforward an investigation is—both in actuality and in appearance—the more credible and ultimately effective it will be.

E. The Independent Committee and Investigatory Counsel Should Determine the Appropriate Scope of the Inquiry and the Rules of the Road

The Board should pass a resolution broadly authorizing the Independent Committee to retain counsel and counsel's agents (*e.g.*, forensic accountants or other experts), conduct an investigation, and report its ultimate findings to the Board. The Independent Committee should retain

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64 Robert H. Jackson, "The Federal Prosecutor", An Address Delivered at the Second Annual Conference of U.S. Attorneys, Washington, D.C. (1 April 1940), online: www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf (and quoted in *Morrison, Independent Counsel v. Olson, et al.*, 487 U.S. 654 at 728 (1988) (Scalia, J., dissenting)).

Investigatory Counsel in writing. Investigatory Counsel's retention letter should state the allegations under review, the scope of the inquiry including the issues to be investigated and, when possible, a list of the documents to be reviewed and the witnesses to be interviewed. The mandate should also make clear that counsel will advise the Independent Committee of its legal rights and obligations, as well as potential liabilities. Having a clear mandate for the Investigatory Counsel is the best way to prevent "mission creep". Absent a conflict, the general counsel or regular outside counsel will advise the company of its related rights, obligations, and liabilities. The Independent Committee can expand the scope of the Investigatory Counsel's engagement in appropriate circumstances, but should confirm in writing any such expansion.

The Independent Committee, in consultation with the Board as appropriate, should determine the scope of Investigatory Counsel's mandate as set forth in the retention letter, and state whether the Committee shall act for the Board or investigate and report to the Board for action. In defining the scope of the investigation, the Independent Committee should provide Investigatory Counsel at the outset with a mandate to examine only specific allegations or explicitly defined issues. Investigatory Counsel may reassess with the Independent Committee whether any additional allegations or issues (*e.g.*, red flags) uncovered during the originally scoped investigation should form the basis for an expanded or separate investigation by Investigatory Counsel, other investigatory counsel, or by regular company counsel.[65]

The Independent Committee and Investigatory Counsel should also agree upon specific reporting procedures and protocols for documenting the investigation (*e.g.*, the designation of all communications with legends such as "ATTORNEY-CLIENT PRIVILEGED" and, when applicable, "ATTORNEY WORK PRODUCT").

That being said, practitioners should note that there is significant uncertainty in Canada as to the scope of privilege in the internal investigation context.[66] Although there appears to be agreement that lawyers' notes of an interview will be protected by privilege, this is because courts have held that these notes contain a blend of what happened and what the lawyer thought was important.[67] There is less certainty as to whether a transcript containing the lawyer's questions of the witness (and thus, the product of the lawyer's analysis and judgment) would be afforded similar protection.[68]

One Canadian court has found that litigation privilege would apply to protect witness interview notes, recorded statements and collected photographs on the basis that the dominant purpose for the creation of the documents could not have been to prepare for litigation. The court came to this conclusion despite the fact that there was a statutory obligation for the company to conduct the interview. Further, the court rejected the argument that privilege could not apply to witness statements and notes taken in the context of this

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65 The engagement letter for Investigatory Counsel should make clear that Investigatory Counsel's work product, data, document collection and analysis belong to the Independent Committee and the company, not to Investigatory Counsel, and should be returned to the Independent Committee and company upon completion of the investigation for possible use by the company in its defense of possible third-party or government claims.

66 See A Purposive Approach to Privilege in the Context of Internal Investigations, Gerald Chan and Carlo di Carlo, *Advocates Quarterly*, vol. 49 no. 3 (February 2019)

67 See *R v Dunn*, 2012 ONSC 2748, ¶57.

68 See *R v Dunn*, 2012 ONSC 2748, ¶57.

investigation because those communications deal with existing facts. In the Court's view, drawing a distinction between fact and communication in this context risked eroding the proper scope of the privilege.[69]

However, a recent decision from the Ontario Superior Court of Justice found that audio recordings of such interviews would not be protected by privilege. The case dealt with a criminal fraud investigation that resulted in search warrants requiring the company to turn over, among other things, recordings of telephone conversations that an employee of the target company had with potential witnesses on the instructions of his counsel and in anticipation of future litigation. In what reflects a narrow approach to privilege in the internal investigation context, the reviewing court rejected the company's privilege claim on the basis that witness statements contain factual matters, as opposed to counsel's strategy:

If the issue here was what counsel thought was important from the witness statements, or whether counsel thought some witness statements were important while others were not, that information might be covered by the privilege. However, litigation privilege cannot be used as an indiscriminate blanket to cover each and every witness statement collected.[70]

There is similarly a dispute in Canadian case law over the extent that privilege applies to the report that is the end product of such investigations. Again, the disagreement turns on the extent to which courts see these reports as consisting primarily of fact-gathering investigative work, as opposed to a legal analysis.[71]

Given this uncertainty, the goal at the outset should be frequent updating by oral reporting. Careful consideration should be given to the extent to which written reports should be rendered, if at all, during or at the conclusion of the investigation.[72] There is typically limited utility and great risk in creating interim written reports of investigation. Such interim reports run the risk of creating confusion and credibility issues, as well as potential unfairness to officers or employees who are the subjects of the investigations if facts discovered in the latter part of the investigation are inconsistent with preliminary factual determinations or interim substantive findings.

The Board, in consultation with the Independent Committee, should also determine whether and to what extent Investigatory Counsel may waive the company's attorney-client privilege or its own work-product protections in its dealings with the government or other third parties.[73] This

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69 *Alberta v Suncor Energy*, 2016 ABQB 264, ¶73, 74. On appeal, the appellate court did not address the Chambers Judge's application of privilege to witness statements (see 2017 ABCA 221).

70 *Ontario (Provincial Police) v Assessment Direct Inc*, 2017 ONSC 5686, ¶10.

71 See, for example, *Slansky v. Canada (Attorney General),* [2013] 3 FCR 558, ¶60, aff'd [2015] 1 F.C.R. 81 (CA).

72 A further discussion on the format for Investigatory Counsel's final report can be found later in this paper in Section IV.

73 *See In Re Pacific Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012) (holding that turning over to the government internal investigative documents pursuant to a confidentiality agreement constituted a waiver of the attorney-client and work-product privileges and rejecting the doctrine of "selected waiver"); *Mir v. L-3 Commc'ns Integrated Sys., L.P.*, 315 F.R.D. 460 (N.D. Tex. 2016) (voluntary disclosure of internal documents to the Office of Federal Contract Compliance Programs ("OFCCP"), pursuant to an express confidentiality agreement, was a waiver of work-product protection because the OFCCP was a "potential adversary"); *In re Qwest Commc'ns Internat'l, Inc., Sec. Litig.*, 450 F.3d 1179 (10th Cir. 2006) (holding that a company's turning over to the SEC and the DOJ of internal investigative documents, pursuant to a confidentiality agreement, constituted a waiver of the attorney-client and work-product privileges and rejecting the doctrine of "selective waiver" or "limited waiver". *See also U.S. v. Reyes.*, U.S. Dist. Lexis 94456 (N.D. Cal. December 22, 2006) (holding that investigating counsel's oral report to the DOJ and the SEC summarizing otherwise privileged internal investigation interviews created a waiver and rejecting the concept of "selective waiver").

is one of the most important and complicated questions the company and Investigatory Counsel will face in connection with the investigation. The Board and the Independent Committee must decide who, on behalf of the company, will ultimately decide the privilege-waiver questions, including consideration of including this responsibility in the Board resolution giving the Independent Committee oversight of the internal investigation. The Independent Committee should not give Investigatory Counsel the authority to make such waiver decisions without prior full deliberation by the Independent Committee and, if appropriate and so arranged, also by the Board.[74]

Depending on the subject matter of the investigation, it will often be necessary for Investigatory Counsel to hire outside experts or consultants (*e.g.*, forensic accountants for accounting issues, especially if the company's financial statements are implicated). Under Sarbanes-Oxley, the audit committee (which may well be functioning as the Independent Committee) has the authority to retain expert assistance in the course of an investigation.[75] The Independent Committee should exercise that authority by permitting Investigatory Counsel to retain additional professionals with appropriate consultation with the Committee.

The choice of a particular expert and the manner in which Investigatory Counsel retains experts are critical junctures in an investigation. In order to protect the attorney-client privilege and general confidentiality of communications between Investigatory Counsel and its additional professionals, it is not advisable to choose professionals who are regularly employed by the company to perform similar services, such as using forensic accountants from the same firm that is the company's independent auditor. Forensic experts should also be retained directly through external counsel rather than by the company.

Experts should sign retention agreements that make clear that Investigatory Counsel has engaged them in order to assist Investigatory Counsel in providing legal advice. Conclusions of independent experts also improve the appearance to outsiders (*e.g.*, government prosecutors and regulators) that the investigation is, in fact, independent.

F. Communications to and Indemnification of Company Employees

Numerous management and employee-morale issues will likely arise during the course of an internal investigation, especially when long-standing practices or the conduct of senior employees or managers is under investigation. These issues should be addressed promptly by communications from the Independent Committee, or alternatively by a member of management, to all affected employees to advise them about the general purpose of the investigation, the expectation that all employees will cooperate with the inquiry and with Investigatory Counsel, and the need to preserve all evidence (*e.g.*, electronic and paper communications, records, data, etc.) related to the investigation.[76]

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74 We note the possibility that Investigatory Counsel may unintentionally induce an inadvertent waiver of the corporate attorney-client privilege if there are communications by company's officers or Board members directly with Investigatory Counsel rather than through the Independent Committee. *See Ryan*, *supra*, note [•] at *3. *See generally* Gregory P. Joseph, "Privilege Developments I" (11 February 2008), *The National Law Journal*. However, the confines of this paper do not allow for analysis and recommendations with respect to this circumstance.

75 *See* Securities Exchange Act, *supra*, note [•] § 78j-1(m)(5) ("AUTHORITY TO ENGAGE ADVISERS. Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties").

76 The appropriate form of such communications will vary by investigation. For instance, if the cause of the investigation is already

Importantly, the Independent Committee should communicate that "cooperation" in most circumstances includes the following: (1) the provision, upon request, of all documents related to company business whether kept in the employee's office, home, or personal computer;[77] (2) strict compliance with all document hold and retention notices; and (3) participation in interviews conducted by Investigatory Counsel.[78]

Whether to indemnify or advance legal fees for current or former employees who retain individual counsel (and the scope of any such indemnification or advancement) is an important decision for the company to make, usually by senior management if they are not implicated in the investigation, often in consultation with the Independent Committee and the Board. A variety of factors play into the decision of which employees—and to what extent they—should be indemnified for or advanced legal fees. While corporate decision-makers must always have the best interests of the company and its shareholders in mind, they will have to consider a number of legal and practical factors on the indemnity/advancement question, including provincial and state law,[79] company bylaws, historical practice, seniority, employment contracts,[80] insurance coverage (or lack thereof), etc. Despite some early controversy concerning the DOJ's position on these issues,[81] in

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public or otherwise widely known throughout the company, then a memorandum distributed to all or relevant employees might be appropriate.

77 Many employers allow employees to use the same device for both personal and work services and may even reimburse employees for the cost of the device. In such cases, the employer may require employees to sign a personal privacy waiver regarding the data stored on the device. Investigatory Counsel should confirm that such a policy is in place before attempting to obtain an employee's personal devices. Investigatory Counsel should also carefully read the policy to determine whether it excludes an employer's ability to review the employee's personal data, including personal emails and text messages. For further discussion, *see* Privacy Rights Clearinghouse, "Bring Your Own Device (BYOD)… at Your Own Risk" (1 September 2013),online: privacyrights.org/consumer-guides/bring-your-own-device-byod-your-own-risk.

78 Generally, an employee who does not cooperate fully with an internal investigation, including making themselves available for an interview, can be subject to employment sanctions, including possible discharge. *See Hollinger Internat'l., Inc. v. Black*, 844 A.2d 1022, 1077–78 (Del. Ch. 2004) (holding company acted reasonably in removing CEO who refused to answer questions in an internal investigation by invoking his Fifth Amendment privilege, stating that although the CEO "may have possessed the personal right to invoke the privilege, that does not immunize him from all collateral consequences that come from the act"); *Gilman v. Marsh & McLennan Cos.*, 826 F.3d 69 (2d Cir. 2016) (upholding the termination of two employees who declined to speak with their employer regarding pending criminal investigations directly related to their employment). However, when an employee invokes constitutional protections under the Fifth Amendment not to testify before a governmental body, we do not think it appropriate for a company to sanction the employee's invocation of constitutional rights by penalty or discharge. Nor, importantly, do we think it appropriate for governmental bodies to consider a corporation non-cooperative if it does not discharge or sanction an employee who invokes such protections. We note the observation of the U.S. Supreme Court in *Slochower v. Board of Higher Education,* 350 US 551 at 557-558 (1956) that "a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who might otherwise be ensnared by ambiguous circumstances . . . and do not think a company should be in any way penalized for respecting an employee's invocation of such constitutional right."

79 Some state statutes provide for indemnification and advancement for only officers and directors, while others provide for employees and agents as well. *Compare* N.Y. Bus. Corp. Law § 721 (stating that New York's indemnification and advancement provision does not affect "any rights to indemnification to which corporate personnel other than directors and officers may be entitled by contract or otherwise under law") *and* 8 Del. C. § 145(b) ("A corporation shall have power to indemnify any person who [faced criminal or civil litigation because] the person is or was a director, officer, employee or agent of the corporation"). Most states require companies to indemnify directors or officers if they are successful on the merits. *See, e.g.*, N.Y. Bus. Corp. Law § 723(a); Utah Code 16-6a-903. Delaware requires companies to indemnify any employee if they are successful on the merits. *See* 8 Del. C. § 145(c). See also Section 136 of Ontario's *Business Corporations Act*, RSO 1990, c B16, which provides that a corporation may indemnify a director or officer for costs of investigative proceedings in certain circumstances.

80 In some situations, the employee's employment agreement may address the issue or may require indemnification. *See, e.g.*, *Legg v Simcoe Muskoka Catholic School Board*, 2014 ONCA 745, in which the Ontario Court of Appeal affirmed the lower court's finding that the word "proceeding" in the indemnification clause of an employment contract was broad enough to include the formal investigation commenced by the employer against the employee.

81 In 2003, Deputy Attorney General Larry Thompson released a memorandum that many lawyers interpreted as indicating that companies under investigation can gain favor with prosecutors if they refuse to pay the legal fees of their employees. *See* Thompson Memo, *supra*, note [•]. However, in a 2006 case against former KPMG employees, Judge Lewis A. Kaplan of the Southern District of New York issued a sharp rebuke of such tactics by dismissing the charges against thirteen former KPMG employees, finding that KPMG refused to pay the former employees' legal expenses due to government pressure that "shocks the conscience" and deprived them of their constitutional

2008 then-Deputy Attorney General Mark Filip by policy memorandum expressly declared that, in evaluating cooperation, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to individuals, nor may they request that a corporation refrain from taking such action.[82]

The SEC generally has not considered whether an entity has chosen to indemnify or advance legal fees for its employees or former employees in determining whether the entity has been sufficiently "cooperative."[83] The SEC, however, explicitly bars settling parties from recovering penalty payments through indemnification agreements. This policy, adopted in 2004 to purportedly "enhance deterrence and accountability," mandates "settling parties to forgo any rights they may have to indemnification, reimbursement by insurers, or favorable tax treatment of penalties."[84]

The *Canada Business Corporations Acts* ("CBCA") <u>*permits*</u> a corporation to indemnify a director or former director against all reasonably incurred costs, including amounts paid to settle a legal action or satisfy a judgment, where the person is, or was, involved by reason of being or having been a director if:

i. They acted honestly and in good faith with a view to the best interests of the corporation; and

ii. In the case of a criminal or an administrative action or proceeding that is enforced by a monetary penalty, they had reasonable grounds for believing that their conduct was lawful.[85]

With the approval of a court, a corporation may also indemnify directors and former directors against all costs and expenses reasonably incurred in respect of actions by or on behalf of the corporation if the above conditions are met.[86] Under the mandatory indemnification provisions

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right to substantive due process. *See US v. Stein*, *et al.*, 495 F. Supp. 2d 390 at 415 (S.D.N.Y. 2007).

82 *See* Deputy Attorney General Mark Filip, "Principles of Federal Prosecution of Business Organizations" (28 August 2008). *See also* Justice Manual, *supra*, note [•] § 9-28-73.

83 In 2004, the SEC took action against Lucent in part because the company "expanded the scope of employees that could be indemnified against the consequences of this SEC enforcement action," after it had reached "an agreement in principle with the staff to settle the case, and without being required to do so by state law or its corporate charter." *See* SEC Press Release, "Lucent Settles SEC Enforcement Action Charging the Company with $1.1 Billion Accounting Fraud" (17 May 2004), SEC, online: www.sec.gov/news/press/2004-67.htm ("Companies whose actions delay, hinder or undermine SEC investigations will not succeed," said Paul Berger, Associate Director of Enforcement. "Stiff sanctions and exposure of their conduct will serve as a reminder to companies that only genuine cooperation serves the best interests of investors").

84 Stephen Cutler, "Speech by SEC Staff: 24th Annual Ray Garrett Jr. Corporate & Securities Law Institute", Chicago, Illinois (29 April 2004), online: www.sec.gov/news/speech/spch042904smc.htm. Today, SEC settlement orders sometimes bar indemnification. *See* Yaron Nili, "How Much Protection Do Indemnification and D&O Insurance Provide?" (28 May 2014), *Harvard Law School Forum on Corporate Governance*, online: corpgov.law.harvard.edu/2014/05/28/how-much-protection-do-indemnification-and-do-insurance-provide/. Nevertheless, the SEC has codified its anti-indemnification position. *See* Item 512 of Regulation S-K, 17 C.F.R. § 229.512 (stating that indemnification for liabilities under the Securities Act of 1933 "is against public policy as expressed in the Act and is therefore unenforceable"). *See also SEC v. Conaway*, 697 F. Supp. 2d 733 at 772 (E.D. Mich. 2010) (holding that, although "the SEC has provided no authority" to bar indemnification, "the punitive value of the penalty would be greatly eroded against the public interest if it were made by a third party").

85 *Canada Business Corporations Act*, RSC 1985, c C-44, s 124(3) ["CBCA"].

86 *Id*., s 124(7). *See, e.g.*, *Cytlynbaum r Look*, 2012 ONSC 4578. Here, the company sued former officers and directors with respect to bonus, equity payouts, and litigation indemnity payments made to them. These individuals claimed that they were entitled, under the company's bylaws and contractual indemnities, to interim advancement of their legal fees and expenses in defending against the company's action. The court held that Section 124 of the CBCA provides a "comprehensive code of general application" regulating indemnification of

in the CBCA, a director or former director *is entitled to* an indemnity from the corporation for all amounts reasonably incurred to defend an action or proceeding in which they are made a party by reason of being or having been a director, if the person seeking indemnity was not (a) judged by the court or other competent authority to have committed any fault or omitted to do anything they ought to have done and (b) fulfils the conditions set out in (i) and (ii) above.87Depending on the scope and size of the internal investigation, we recommend that Independent Committees consider developing internal guidelines at the outset of an internal investigation regarding indemnity and advancement that will be followed, considering the legal and practical factors outlined above. The guidelines should include the possibility that the Independent Committee may expand the scope of indemnity to include current or former employees who might not be covered by the bylaws, but are likely witnesses, subjects, or targets of the inquiry. The guidelines should also allow expansion of indemnity to independent contractors or acting officers of companies or their subsidiaries who perform important executive functions, but are not literally within the company's standard indemnity policies.

G. Joint Defense Agreements

The subject of communications with company employees also raises the question of whether a joint defense agreement ("JDA") or common interest agreement ("CIA")[88] between the company and its employees is necessary or appropriate. Under the joint-defense or common-interest doctrines, parties to an agreement can extend the attorney-client and work-product privileges to information exchanged among the parties and their counsel that would otherwise be waived by such an exchange. To establish the protection, participants to the JDA must generally show that the information would be privileged if not for disclosure to other participants, that the information is confidential among the participants and their counsel, that it has not been disseminated further, and that it is relevant to or advances a common legal interest.[89]

Traditionally, JDAs provided counsel for companies and counsel for individual employees with a mutually beneficial opportunity to collaborate in the context of an internal investigation without waiving the attorney-client privilege. The changes to the cooperation requirements in the Yates Memo, however, may have changed the landscape, at least as to JDAs between employees and companies seeking cooperation credit from the DOJ. In the past, the benefit of a JDA to the company was access to privileged information from counsel for potentially liable employees that these employees otherwise may have been unwilling to share. The benefit of a JDA for individual employees was potentially better insight into the internal investigation, the opportunity to shape the findings of the internal investigation, and the ability to share costs and resources.

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present and former directors and officers, although indemnification was ultimately denied in the particular case.

87 CBCA, *supra*, note [•], s 124(5).

88 For the purposes of this paper, "JDA" is used to refer to both types of agreement. Indeed, the distinction between a JDA and CIA is not always clear. Some jurisdictions recognize virtually no distinction, using the terms interchangeably. *See, e.g.*, *Minebea Co., Ltd. v. Papst*, 228 F.R.D. 13 at (D.D.C. 2005) ("The joint defense privilege, often referred to as the common interest rule, is an extension of the attorney-client privilege that protects from forced disclosure communications between two or more parties and/or their respective counsel if they are participating in a joint defense agreement"). Other jurisdictions view the JDA as a more limited exception to be used only when litigation is actively pending and the CIA as a broader extension of the privilege that can be used regardless of whether litigation is pending. *See, e.g.*, *United States v. LeCroy*, 348 F. Supp. 2d 375 at 381 (E.D. Pa. 2004) ("Because the privilege sometimes may apply outside the context of actual litigation, what the parties call a 'joint defense' privilege is more aptly termed the 'common interest' rule") (quoting *In re Grand Jury Subpoena, A. Nameless Lawyer*, 274 F.3d 563, at572 (1st Cir. 2001)).

89 *See United States v. Krug*, 868 F.3d 82 at 86-87 (2d Cir. 2017).

However, the Yates Memo's requirement that companies identify wrongdoers and detail the misconduct learned in the internal investigation in order to receive cooperation credit[90] and Deputy Attorney General Rosenstein's subsequent revised guidance on the topic[91] have limited the incentives for JDAs between the company and individual employees in the context of DOJ investigations. Although a company may benefit from a JDA because it may facilitate the flow of information from otherwise unwilling employees,[92] the Yates Memo's strict cooperation requirements mean that companies seeking cooperation credit might want to disclose information about employees, even if the company learned it through a protected JDA communication. While Deputy Attorney General Rosenstein softened the Yates Memo's reporting requirements, it still requires disclosure of details regarding individuals with substantial involvement or responsibility for the alleged misconduct—something a company likely does not know at the time when it must decide whether to enter into a JDA with an employee. Thus, a company is stuck with two somewhat conflicting options. The company could use a traditional JDA and possibly forego cooperation credit if the individual ends up being substantially involved in the misconduct and the company is blocked from disclosing details pursuant to the JDA, or a company could use a more limited JDA with a carve-out for disclosing information to the DOJ, which may in turn reduce the amount of information the investigators are able to obtain and thereby affect the level of cooperation the company is able to offer the government. The DOJ suggests that companies address the situation by "crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate."[93] If that "flexibility" refers to JDAs that permit companies to share certain information learned through the JDA with law enforcement authorities, then it may signal the end of traditional JDAs between companies and individuals and limit the company's access to information.

While there may be no path for meaningful traditional JDAs between companies and individuals when the company wants to preserve the option of seeking cooperation credit from the DOJ, JDAs may still be beneficial between companies and individuals when the DOJ cooperation credit is not at play. JDAs also may be advisable among individuals, or among the company, Board and Independent Committee, when those parties intend to exchange privileged information.[94] Finally, even if cooperation is in play, JDAs in the internal investigation context are often advisable when limited strictly to the sharing of company documents with current and former employee witnesses.

If a JDA is appropriate, then general best practices governing JDAs apply to such agreements between the company and individuals or among individuals. While in practice many JDAs are oral, consideration should be given to memorializing such agreements in writing so that the

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90 *See* Yates Memo, supra note 21, ("That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts related to that misconduct").

91 *See* Justice Manual, *supra*, note [•] § 9-28.700.

92 A company's response may be to require employees to submit to interviews as a condition of employment, which implicates constitutional issues. *See supra* note 78.

93 *See* Justice Manual, *supra*, note [•] § 9-28.730.

94 A JDA might be a useful tool for protecting information about an internal investigation shared between counsel for a company and the government from third party discovery. In the instances that a third party has challenged such a common interest assertion, the results have been varied. *See, e.g.*, *U.S. v. Bergonzi*, 216 F.R.D. 487 at 496 (N.D. Cal. 2003) (finding that, despite entering into a confidentiality agreement, no common interest existed between the government and the company disclosing information because "it could not have been the company's goal to impose liability onto itself"); *S.E.C. v. Berry*, 2011 WL 825742 at *5 (N.D. Cal. March 7, 2011) (agreeing "that if a party lowers the shield of protection to foster an amicable relationship with the government, it should not then be able to raise it against parties injured by its disclosures"). *But see Aronson v. McKesson HBOC, Inc.*, 2005 WL 934331 at *9 (N.D. Cal. March 31, 2005) (holding that confidentiality agreements between the government and the company precluded waiver of the privilege).

parties can mitigate risks associated with future litigation regarding the existence of an oral JDA and its precise parameters.[95] The downside of a written agreement is that it is evidence of the existence of the JDA, which is a fact that parties to a JDA usually consider confidential. However, to address this concern, the written agreement can specify that the terms of the agreement are confidential. We recommend that the written agreement define what is privileged and protected by the JDA, specify the protocol for withdrawal, require notice if one of the parties is compelled to disclose protected information, and outline the rights of participants if one party agrees to cooperate with the government. For example, a JDA can include a waiver of conflict of interest provision, which would prohibit a cooperating witness from moving to disqualify counsel for other parties to the JDA and would allow for cross-examination of any cooperating former participant based on that person's confidential information.[96]

Finally, all parties to the JDA should be aware that JDA communications are only protected if the attorney-client privilege covers those communications in the first place. A JDA will not protect communications among non-lawyers or their agents.[97] This is particularly relevant when parties to a JDA work together and have opportunities to communicate outside the presence of their counsel. Indeed, the best practice is to limit JDA communications to conversations among counsel, which also may head off use of confidential information in cross-examining cooperating former JDA participants.

III. CREATING AN ACCURATE FACTUAL RECORD: DOCUMENT REVIEW AND WITNESS INTERVIEWS

Given that prosecutors and regulators pay particular attention to document preservation and production, Investigatory Counsel must ensure an accurate factual record by expeditiously collecting and reviewing relevant documents, as well as interviewing relevant witnesses.

A. Mechanics of a Litigation Hold

At the outset of an investigation, counsel (likely Investigatory Counsel in collaboration with regular outside or in-house counsel) should first identify the universe of documents that must be preserved (as opposed to necessarily collected and reviewed). Counsel should not send a blanket email request that all relevant documents be forwarded to a central source.

Second, Investigatory Counsel should identify all relevant employees who are the likely sources of documents. Investigatory Counsel, in consultation with disinterested outside and in-house counsel, should conduct preliminary interviews to determine such relevant employees.

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95 *See United States v. Weissman*, 195 F.3d 96 at 99 (2d Cir. 1999) (affirming no oral JDA was established).

96 This is in accordance with existing case law. *See, e.g.*, *United States v. Almeida*, 341 F.3d 1318 at 1326-27 (11th Cir. 2003) (holding that communications made under a JDA "do not get the benefit of the attorney-client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence"). *See also* ABA Presentation, "Joint Defense/Common Interest Agreement", online: www.americanbar.org/content/dam/aba/events/labor_law/2017/11/conference/papers/SAMPLE%20Joint%20Defense%20Common%20Interest%20Agreement%202%20for%20ABA%20Presentation.pdf.

97 *United States v. Austin*, 416 F.3d 1016 at 1019, 1025 (9th Cir. 2005) (noting the District Court held that a written JDA did not protect communications among individuals about the matter that occurred outside the presence of counsel and without direction by counsel, but declining to decide that issue and dismissing for lack of jurisdiction).

Third, in-house counsel, after consulting with Investigatory Counsel, should send an email direction, commonly referred to as a "litigation hold," to relevant employees stating, in essence, that none of the documents identified in the litigation hold, including electronic documents and attachments, may be destroyed without explicit approval of designated in-house counsel. Direction should be preceded by an immediate freeze of all electronic information on the company's computers.

Fourth, Investigatory Counsel should engage in an analysis of relevant documents to determine if others should be included in the litigation hold. This is especially important when the organization affected by the internal inquiry is in many different locations. For electronic documents, this may include communicating with the "key players" to learn how they stored information. Although the 2015 amendments to the Federal Rules of Civil Procedure pertaining to discovery have, at least in theory, reduced the scope of electronic information that may eventually be produced in litigation by introducing a "proportionality" concept,[98] in-house counsel nonetheless already should have prepared and have available guides to all sources of "electronically stored information" ("ESI") in the company and should be prepared to institute a litigation hold on all such materials.[99] That hold should include procedures sufficient to preserve hard-copy documents, as well as electronic documents and ESI, including the metadata associated with native format files.

Disinterested in-house counsel (or an equivalent executive if there is no in-house counsel available) should oversee compliance with a litigation hold, using reasonable efforts to continually monitor the party's retention and production of relevant documents, including periodically re-issuing the litigation hold to remind key players of their obligation to preserve.[100] Such in-house counsel should regularly apprise Investigatory Counsel of the company's litigation hold efforts and compliance. Once the relevant documents are obtained, all documents should be tracked in the same way that one would during traditional litigation. A document storage and retention policy for the investigation should be established as early as possible following the collection of relevant documents. This should involve the segregation of relevant backup electronic media, which in some cases may necessitate Investigatory Counsel's taking physical possession of backup media.

B. Document Collection and Review

Investigatory Counsel should oversee and manage document collection. As mentioned above, a person or company may only refuse to produce documents on the bases of irrelevance or privilege. The relevant universe of hard-copy and electronic documents must be identified and collected as early as possible in the investigative process so that all available information will be preserved, and there will be a sufficient factual background to identify relevant witnesses and

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98 *See* Federal Rules of Civil Procedure § 26(b)(1) ["FRCP"], limiting the scope of discovery to "any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit" [emphasis added].

99 *See* U.S. Dist. Ct., "Guidelines for the Discovery of Electronically Stored Information" (1 December 2015), *Northern District of California*, online: www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines-12-1-2015.pdf at 1-2 (discussing need to preserve electronically stored information under the proportionality standard at FRCP § 26(b)(1)).

100 *See Karsch v. Blink Health Ltd.*, 2019 WL 2708125 at *18 (S.D.N.Y. June 20, 2019) (holding that a plaintiff in a civil action was obligated to preserve evidence relevant to his claims beginning on the date that he sent a demand letter). *See also Telecom Int'l Am. Ltd. v. AT&T Corp.*, 189 F.R.D. 76 at 81 (S.D.N.Y. 1999) ("Once on notice [that evidence is relevant], the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation") (citing *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12 at 18 (D. Neb. 1983)).

conduct efficient interviews by asking the appropriate questions and being able to refresh witnesses' recollections.

In-house counsel and internal technology experts can be particularly helpful in identifying processes and sources of documents, and in coordinating the document collection process; each should play a major role in supervising the gathering, production, and preservation of documents, including electronic documents. As with traditional litigation, care should be taken to avoid over- or under-production during discovery. Over-producing data, especially in light of the volume of electronic media, can greatly drive up fees without yielding additional relevant data. Under-producing data and spoliation during the discovery process may result in sanctions ranging from adverse-inference instructions and monetary fines to default judgments,[101] with the most severe sanctions being reserved for instances when evidence of willfulness or bad faith by counsel exists.[102] In the context of a criminal investigation, such conduct might result in charges against individuals for obstruction of justice.

Once the Independent Committee has been appointed and Investigatory Counsel retained, we recommend that the Investigatory Counsel and retained technology professionals should retrieve, host, and analyze electronic and hard-copy documents. Internal technology professionals should be used only in those circumstances in which the company has a sufficiently sophisticated staff that is trained in issues that may become critical in a subsequent litigation (*i.e.*, chain of custody) or in a government investigation (*i.e.*, the preservation of metadata).

C. Witness Interviews

After relevant documents are reviewed (assuming time permits), Investigatory Counsel should identify relevant witnesses and begin conducting interviews.[103] In certain cases, such as when the scope of the issues are unclear, it may make sense for Investigatory Counsel to begin the interview process before all relevant documents can be digested. It is also important to consider whether in-house counsel or outside counsel other than Investigatory Counsel should be present

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101 *See In Re Seroquel Products Liab. Litig.*, 244 F.R.D. 650 (M.D. Fla., August 21, 2007) (granting in part a motion for sanctions against the defendant for failure to produce the discovery in usable format but reserving on the appropriate sanction to impose); *Metropolitan Opera Assoc., Inc. v. Local 100, Hotel Employees & Restaurant Employees Int'l Union*, 212 F.R.D. 178 at 222 (S.D.N.Y. 2003); *In the Matter of Banc of America Sec. LLC*, Admin. Proc. File No. 3-11425 (March 10, 2004), online: www.sec.gov/litigation/admin/34-49386.htm (fining Banc of America $10,000,000 for violating sections 17(a) and 17(b) of the Exchange Act for failure to produce documents during a Commission investigation).

102 *See Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639 at 643 (1976) (district courts are granted considerable discretion to impose the extreme sanction of dismissal or default where there has been flagrant, bad faith disregard of discovery duties); *Wanderer v. Johnston*, 910 F.2d 652 at 656 (9th Cir. 1990) (in deciding the severity of sanctions courts should consider five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to [the party seeking sanctions]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions"); FRCP § 37(e) ("only upon finding that the party acted with the intent to deprive another party" of the use of ESI in litigation may the court "(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment"); *Teller v. Helbrans*, 2019 WL 5842649 at *12 (E.D.N.Y. November 7, 2019) (dismissing the plaintiff's complaint with prejudice after he ignored discovery obligations, refused to provide documents, and failed to appear at his deposition).

103 Investigating lawyers should be aware that they could become witnesses in a criminal or civil procedure when an issue arises as to what statements a witness made to them during the investigation. *See* Therese Poletti & Elise Ackerman, "Ex-Brocade CEO Reyes Guilty on all Securities Fraud Counts" (7 August 2007), *The Mercury News*, online: www.mercurynews.com/2007/08/07/ex-brocade-ceo-reyes-guilty-on-all-securities-fraud-counts/ (describing trial testimony of investigatory counsel who conducted the internal investigation of company and who interviewed former CEO during that investigation).

during the employee interviews. The risks of having in-house or regular outside counsel present at interviews include inadvertently chilling the employee's willingness to be forthcoming and having the employee incorrectly perceive that they are represented personally by company counsel. The presence of in-house or regular outside counsel for the company may also implicate concerns regarding the independence of Investigatory Counsel. At the very least, the issue should be thoroughly vetted with the Independent Committee before counsel other than Investigatory Counsel takes a seat at the investigating table.

In some instances, it may be necessary for the company to pay for separate legal counsel for employees who are being interviewed and may have—or may appear to have—interests adverse to the company.[104] However, depending upon the company's bylaws, it should not be necessary to suggest separate counsel until such adversity becomes sufficiently clear or until an employee requests separate counsel. An employee may on her own choose to seek the advice of counsel and ask that counsel be present for the interview. Absent exigent circumstances, such as the government threatening extreme action on a short timetable, a company should not refuse to grant such a request for counsel. However, as indicated earlier, companies should advise employees that failure to cooperate timely—which includes fully submitting to interviews by Investigatory Counsel—may result in adverse employment consequences, including dismissal.

Often, an unrepresented employee will ask just before or during an interview whether they need to consult counsel, or if they retain counsel, whether the company will pay for such counsel. Investigatory Counsel should be especially wary of this situation. Under these circumstances, Investigatory Counsel should remind the witness that counsel does not represent them and that if they wish to speak to their own counsel, the Investigatory Counsel would be willing to adjourn the interview for a reasonable time to allow such consultation, and consider the company's indemnification of the employee's costs of counsel and advancement of fees and expenses. As discussed above, advance preparation for such contingencies should include consultation with the Independent Committee at the outset of the engagement regarding the scope of the company's obligations to indemnify and advance fees to categories of current and former directors, officers, and employees.

The Independent Committee should also decide whether Investigatory Counsel will make documents available to employees and their counsel for review before conducting interviews. Absent special circumstances such as valid concerns of possible witness tampering, obstruction of justice, other evidence of attempts to disrupt the integrity of the internal investigation, or an inability in advance to retrieve and review voluminous documentation, Investigatory Counsel generally should not interview witnesses before they have had a chance to review relevant documents, especially emails and other communications the witness authored or received. We caution Investigatory Counsel against interviewing a witness who has not been given an adequate opportunity to refresh his or her recollection as to prior events by reviewing key documents such as emails. Investigatory Counsel also should not succumb to pressure from prosecutors or regulators to interview such witnesses before they have had a chance to review documents. Such a premature interview could result, by design

104 *See* discussion on employee indemnification and advancement of individual attorney's fees in Section II. F. One event that can trigger consideration of separate counsel for an employee is if the government asks to interview that employee. Company counsel might have a conflict advising the employee whether they "should" agree to such an interview.

or inadvertently, in the witness making a misstatement that otherwise would not have occurred if counsel had refreshed the witness with all relevant documents and electronic communications.[105] Accordingly, before interviews and whenever practical, Investigatory Counsel should make available to employees and their counsel in advance documents that will be covered in the interview, and allow employees to review copies of their documentary files, including calendars and relevant electronic data**.** Additionally, Investigatory Counsel should provide a preview of at least the general topics to be covered in the interview.

The significance of witness individual representation and appropriate preparation with company documents is especially noteworthy in light of the position taken by the DOJ that an employee can be indicted for obstruction of justice under 18 U.S.C. Section 1512 if they lie to Investigatory Counsel conducting an internal investigation when they knows that their statements may be shared with a government agency such as the DOJ or the SEC conducting its own investigation. In recent years, the government has brought several such cases.[106] The Canadian *Criminal Code* similarly outlines consequences for obstruction of justice under Section 139.[107] Given the risk to employee witnesses, we recommend that Investigatory Counsel advise employees at the outset of the interview, when relevant, that the company might disclose information from the interview or a memorandum of the interview to governmental authorities.

At the outset of the interview, in addition to providing an overview of the investigation and the purpose of the interview, Investigatory Counsel should make the following admonitions commonly referred to as *Upjohn* warnings: (1) Investigatory Counsel represents the company (or the Independent Committee, as the case may be); (2) Investigatory Counsel is not the employee's lawyer and does not represent the employee's interests separate from those of its own client; (3) the conversation is protected by the attorney-client privilege, but the privilege belongs to the company; and therefore (4) the company can choose to waive its privilege and disclose all or part of what the employee has told Investigatory Counsel during the interview to independent auditors, prosecutors, regulators, or others.[108]

There is debate over whether Investigatory Counsel should provide the employee-interviewee with a written copy of the *Upjohn* warnings. On the one hand, written warnings reduce the risk of a later challenge to the warnings and any argument that Investigatory Counsel and the

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105 Similarly, Investigatory Counsel should resist government attempts to interview company witnesses before Investigatory Counsel has done so or before witnesses have reviewed documents.

106 *See United States v. Kumar*, 617 F.3d 612 at 617 (2d Cir. 2010) (defendants prosecuted for obstruction of justice based upon false statements made to outside counsel conducting an internal investigation); *United States v. Ray*, Plea Agreement, No. 2:08-01443 (C.D. Cal. December 15, 2008) (executive's false statements to general counsel concerning practice of back-dating stock options violated 18 U.S.C. § 1519 prior to any federal investigation); *United States v. Singleton*, No. H-06-080, 2006 WL 1984467 (S.D. Tex. July 14, 2006) ["*Singleton*"] (defendant prosecuted on charges based on statements and writings made to outside law firm hired by employer to conduct an internal investigation after a government investigation had begun); *United States v. Jones*, Information, No. 1:07-00227 (S.D.N.Y. March 23, 2007) ["*Jones*"]. Note, however, that the defendant in *Singleton* was not convicted on the obstruction charges at trial and that the defendant in *Jones* was allowed to withdraw his guilty plea.

107 *Criminal Code*, *supra*, note [•], s 139. Certain provincial securities legislation also specifically provide that a person may not withhold, destroy, conceal, or refuse to give any information or record required for an investigation. *See, e.g.*, British Columbia's *Securities Act*, RSBC, c 418, s 57.5; Manitoba's *The Securities Act*, CCSM c S50, s 35(2); Alberta's *Securities Act*, RSA 2000, c S-4, s 93.4(1); Nova Scotia's *Securities Act*, RSNS 1989, c 418, s 29E(2).

108 *See Upjohn Co. v. United States*, 449 U.S. 383 at 394-395 (1981).

interviewee formed an attorney-client relationship.[109] Thus, a written record of the provision of the *Upjohn* warnings clears the way for making a full disclosure of information learned during interviews to the government. For the company and Investigatory Counsel, the ability to disclose nearly all information learned during interviews may make the difference in receiving government leniency.[110] On the other hand, some argue that asking an employee to sign a statement acknowledging the *Upjohn* warnings can have a chilling effect on that employee's willingness to share information, thus obstructing the fact-finding purpose of the interview.[111]

Investigatory Counsel should memorialize the interviews in a manner consistent with the attorney work-product doctrine and the ultimate purpose of the investigation. Counsel should decide on an investigation-by-investigation or witness-by-witness basis whether to prepare formal memoranda of interviews or merely maintain interview notes. If the Independent Committee requests or Investigatory Counsel decides on written memoranda for interviews, Investigatory Counsel should prepare the memorandum of the substance of each witness's interview as close in time to the interview as possible. In the alternative, Investigatory Counsel can maintain interview notes, as opposed to formal memoranda, as part of the record of the investigation. Maintaining interview notes, as opposed to formal memoranda, has the benefit of saving time and fees, as well as allowing for more strategic flexibility in responding to government-disclosure and follow-on civil litigation requests.

A complex question is the extent to which Investigatory Counsel should provide privileged- and work-product protected material to the company's independent auditors if, as would be expected, they so request.[112] There is little, if any, authority to support the view that the privilege can be maintained if attorney-client privileged information is disseminated to an independent auditor.[113] With respect to the production to independent auditors of Investigatory Counsel's work

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109 *See, e.g.*, White Collar Crime Working Group, "Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts With Corporate Employees" (17 July 2009), American Bar Association at 5-6.

110 *See* Yates Memo, *supra*, note [•] (stating that, among other things, in order to qualify for cooperation credit "corporations must provide to the Department *all relevant facts relating to the individuals responsible for the misconduct*" [emphasis added]). *But see* George Breen, "The 'Yates Memo' Revisited: Pursuing Individuals Remains a DOJ Top Priority – Senior Management and Members of Boards of Directors in Focus" (5 December 2018), *The National Law Review*, online: www.natlawreview.com/article/yates-memo-revisited-pursuing-individuals-remains-doj-top-priority-senior-management. On November 29, 2018, Deputy Attorney General Rod Rosenstein "announced changes" to the Yates Memo that reflected "concerns that it was inefficient to require companies to identify every employee involved irrespective of culpability" and stating that instead "DOJ's focus will be on those who play 'significant roles in setting a company on a course of criminal conduct'". *See* Rosenstein Speech, *supra*, note [•].

111 *See* Jeffrey Eglash, Gordon Greenberg & Laurie Levenson, "Avoiding the Perils and Pitfalls of Internal Corporate Investigations: Proper Use of Upjohn Warnings" (February 11-14, 2010), ABA Section of Litigation Corporate Counsel CLE Seminar, online: www.kkc.com/assets/Site_18/files/resources/Avoiding-the-Pitfalls-of-Internal-Corporate-Investigations-Proper-Use-of-Upjohn-Warnings.pdf at 11-12.

112 *See* David Brodsky, Pamela Palmer & Robert Malionek, *The Auditor's Need For Its Client's Detailed Information vs. The Client's Need to Preserve the Attorney-Client Privilege and Work Product Protection: The Debate, The Problems, and Proposed Solutions* (April 2006), *Latham & Watkins LLP*, online: www.lw.com/thoughtLeadership/auditors-vs-clients-needs-attorney-client-privilege.

113 *See*, *e.g.*, *Cavallaro v. United States*, 284 F.3d 236 (2d Cir. 2002) (disclosure of privileged communications to auditors not hired by counsel to assist in the provision of legal advice waives the privilege); *First Fed. Sav. Bank of Hegewisch v. United States*, 55 Fed. Cl. 263 at 269-270 (Fed. Cl. 2003) (attorney-client privilege was waived when board minutes containing confidential communications between board members and outside counsel were disclosed to outside auditors who were auditing company's financial statements); *Circuit Colonial BancGroup Inc. v. PriceWaterhouseCoopers LLP*, No. 2:11-CV-746-BJR, 2016 WL 9711528 (M.D. Ala. June 24, 2016) (accord); *Cottillion v. United Refining Co.*, 279 F.R.D. 290 at 312 (W.D. Pa. 2011) ("[C]ourts have consistently held that 'documents exchanged between a company's ... counsel and its auditors are not protected by the attorney-client privilege'") (collecting cases); *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125 at *7 (S.D.N.Y. December 23, 1993) ("Pfizer cannot assert attorney-client privilege for any documents that were provided to its independent auditor. Disclosure of documents to an outside accountant destroys the confidentiality seal required of communications protected by the attorney-client privilege").

product (distinct from privileged communications), the decisions are not uniform,[114] but the majority of courts hold that a disclosure of work product to an independent auditor does not waive the privilege.[115] These courts reason that the work-product protection promotes the adversary process by protecting the attorney's litigation preparation from discovery, and that the absence of a common interest between a company and its auditor does not alone make the auditor an "adversary" sufficient to vitiate the privilege, especially in light of an auditor's duty of confidentiality.[116]

While avoiding disclosure to the independent auditors would be ideal to avoid waiver, the reality is that, in most cases, especially when the issues are accounting related, the auditor will insist that presentation of privileged material is a *sine qua non* for the certification of financial statements. Under those circumstances, the company may have no choice but to authorize the communication or delivery of such materials. In the event that disclosure is indeed required, Investigatory Counsel should determine that any materials provided to the auditor are indeed work product and review the applicable case law in the relevant jurisdiction(s) to determine the governing law and ensure the specific circumstances of the audit and the nature of the materials provided do not render the auditor an "adversary" and destroy the privilege. In addition, Investigatory Counsel should discuss and memorialize the auditor's confidentiality obligations to the company, if the company's existing agreement with the auditor does not contain adequate confidentiality provisions. Investigatory Counsel should also ensure that only those materials necessary to the auditor's examination are provided in order to minimize the scope of waiver if one is later found. Finally, we further recommend that the Independent Committee advise Investigatory Counsel at the outset of the engagement not to share information with the company's independent auditors without the fully informed consent of the Independent Committee.

IV. DEVELOPING A RECORD OF THE INVESTIGATION

During the course of the investigation, we recommend that Investigatory Counsel keep and continuously update a record of witnesses and documents examined, documents shown to witnesses, and issues being raised. We also recommend that Investigatory Counsel regularly update the Independent Committee on the course of the investigation. Under most circumstances—and

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114 *See Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113 at 115-117 (S.D.N.Y. 2002) (holding that the disclosure of meeting minutes regarding an internal investigation report to outside auditors waives both the attorney-client and work-product privileges, because the auditor's interests were not necessarily aligned with the corporation's interests). *See also First Horizon Nat'l Corp. v. Houston Casualty Co*., No. 2:15-CV-2235, 2016 WL 5867268 (W.D. Tenn. October 5, 2016) (work product protection waived for materials defendant company sent to outside auditors).

115 *See United States Securities and Exchange Commission v. Herrera*, 324 F.R.D. 258 at 265 (S.D. Fla. 2017) (holding that documents shared with outside auditor does not waive work product protection); *In re Weatherford Int'l Sec. Litig.*, No. 11 Civ. 1646, 2013 WL 12185082 at *5 (S.D.N.Y. November 19, 2013) (holding that "[i]n this circuit, disclosure to an outside auditor does not generally waive work product protection"); *United States v. Deloitte, LLP*, 610 F.3d 129 at 139 (D.C. Cir. 2010) ["*Deloitte*"] (after noting that no circuit court had addressed the issue of whether disclosure of work product to auditors waives the privilege stating that "[a]mong the district courts that have addressed this issue, most have found no waiver") (collecting cases); *Merrill Lynch Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004) (holding that "any tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work product doctrine"); *Am. Steamship Owners Mut. Prot. & Indem. Ass'n v. Alcoa Steamship Co.*, No. 04 Civ. 4309, 2006 WL 278131 (S.D.N.Y. February 2, 2006) ("declin[ing] to follow *Medinol*"); *S.E.C. v. Berry*, No. C07-04431 RMW (HRL), 2011 WL 825742 (N.D. Cal. March 7, 2011) (accord); *United States v. Baker*, No. A-13-CR-346-SS, 2014 WL 722097 (W.D. Tex. February 21, 2014) (holding disclosure to outside auditors did not waive privilege, but ordering in camera review to assess whether documents contained *Brady* material).

116 *Deloitte*, *supra*, note [•] at 140-143 (explaining that the "power to issue an adverse opinion" does not make the auditor an adversary and auditor's duty of confidentiality precluded risk of disclosure).

especially in the early stages of the inquiry—Investigatory Counsel should provide these updates orally because the possibility exists that preliminary information gathered or early conclusions formed may well prove to be inaccurate or incomplete; premature recording of such information or conclusions could well be unfairly prejudicial to the company as well as implicated employees. In particular, once the Investigatory Counsel has conveyed early impressions to the Independent Committee (based on preliminary reviews of documents and early interviews), those impressions may, as a practical matter, prove embarrassing to modify or impossible to eradicate from the minds of the Independent Committee.

Once the investigation is complete, Investigatory Counsel must report its findings, conclusions, and reasoning to the Independent Committee. Counsel must give careful and early consideration to whether the ultimate form of the report will be written or oral. Compared to a written report, an oral report, often appropriately supported by PowerPoint, is usually often more efficient in terms of timely preparation and managing legal fees and expenses and can mitigate risks of later discovery and attorney-client privilege and work-product waivers. If Investigatory Counsel decides upon a written report, it should carefully consider whether prosecutors, regulators, or the company's independent auditor will receive a copy. Disclosing the report outside of the Independent Committee, the Board, and senior management of the company will likely result in waiver of the attorney-client privilege.[117] On the other hand, the Independent Committee might request a written report to memorialize the investigation for a fractured Board. There also might be instances when the company decides to release a written report publicly.[118]

Investigatory Counsel should be careful to remind the Board that the report's conclusions are ultimately that of the Independent Committee, not just Investigatory Counsel, and that all Board members have fiduciary responsibilities to draw their own conclusions as to the evidence presented, and should not simply accept the conclusions as drawn by Investigatory Counsel without a full understanding of the bases for such conclusions.

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117 A 2020 Massachusetts Superior Court decision strikes a blow to work-product and privilege protections, at least as they relate to factual findings, in internal investigations. In *Attorney General v. Facebook, Inc.*, No. 1984CV02597-BLS1 at 6 (Mass. Sup. Ct., Suffolk Cnty. January 16, 2020), the Massachusetts Attorney General issued Civil Investigative Demands ("CIDs") to Facebook in connection with its App Developer Investigation ("ADI"). The ADI followed in the wake of the Cambridge Analytica scandal whereby, in violation of Facebook's policies, an app was used to collect personally identifying data from Facebook users and their friends. That information was then used to target Facebook users with campaign messaging benefiting Cambridge Analytica's clients during the 2016 Presidential election. Facebook retained outside counsel to design and direct the ADI in order to gather facts needed to provide legal advice to Facebook. Facebook provided periodic public updates about the ADI and its general findings. Facebook resisted a number of the CIDs on the ground that the information sought was protected by the work-product doctrine and/or the attorney-client privilege. The court held that the work-product doctrine did not apply because Facebook already had an internal team working to monitor compliance, and therefore Investigatory Counsel shared "the same goals" as the internal team and the materials generated would have been created "irrespective of the prospect of litigation." *Id.* at 12. In addition, the court found that the AG had demonstrated "a substantial need" for the fruits of the ADI, thus further defeating work-product protection. *Id.* at 16. The court further held that the attorney-client privilege did not apply to the CIDs seeking information that is "factual in nature," such as the "results of an internal investigation that Facebook has affirmatively 'touted . . . to the public in an effort to explain and defend its actions.'" *Id.* at 18. The court did find, however, that some of the "internal communications and internal correspondence" called for by the CIDs may constitute requests for legal advice and/or legal advice "that are classically protected from disclosure by the attorney-client privilege." *Id.* The Massachusetts Supreme Judicial Court granted Facebook's application for direct review in May 2020. *See* U.S. Chamber Litigation Center, "Attorney General's Office v. Facebook, Inc." (13 May 2020), , online: www.chamberlitigation.com/cases/attorney-general-s-office-v-facebook-inc. Pending the outcome of this appeal, attorneys engaged in internal investigations should be mindful of the significant issues raised by this decision. For further discussion of the lower court's decision, *see* Danny McDonald, "Mass. Judge orders Facebook to turn over info to Maura Healey" (17 January 2020), *Boston Globe*, online: www.bostonglobe.com/2020/01/18/metro/mass-judge-orders-facebook-turn-over-info-ag-healey/.

118 *See* Liane Hornsey, "Statement on Covington & Burling Recommendations" (14 June 2017), *Uber Newsroom*, online: www.uber.com/newsroom/covington-recommendations/.

V. POST-INVESTIGATION USE OF INTERNAL-INVESTIGATION DOCUMENTS AND WORK PRODUCT IN GOVERNMENT INVESTIGATIONS AND CIVIL LITIGATION

A. Role of Investigatory Counsel in Follow-on Investigations and Civil Litigation

Any court or securities regulator decision will contain findings of fact, and settlements (with the exception of no-contest settlements) will contain certain admissions. These findings and admissions could be relied on by plaintiffs in subsequent civil suits or class actions. Although findings by an authority in another jurisdiction would not be binding in private proceedings, they are also likely to be adduced as evidence of wrongdoing.

Once the investigation has concluded, the company may be tempted to use Investigatory Counsel to defend government investigations and civil litigation. While this would perhaps reduce legal fees, many experienced general counsel and practitioners believe that companies should not utilize Investigatory Counsel as its defense counsel, lest it call into question Investigatory Counsel's independence and compromise the inquiry's legitimacy. We agree and recommend that counsel other than Investigatory Counsel handle such follow-on legal matters.

B. Use of Investigatory Counsel's Work Product

In an effort to minimize expenses and maximize the speed and effectiveness of preparation in the face of civil litigation or government investigations, company counsel post-investigation might request use of the documents and other databases that Investigatory Counsel accumulated. We recommend that such documents and databases be made available for that use, especially if the same materials have already been disclosed to the government. However, before doing so, Investigatory Counsel should consider removing material that reflects its internal thought processes in order to preserve privileges and maintain Investigatory Counsel's independence, both actual and perceived. If Investigatory Counsel intends to share its internal thought processes with defense counsel, it should consider whether a JDA to preserve privilege is appropriate.

Among the more difficult issues facing company counsel that has inherited such a document depository and work product is the extent to which they should be made available to counsel for individual present or former employees who might also be facing civil litigation and government investigations post-investigation. We believe that, absent genuine concerns about obstruction of justice, fairness dictates that the current or former employee's own emails and other documents to which they had access should be made available to such individuals, especially if they have already been made available to the government.[119]

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119 It should be noted that the DOJ is on record in at least one option backdating case that disclosure of witness interview memoranda of Investigatory Counsel to counsel for derivative plaintiffs, and other parties, would constitute premature disclosure of the substance of testimony from potential government witnesses and would facilitate efforts by subjects and potential criminal defendants to manufacture evidence and tailor their testimony and defenses to conform to the Government's proof. *See In re United Health Group Shareholder Derivative Litigation*, Civil No. 06-1216JMR/FLN (D. Minn.).

VI. ISSUES IN CROSS-BORDER INTERNAL INVESTIGATIONS

When properly conducted, internal investigations can provide immeasurable protection to the companies that utilize them either by deterring full-blown government involvement or demonstrating good faith in correcting any blunders. However, as the corporate world takes on an increasingly global footprint, internal investigations are more likely than ever to venture into transnational jurisdictions. This creates an additional set of challenges. At the outset of any cross-border investigation, Investigatory Counsel should hire local counsel to provide guidance on how a particular jurisdiction's laws will apply to these challenges. The following constitutes a non-exhaustive list of issues to consider in cross-border internal investigations.[120]

A. Attorney-Client Privilege

In the U.S., Investigatory Counsel will often try to bring the entire investigation (including the work of accountants and other consultants) within the scope of the attorney-client privilege. However, the attorney-client privilege looks markedly different in the international context, where it is often applied more strictly (if it applies at all). For example, in March 2017, German authorities raided the German offices of Jones Day to obtain documents related to the firm's representation of Volkswagen AG ("VW").[121] Jones Day had represented VW since 2015 when it began conducting a comprehensive internal investigation into the VW diesel emissions scandal, which included VW's affiliate, Audi AG. After lengthy court battles over the propriety of the seizure and the scope of the attorney-client privilege to the case, Germany's Federal Constitutional Court in July 2018 declined to extend privilege protections on constitutional grounds.[122] In doing so, the court concluded that a foreign law firm lacks standing to bring a constitutional complaint because it is not a domestic legal person under the German Constitution.[123] As to the attorney-client privilege, the court noted that it only protects documents and data if the relationship is between a person/corporation formally charged with a criminal offense and his/its lawyer—not an affiliate of a corporate client.[124] Because Audi AG was not Jones Day's client and because Jones Day was not engaged to represent VW in a criminal investigation in Germany (VW had engaged Jones Day only to conduct an internal investigation), VW's constitutional complaint was dismissed. The court declined to place an absolute prohibition on the use of material that English and U.S. lawyers would consider protected by the privilege because it "considerably restricts effectiveness of law enforcement as required under constitutional law" and would "only [be] feasible in exceptional circumstances" like "an interference with the scope of protection of human dignity."[125]

At minimum, the 2018 German ruling demonstrates the importance of analyzing local conceptions of the attorney-client and work product privileges at the outset of an investigation.

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120 A comprehensive discussion of cross-border investigations is beyond the scope of this paper. This section, however, introduces a number of threshold issues on a summary basis that Investigatory Counsel will have to address.

121 *See* Jack Ewing & Bill Vlasic, "German Authorities Raid U.S. Law Firm Leading Volkswagen's Emissions Inquiry" (16 March 2017), *New York Times*, online: www.nytimes.com/2017/03/16/business/volkswagen-diesel-emissions-investigation-germany.html.

122 *See* 2 BvR 1405/17, 2 BvR 1780/17, 2 BvR 1562/17, 2 BvR 1287/17, 2 BvR 1583/1. *See also* Press Release No. 57, "Constitutional complaints relating to the search of a law firm in connection with the 'diesel emissions scandal' unsuccessful" (6 July 2018), *Bundesverfassungsgerict*, online: www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-057.html.

123 *Id*.

124 *Id*.

125 *Id*.

Companies should be aware that law firms remain subject to the local law in which their law firm's offices are located. Importantly, most jurisdictions "do not recognize an attorney-client privilege for in-house counsel at all, and where it is recognized it is not absolute".[126] To the extent possible, multinational companies should consider keeping their privileged information in jurisdictions with the strongest privilege protections (like the U.S.) or risk exposing sensitive documentation.

B. Data Privacy and the GDPR

After considering whether and to what extent a foreign country's privilege laws will protect the investigation, Investigatory Counsel should also consider where relevant documents are located to ensure that their investigation does not run afoul of data privacy laws like the European Union's General Data Protection Regulation ("GDPR").[127]

The Council of the European Union and the European Parliament adopted the GDPR in 2016.[128] It was designed to standardize data protection laws across all EU countries by imposing strict new rules on the control and processing of personally identifiable information. The GDPR became enforceable and superseded the prior EU data protection framework in May 2018.[129] While decidedly European in origin, the GDPR's impact extends well beyond the EU. Its extra-territorial provision applies the GDPR's data protection requirements to organizations that offer goods or services to individuals in the EU or that monitor EU individuals' behavior.[130] Therefore, if a U.S.-based company is conducting an internal investigation of its EU-based staff, it must comply with the GDPR. European data subjects also have a private right of action for data breaches.[131] And the consequences for non-compliance are significant. For example, fines for noncompliance with the GDPR can be as high as 20 million euros or 4% of a company's total global revenue from the preceding financial year, whichever is higher.[132]

Even outside of Europe, companies must remain sensitive to data privacy regulations in individual countries. For example, China is currently in the early stages of setting up its own data protection regime through the Personal Information Security Specification (the "Specification"),

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126 *See* Robert G. Morvillo & Robert J. Anello, "White Collar Crime: Attorney-Client Privilege in International Investigations" (5 August 2008) 240:25 NYLJ (Lexis). For a short overview of the concept of privilege as it exists in France, the United Kingdom, Germany, India, and China, *see also* Lisa J. Savitt & Felicia Leborgne Nowels, "Attorney-Client Privilege for In-House Counsel Is Not Absolute in Foreign Jurisdictions" (1 October 2007), *The Metropolitan Corporate Counsel*, online: www.metrocorpcounsel.com/articles/8909/attorney-client-privilege-house-counsel-not-absolute-foreign-jurisdiction.

127 On March 23, 2018, Congress passed the Clarifying Lawful Overseas Use of Data Act ("CLOUD Act"), which requires U.S. entities to comply with search warrants and to turn over data to law enforcement officials regardless of where that data is stored, as long as those U.S. entities have possession, custody, or control over the data being sought. This requirement raises issues of conflict with Article 48 of the GDPR, which forbids transfer of data to foreign countries absent an international agreement. For a comprehensive discussion of the CLOUD Act and its requirements, *see* Matthias Artzt & Walter Delacruz, "How to comply with both the GDPR and the CLOUD Act" (29 January 2019), *The International Association of Privacy Professionals*, online: iapp.org/news/a/questions-to-ask-for-compliance-with-the-eu-gdpr-and-the-u-s-cloud-act/.

128 *See* General Data Protection Regulation, Reg (EU) 2016/679 (27 April 2016), L119 Official Journal of the European Union 1, online: eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679 ["GDPR"].

129 *See id*., Article 99.

130 *See id*., Article 3.

131 *See id*., Chapter VIII.

132 *See id*., Article 83(6). Fines are administered by individual Member State supervisory authorities taking into account the following eleven criteria: (1) nature, gravity, and duration of the infringement; (2) intention; (3) mitigation; (4) degree of controller/processor responsibility; (5) history of previous infringement(s); (6) cooperation; (7) data type; (8) proactive reporting/notification; (9) compliance with previous orders; (10) certification; and (11) other. *See also id*., Article 83(2).

which took effect in May 2018.[133] Like the GDPR, the Specification lays out granular guidelines for consent and how personal information is collected, used, and shared. In January 2019, the National Information Security Standardization Technical Committee, known as TC260, released a draft of a revised version of the Specification that includes new and modified requirements for personal information controllers.[134] Although the Specification is not a mandatory, legally binding regulation, the Chinese government likely will rely upon it as a standard to determine data protection compliance. Therefore, companies doing business in China or that provide services to Chinese users should review their internal policies to ensure consistency with the Specification

In Canada, an employee's right to privacy in the workplace is balanced with the employer's right to protect legitimate business interests. Whether or not there has been a breach of privacy often stems from interpreting the employment contract. Legislation such as the *Privacy Act*[135] imposes obligations on the federal government for how to handle personal information, while legislation like the *Personal Information Protection Electronic Documents Act* ("PIPEDA")[136] binds private sector organizations. However, different provinces are governed by their own sets of legislation outlining procedures for collecting, using, and disclosing personal information.[137] In provinces like Ontario, private sector employers are largely governed by common law protections and contractual provisions, which must align with the *Employment Standards Act, 2000*[138] and other relevant legislation in the province.[139]

In *BMG Canada Inc v John Doe*, the Federal Court noted that there was no limitation in PIPEDA restricting the ability of the court to order the production of documents.[140] Section 7(3)(c) allows disclosure without consent if it is required to comply with a subpoena or warrant or to comply with the rules of court relating to the production of records. Consequently, directors can disclose personal information without consent in accordance with a subpoena, warrant, or rules of the court. When it comes to third parties, Canadian privacy laws and bank privacy policies also contain exceptions that allow the production of otherwise "private" information if the production is compelled by law or statute.

In short, when identifying key documents for an internal investigation and especially when data needs to be transferred, it is imperative that Investigatory Counsel consider the implicated privacy laws and whether the GDPR or an individual country's regulations apply. In doing so, counsel should consider where personal data is located, on what basis it will be processed, and how that data will be relocated or transferred.

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133 *See Information Security Technology – Personal Information Security Specification* (GB/T 35273-2017). For an English translation, *see* online: www.chinalawtranslate.com/en/persona-information-security-standards/.

134 *See* Wang Wei, "Notice on the work of soliciting opinions on the implementation of the national standard 'Information Security Technology Personal Information Security Specification (Draft)'" (1 February 2019), *National Information Security Standardization Technical Committee*, online: www.tc260.org.cn/front/postDetail.html?id=20190201173320.

135 *Privacy Act*, RSC 1985, c P-21.

136 *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5.

137 To date, Alberta, British Columbia, Québec, Ontario, New Brunswick, and Newfoundland & Labrador have been deemed to have substantially similar laws to that of the federal PIPEDA. *See* online: www.priv.gc.ca/ leg_c/legislation/ss_index_e.asp.

138 *Employment Standards Act, 2000*, SO 2000, c 41.

139 *See* Monica R. Jeffrey, "Overview of Workplace Investigation Law in Canadian Jurisprudence", *Association of Workplace Investigators*, online: www.awi.org/page/canada_jurisprudence.

140 *BMG Canada Inc v John Doe*, 2004 FC 488.

C. Employee Rights and Labor Laws

Access to information is often a challenge Investigatory Counsel face during an internal investigation. A company's own employees are often the best sources of that information. While many U.S. employees generally must cooperate with internal investigations,[141] employees in other countries can refuse to do so even if they are not the target of the investigation.[142] Canadian employees do not necessarily have a duty to cooperate in an investigation, but their refusal to participate may result in a finding of insubordination if they knowingly withhold information pertaining to the investigation.[143] Employees wishing to contribute to an investigation are protected under Section 425.1 of the *Criminal Code*, which precludes an employer from taking disciplinary measures against, demoting, terminating, or otherwise adversely affecting an employee (or threatening to do so) with the intent of preventing the employee from providing information relating to a breach of statute or with the intent of retaliating against the employee.[144] However, this provision is of limited application. It applies only where the disclosure is contemplated or made to "a person whose duties include the enforcement of federal or provincial law".[145]

Even if required to cooperate, employees abroad often can take advantage of expanded rights (similar to U.S. *Miranda* rights or other rights under the 5th Amendment), which ultimately limit the practical extent of that cooperation.[146] Unlike in the U.S., in Canada there is no equivalent to "pleading the fifth". Witnesses must answer questions even if they are self-incriminating. The refusal of a person to attend or answer questions will expose the person to a potential finding of contempt by the court. However, the Canadian constitutional right against self-incrimination,[147] the provincial evidence statutes, and the federal *Canada Evidence Act*[148] all prevent the use of self-incriminating testimony against that individual at a subsequent proceeding, except with respect to any potential prosecution of such witness for perjury or for the giving of contradictory evidence. If an employee claims protection under such acts, they are protected against the Crown using their compelled testimony against them in any other proceeding.[149]

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141 *See, e.g.*, *Nuzo v. Northwest Airlines, Inc.*, 887 F. Supp. 28 at 33 (D. Mass. 1995) (concluding that the "plaintiff's discharge for failure to comply with orders to cooperate in a company investigation did not interfere with any contractual or constitutional rights under state or federal law").

142 For example, in Brazil, an employee can refuse to participate in any internal interview and this refusal is neither a criminal offense nor a labor fault. *See, e.g.*, Insight, *The Investigations Review of the Americas 2019* (September 2018), *Global Investigations Review*, online: globalinvestigationsreview.com/edition/1001208/the-investigations-review-of-the-americas-2019.

143 Labour & Employment Law: Workplace Investigations: Be Careful What you Wish For", 12th Annual National Administrative Law and Labour & Employment Law Conference (25 November 2011) at 2-3.

144 *Criminal Code*, *supra*, note [•], s 425.1.

145 In *Anderson v IMTT-Quebec Inc*, 2013 FCA 90, an employee attempted to use this provision in a wrongful dismissal claim; the employee had made complaints and was dismissed for disloyal actions. The Federal Court of Appeal stated, "The purpose of section 425.1 of the *Criminal Code* is not to allow an employee to make with impunity, reckless complaints to public authorities and without regard for the employer's internal mechanisms or respect for work colleagues. The provision does not allow an employee to avoid the consequences of a dismissal in progress by filing reckless complaints to public authorities against his or her employer and work colleagues." *Id*. at para 44. The court found that while Section 425.1 creates an exception to the normal duty of loyalty owed to an employer, it does not make that duty completely void of meaning.

146 For example, in Australia, "the ability of an employer to require cooperation with an internal investigation is curbed by the operation of the privilege against self-incrimination – more commonly known as the right to silence." *See* Nicholas Turner & Jonathon Ellis, "Internal investigations: are employees required to cooperate?" (11 October 2016), *DLA Piper*, online: www.dlapiper.com/en/australia/insights/publications/2016/10/internal-investigations/.

147 *Charter*, *supra*, note [•], s 13.

148 *Canada Evidence Act*, RSC 1985, c C-5 ["CEA"].

149 *See, e.g.*, CEA, *supra*, note [•], s 5(2), which protects the witness against the use of their compelled testimony given in one proceeding with respect to future criminal proceedings; Ontario's *Evidence Act*, RSO 1990, c E23, s 9(2), which protects the witness against the use of their compelled testimony given in one proceeding with respect to any other civil proceeding or any proceeding under any act of the legislature.

Privacy protections in Europe have even been extended to limit an employer's ability to access certain employee information, making it harder to gain access to such data without express employee notice and consent.[150] Accordingly, practitioners must consider the many ways in which stricter labor and employment laws can substantially hamper an internal investigation and consult with local lawyers on what requirements must be met.

D. Culture and Language Barriers

Just as cultural and linguistic sensitivities matter in every other form of cross-border interactions, they also matter for investigations. Employees whose first language is not English may require or desire to have an interpreter present during interviews. In countries with a history of governmental suppression or distrust, interviewers may want to steer clear of words like "investigation," "whistleblower," and "informant" in favor of more neutral terms like "discussion," "analysis," "employee," or "colleague." Investigatory Counsel should take into account body language during interviews. For instance, looking someone directly in the eye may be considered rude in some countries, but not others.[151] Similarly, a more direct interview style may be effective in some jurisdictions, but will be ineffective in others.[152] If Investigatory Counsel anticipates cultural or linguistic issues in their investigation, they should consider hiring multilingual staff, translators, or local professionals to aid in overcoming these difficulties.

E. FCPA and Other Bribery Issues

When carrying out internal investigations that involve the Foreign Corrupt Practices Act ("FCPA"), the *Corruption of Foreign Public Officials Act*, or other bribery issues, multinational employers may find themselves investigating alleged wrongdoing in more than one country. In such cases, practitioners should be aware that in 2018, the DOJ adjusted its approach to holding individuals and corporations responsible for improper conduct under the FCPA.[153]

VII. RECOMMENDATIONS

1. A company should take steps to consider an internal investigation when significant corporate malfeasance has been alleged or when an independent auditor gives notice that it suspects the possibility of illegal corporate activity. In reaching a decision on whether or to what extent an internal investigation is in the best interests of the company and its shareholders, the Board of Directors, audit committee, or special committee should—in consultation with disinterested in-house or outside counsel—weigh and consider published prosecutorial and regulatory policies, related

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150 For example, in 2017, the European Court of Human Rights ruled that employer monitoring of an employee's personal communications during work time breached his privacy rights under Article 8 of the European Convention on Human Rights. *See In the Case of Bărbulescu v. Romania*, App No. 61496/08 (Strasbourg: European Court of Human Rights, 5 September 2017), online: hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-177082%22]}. *See also R v Cole*, 2012 SCC 53, in which the Supreme Court of Canada recognized that employees may have a reasonable expectation of privacy on an employer-owned computer, thereby limiting the employer's right to access that information.

151 *See, e.g.*, Alicia Raeburn, "10 Places Where Eye-Contact Is Not Recommended (10 Places Where The Locals Are Friendly)" (12 September 2018), *The Travel*, online: www.thetravel.com/10-places-where-eye-contact-is-not-recommended-10-places-where-the-locals-are-friendly/.

152 *See, e.g.*, Pamela Leri, "Interviewing Across Cultures", *Going Global*, online: fordschool.umich.edu/downloads/InterviewCrossCultures.pdf (outlining general regional trends in interview styles).

153 *See supra* note 25.

cases and dispositions, DOJ and/or SEC guidance, and the impact and costs to the company of an investigation and of any potential follow-on litigation. A Board, an audit committee, or a special committee may, in select circumstances, after consultation with counsel, conclude that it is not in the best interests of the company to conduct an internal investigation, or disclose to or cooperate with, the government if an investigation is undertaken.

2. When the alleged or suspected conduct implicates high-level, sensitive, or serious misconduct, or when the company itself is the focal point of a government inquiry, management, usually including the general counsel's office, should not be, and should not be perceived to be, in charge of or otherwise exert any material influence over the internal investigation.

3. The Independent Committee should be delegated the task by the Board of overseeing the internal investigation, including retaining counsel to conduct the investigation, when significant corporate malfeasance has been alleged or when an independent auditor gives notice that it suspects the possibility of illegal corporate activity. The audit committee often constitutes the Independent Committee.

4. The goal of the Independent Committee should be to seek to determine the truth of the underlying allegations, to safeguard and act in the best interests of the shareholders, and to prevent the internal investigation from impairing the reputations of employees, officers, and directors of the company not found to have engaged in wrongdoing.

5. The Board of Directors should pass a resolution broadly authorizing the Independent Committee to retain counsel and counsel's experts and consultants, conduct an investigation, and report its ultimate findings to the Board.

6. The Independent Committee should retain Investigatory Counsel who is highly qualified and credible. In many but not all cases, this is best accomplished by retaining counsel who has not had a significant prior relationship with the company and/or its senior management.

7. The Independent Committee should retain the Investigatory Counsel in writing. Investigatory Counsel's engagement letter should state the allegations under review, the scope of the inquiry, and make clear that Investigatory Counsel is to advise the Independent Committee of its and the company's legal rights and obligations, as well as its potential liabilities.

8. The scope of the Investigatory Counsel's engagement may be expanded in appropriate circumstances, but that expansion should take place only at the direction of the Independent Committee and should also be confirmed in writing.

9. The Investigatory Counsel should be instructed to conduct an investigation designed to discover essential facts about the underlying allegations of wrongdoing, including using such investigative, technological, and professional techniques of which they are capable.

10. Investigatory Counsel's investigation should stay within the scope as dictated by the Independent Committee. If, however, Investigatory Counsel learns of potential wrongdoing that falls outside the originally defined scope of the investigation, then Investigatory Counsel should bring

such conduct to the attention to the Independent Committee. The Independent Committee then, in consultation with Investigatory Counsel, can decide whether to expand the scope of the investigation.

11. The Independent Committee and Investigatory Counsel should also agree upon specific reporting procedures and protocols for documenting the investigation.

12. The Independent Committee should also determine whether and to what extent Investigatory Counsel may waive the company's attorney-client privilege or its own work-product protections in its dealings with government or other third parties. The waiver of these protections is a major corporate decision that requires full and frank discussion of the benefits of the privileges and work-product protections and the impact of a waiver on prosecutorial, regulatory, or other parallel proceedings.

13. The engagement letter for Investigatory Counsel should make clear that Investigatory Counsel's work product, data, and document collection and analysis belong to the Independent Committee and its retained Investigatory Counsel.

14. The Independent Committee should authorize the Investigatory Counsel in writing to retain additional professionals, including forensic accountants, investigators, and public relations advisers, if necessary.

15. The experts and any other additional professionals should sign retention agreements that make clear their engagement is in contemplation of providing assistance for legal advice.

16. The Independent Committee should carefully consider communicating with affected employees to notify them of the nature of any prospective investigation, the possible need for witness interviews, the ability of the company to recommend counsel for individual employees, the possibility that the company will be responsible for advancing fees and expenses for the employee's representation, and the requirement that employees must cooperate with the investigation.

17. The Independent Committee should explicitly communicate what constitutes "cooperation" of an employee during an internal investigation, and whether an employee's refusal to timely cooperate in this regard may result in dismissal. In most circumstances, the cooperation of employees should include the following: (1) subject to state or foreign privacy laws, production upon request of all material, however or wherever kept related to company business whether kept in the employee's office, home, or personal computer; (2) strict compliance with all document hold and retention notices; and (3) submission to interviews by Investigatory Counsel.

18. At the outset of an investigation, the Independent Committee should consider the scope of indemnity and advancement to directors, officers and employees, or others affiliated with the company, in adherence to its bylaws, other corporate governance policies, or new policies designed for the scope of the internal investigation. Legal and practical considerations on indemnity/advancement also include historical practice, seniority, employment contracts, and insurance coverage. The Independent Committee should also consider, at the outset of an internal investigation, expanding the scope of indemnity to include employees otherwise not covered by standard indemnification policies, and independent contractors or acting officers of companies or their

subsidiaries who perform important executive functions, but are not literally within the company's standard indemnity policies.

19. Disinterested in-house counsel (or an equivalent executive if there is no in-house counsel available) should monitor compliance with litigation holds, using reasonable efforts to continually monitor the client's retention and production of relevant hard-copy and electronic documents.

20. The relevant universe of hard-copy and electronic documents must be identified and collected as early as possible in the investigative process.

21. Investigatory Counsel and retained forensic professionals, as needed, should conduct document review and analysis of electronic and hard-copy documents.

22. Assuming time permits, after review and analysis of documents, Investigatory Counsel should identify the relevant witnesses and conduct the interviews.

23. At the outset of the interview, Investigatory Counsel should advise each witness that: (1) the Investigatory Counsel represents the Independent Committee; (2) Investigatory Counsel is not the employee's lawyer and does not represent the employee's interests; (3) statements made to the Investigatory Counsel must be truthful; (4) the interview is protected by the attorney-client privilege, but the privilege belongs to the company; and (5) the Independent Committee can unilaterally choose to waive its privilege and disclose all or part of what the employee has told Investigatory Counsel during the interview to external auditors, the government, regulators, or others.

24. The Independent Committee and Investigatory Counsel should give careful consideration to whether inside counsel or outside counsel other than Investigatory Counsel should attend witness interviews, with an eye to maximizing the possibility of obtaining objective responses and to ensuring the appearance of obtaining objective responses. If additional counsel is present, their role should be decided in advance, and they generally should appear in an observatory role only.

25. Investigatory Counsel should advise employees at the outset of the interview whether the company has made a decision to waive the attorney-client privilege and work-product protections, or is likely to do so, and to disclose the memorandum of interview to governmental agencies such as the SEC or the DOJ that is conducting its own investigation.

26. Absent special circumstances such as valid concerns of possible witness tampering, obstruction of justice, other evidence of attempts to disrupt the integrity of the internal investigation or the unavailability of hard-copy or electronic documents, Investigatory Counsel should make available to witnesses or their counsel the general topics and specific documents that will be covered in the interview, and allow current and former employees to obtain copies of their relevant documentary files, including emails they authored or otherwise received, calendars, and electronic documents.

27. Absent special circumstances such as valid concerns of possible witness tampering, obstruction of justice, or other evidence of attempts to disrupt the integrity of the internal

investigation, Investigatory Counsel generally should not interview witnesses before they have had a reasonable opportunity to review relevant documents.

28. Investigatory Counsel should resist pressure by prosecutors or regulators to have Investigatory Counsel conduct their interviews before company witnesses have had a chance to refresh their recollection with documents such as their own emails. Similarly, Investigatory Counsel should resist government attempts to interview witnesses before Investigatory Counsel has done so or before the witnesses have reviewed relevant documents.

29. Investigatory Counsel cannot advise an employee whether they should seek the advice of individual counsel. Under these circumstances, Investigatory Counsel should remind the witness that the Investigatory Counsel does not represent the witness and that if they wish to speak to counsel, the Investigatory Counsel will adjourn the interview for a short time to allow such consultation, and, if previously authorized by the Independent Committee, to provide recommendations of counsel.

30. Investigatory Counsel should make an informed decision on how to memorialize the substance of each witness interview (*e.g.*, formal memoranda of interview, informal interview notes, etc.) as close in time to the interview as possible and in a manner consistent with the attorney work-product doctrine and the ultimate purpose of the investigation.

31. Investigatory Counsel and the Independent Committee should consider whether a joint-defense or common-interest agreement between the company and individuals is appropriate, especially when the company is seeking cooperation credit from government prosecutors or regulators.

32. If a joint defense agreement is appropriate between the company and individuals or among individuals, then consideration should be given to memorializing the agreement in writing even though, as a practical matter, many JDAs are oral. A written JDA should set forth the parameters for what is privileged and protected and include a provision that the existence of the agreement is confidential. The agreement should also specify the protocol for withdrawal, require notice if one of the parties is compelled to disclose protected information, and outline the rights of the participants if one party agrees to cooperate with the government.

33. Joint defense communications should be limited to conversations among counsel, not among their clients, non-lawyers, or their agents.

34. The Independent Committee should advise Investigatory Counsel at the outset of the engagement not to share information with the company's independent auditors without the fully informed consent of the Independent Committee. With regard to investigation-related disclosures to a company's independent auditors, the reality is that, in most cases, especially when the issues are accounting related, the auditor will insist that presentation of privileged material is a *sine qua non* for the certification of financial statements. Under those circumstances, the company may have no choice but to authorize the communication or delivery of such materials. In the event that disclosure is indeed required, Investigatory Counsel should determine that any materials provided to the auditor are indeed work product and review the applicable case law in the relevant jurisdiction(s) to determine

the governing law and ensure the specific circumstances of the audit and the nature of the materials provided do not render the auditor an "adversary" and destroy the privilege.

35. Investigatory Counsel should also discuss and memorialize the independent auditor's confidentiality obligations to the company, if the company's existing agreement with the auditor does not contain adequate confidentiality provisions. Investigatory Counsel should also ensure that only those materials necessary to the auditor's examination are provided in order to minimize the scope of waiver if one is later found.

36. During the course of the investigation, Investigatory Counsel should keep and continuously update a record of witnesses and documents examined, documents shown to witnesses, and issues raised.

37. Investigatory Counsel should regularly update the Independent Committee on the course of the investigation. In the early stages of an inquiry, updates should generally be made orally, because of the possibility that preliminary information gathered or early conclusions formed might prove to be inaccurate or incomplete, and prejudicial to the company as well as employees implicated by them.

38. Upon the completion of the investigation, Investigatory Counsel should report its findings and the conclusions, and the bases therefor, to the Independent Committee and, as appropriate, to the Board of Directors. Investigatory Counsel should be careful to remind the Independent Committee that the report's conclusions are ultimately that of the Independent Committee, not just Investigatory Counsel. Investigatory counsel should also remind the Independent Committee and other Board members, as the case may be, that they have fiduciary responsibilities to draw their own conclusions as to the evidence presented.

39. Before presentation of the final report, the Independent Committee and Investigatory Counsel should again give careful consideration to whether the ultimate form of the report will be oral (supported when appropriate by PowerPoint) or written.

40. When involved in cross-border or international investigations, Investigatory Counsel should first hire local counsel to advise on the myriad of complex local-law issues that arise in such investigations. Investigatory Counsel must consider a number of factors when conducting the inquiry, including: (1) varying conceptions of attorney-client privilege and work product protections could have an impact on a governmental entity having access to Investigatory Counsel's work; (2) where data is maintained could cause the investigation to run afoul of local data privacy laws; (3) whether employees are required to cooperate with the investigation could impact the development of relevant facts; and (4) cultural and linguistic differences could have an impact on appropriate and effective questioning of witnesses.

41. Investigatory Counsel generally should not be used as company defense counsel in civil or criminal litigation or investigations that follow the internal investigation.

42. In connection with civil litigation or government investigations, company counsel post-investigation might request use of the documents and other databases that Investigatory Counsel accumulated. We recommend that such documents and databases be made available for that use,

especially if the same materials have already been disclosed to the government. Before doing so, however, Investigatory Counsel should consider removing material that reflects its internal thought processes in order to preserve privileges and maintain Investigatory Counsel's independence, both actual and perceived, and whether a JDA to preserve privilege is appropriate. Similarly, we believe that, absent genuine concerns about obstruction of justice, fairness dictates that the current or former employee's own emails and other documents should be made available to such individuals in connection with civil litigation or government investigations, especially when they may have already been made available to the government.

American College of Trial Lawyers
Phone: 949-752-1801
Website: www.actl.com
Email: nationaloffice@actl.com