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DECISION POINTS OF INTERNAL INVESTIGATIONS

Decisions concerning internal investigations begin with whether to conduct one and end with whether to write a report. Along the way, there are multiple decision points involving, among others, the choice of counsel, conduct of employee interviews, treatment of whistleblowers, and communications with public relations counsel and outside auditors. The authors discuss the strategic choices and their consequences for the company.

By Barry J. Mandel and David J. Aveni *

An internal investigation[1] is a critical tool when evidence of misconduct within a company (or within a company's industry) arises. A properly run internal investigation is essential to root out wrongdoers from within the corporate ranks, defend the company from external allegations, and convince regulators and law enforcement personnel that the company is a good corporate citizen.

One difficulty inherent in running internal investigations is the fact that vital facts tend to become revealed over time as the investigation proceeds. Thus, conducting an effective investigation does not simply flow from the formulation of the right strategy at its inception, but rather from a series of decisions that must be made over time as new facts are discovered. In this article, we explore various decision crossroads that tend to arise as investigations proceed and new facts become revealed.[2]

WHEN SHOULD AN INVESTIGATION BE LAUNCHED?

The first question that naturally arises is whether an investigation should be launched at all. It is beyond question that an investigation should be conducted if there is credible evidence of misconduct at the company. Once such evidence is revealed, it is vital to proactively identify the existence and scope of any improper activities so that such conduct may be stopped and the company can be protected. Similarly, if regulatory or law enforcement agencies have commenced an investigation relating to the company, an internal investigation should be launched quickly to determine what happened and to prepare an effective response.

However, it does not always make sense to wait until such clear red flags arise before commencing an investigation. For example, if a particular type of

[1] Sometimes euphemistically called an "internal review" or an "internal inquiry."

[2] Some of the issues discussed in this article are sufficiently complex that they could be the focus of an entire article on their

footnote continued from previous column…

own. Due to space limitations, this article does not address every issue that tends to arise in an internal investigation, nor does it attempt to provide an exhaustive discussion of any particular issue.

* *BARRY J. MANDEL is a partner in the Washington, D.C, office of Foley & Lardner, LLP and chair of the Securities Litigation and Enforcement Practice Group. DAVID J. AVENI is an associate at the firm's San Diego office and a member of the Securities Litigation and Enforcement Practice Group. Their e-mail addresses are bmandel@foley.com and daveni@foley.com.*

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misconduct has recently occurred at other firms in the marketplace, it may make sense for the company to investigate to determine whether it has the same problem. There are a variety of advantages to conducting an inquiry in such a scenario, even though the company has not been the target of any allegations. One obvious advantage is ending any previously unknown wrongdoing that has occurred at an earlier date, possibly limiting any resulting damage. If misconduct has occurred, there is no benefit, and there is potentially tremendous harm, in delaying its discovery. Stopping any improprieties at an early date could greatly reduce the scope of the company's problem.

Another advantage in conducting such a proactive investigation is that it demonstrates to regulators or law enforcement agencies that the company takes its compliance obligations seriously. Government entities and self-regulatory organizations take a company's proactive efforts to prevent or end misconduct into account when determining whether, or what type, of enforcement action to initiate, and ultimately what, if any, sanctions against the company are appropriate.[3] Thus, a company that proactively discovers the misconduct on its own and ends the problem before a regulator becomes involved is more likely to receive leniency.

Launching an investigation at an early stage also helps reinforce a corporate culture of compliance. It demonstrates to employees that violations of the law will not be tolerated, and encourages them to report wrongdoing at an early stage, using the firm's own internal reporting procedures.[4] Such a corporate culture is critical to preventing serious problems from arising at the company in the future.

Against these advantages of conducting an early investigation, the firm must weigh the costs of such an inquiry to determine whether an investigation makes sense based on the facts currently available. Such costs include both the resources needed to conduct the investigation and the business disruption that can occur once an investigation begins.

WHO SHOULD CONDUCT THE INVESTIGATION?

Once the company decides to commence an internal investigation, the firm must decide who will conduct it: in-house counsel or an external law firm. The answer to this question depends on the nature and seriousness of the allegations, as well as the strength of the evidence suggesting misconduct has occurred. During the early stages of an investigation, before there is substantial evidence of a problem, it may make more sense for in-house counsel to handle the investigation. There are a number of advantages to having in-house attorneys handle the inquiry at this stage. As a practical matter, the expense of hiring external counsel cannot be undertaken every time a company needs to conduct an inquiry into potential misconduct. A feeling that external counsel must be hired for every inquiry may itself create pressure to have fewer investigations, which in turn could leave the company exposed. Moreover, at the early stages of investigating a potential problem, it often makes more sense to utilize in-house counsel's superior knowledge of the company's business, structure, procedures, and personnel.

[3] *See* 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, Rel. Nos. 34-44969 and AAER-1470 (2001) (commonly known as the "Seaboard Report," in which the SEC provided guidance regarding the extent to which a company's diligent investigation and cooperation in eradicating misconduct would be taken into account, and in which it announced that the manner in which the misconduct was discovered is one of the factors it would consider); FINRA Regulatory Notice 08-70 (Nov. 2008) (providing that companies that engage in "proactive undertakings" of comprehensive internal investigations that greatly assist FINRA investigations may receive credit for extraordinary cooperation).

[4] Such a demonstration is not to be taken lightly in view of the competing influences of the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203, 124 Stat. 1376 (2010), and the proposed SEC and CFTC whistleblower rules, which provide whistleblowers an incentive to circumvent internal reporting procedures in favor of the hope of a significant monetary reward for reporting wrongdoing to the government. *See* Rel. No. 34-63237 (2010); 75 Fed. Reg. 75728 (proposed Dec. 6, 2010) (to be codified at 17 C.F.R. 165).

Once it appears likely that misconduct occurred, however, the firm should consider using outside counsel. As the risk of a problem becomes more concrete, it makes sense to use external counsel who have particular expertise in the subject matter of the investigation, and who have experience conducting investigations and interacting with regulators. Using external counsel also helps create a greater perception that the investigators are independent from the company. Even at the earlier stages of an internal investigation, it may also make sense to use outside counsel when the allegations are particularly serious or involve senior management of the corporation. The greater risk to the company from such allegations may warrant the additional expense of hiring external counsel at an early stage.

If the company decides to use external counsel, it also must choose whether to use the firm's regular outside law firm, or hire a firm with which it has not had a close relationship in the past. One view is that using the company's regular law firm damages the independence and objectivity of the investigation, which is one of the advantages of using external counsel in the first place. However, other than in rare circumstances, a new law firm is unlikely to be substantially more independent than the company's regular outside firm. In either case, the firm is being hired and paid by the company, and absent an unusually strong relationship, the company's regular firm should be able to conduct the investigation in a sufficiently objective manner. Provided the regular firm has the necessary experience and subject matter expertise, the regular firm should be able to handle the investigation.

There is a time for the company to hire a new law firm rather than use the regular outside firm, however. When there is a possibility that the regular firm was involved in the underlying facts or in any wrongdoing, that firm obviously should not be responsible for conducting the investigation. In such instance, both legal conflict of interest requirements, and the credibility of the investigation necessitate using another firm.

WHO SHOULD PARTICIPATE IN EMPLOYEE INTERVIEWS?

One of the primary tools of any internal investigation is conducting interviews of employees who may have relevant information. Once counsel is assigned and the investigation has begun, the company will need to decide who will conduct or participate in such interviews. The firm must decide, for example, whether the interviews will be conducted by the attorneys themselves, or whether business managers or compliance department personnel will conduct or participate in the interviews.

It is usually best if attorneys conduct the interviews, for two primary reasons. First, having an attorney conduct the interview strengthens the argument that what is said during the interview is covered by the attorney-client privilege, and that notes or memoranda documenting the interview are similarly privileged.[5] Second, business personnel are not as trained or experienced as attorneys at digging through facts and questioning witnesses. Thus, attorneys may be more effective at questioning employees to uncover the truth.

However, while attorneys should conduct the interviews, under certain circumstances appropriate business people may sit in on the interviews. For example, it is not a good idea for immediate supervisors who may have involvement in the facts or whose supervision may be subject to question participate in the interviews, but other business persons are better candidates to sit in. Provided the presence of such business persons furthers the interests of the company in connection with their legal representation, or their presence is "reasonably necessary" to the investigation, their presence should not destroy the applicability of the attorney-client privilege.[6] It is often very important to obtain the assistance of business personnel at the company in advancing the investigation, and it can be important to include them in the inquiry.

While such business people may be invited to attend the interviews, however, they probably should refrain from taking notes regarding what takes place. Since the notes presumably would be for the business person's own use rather than for the attorney, such notes would difficult to protect under the attorney work-product doctrine.[7] Moreover, if the business person takes notes, that creates the risk of inconsistencies with the notes created by the interviewing attorney. That, in turn, could create unhelpful doubt regarding what actually occurred

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[5] *Upjohn Co. v. United States*, 449 U.S. 383, 394-99 (1981) (attorney-client privilege protects attorney notes taken during interviews with employees during internal investigation); *In re Grand Jury Subpoena*, 599 F.2d 504, 510 (2d. Cir. 1979) (stating that an internal investigation conducted by management would not be privileged).

[6] *QST Energy, Inc. v. Mervyn's and Target Corp.*, 2001 WL 777489 at *3 (N.D. Cal. 2001).

[7] The work-product doctrine may apply to a non-lawyer's written materials if the non-lawyer is acting as the attorney's agent and is working at his or her direction. *See SEC v. Strauss*, 2009 WL 3459204 at *6 (S.D.N.Y. 2009).

during the interview. Since the attorney is the one responsible for conducting the interview, it is best for the attorney to be responsible for documenting the result.

If the case has an international dimension, as often occurs where multinational corporations are involved, that may have an impact on who should conduct and attend employee interviews, since the scope of the attorney-client privilege is different overseas than in the United States. For example, under European Union law, the privilege does not apply to in-house counsel.[8] Thus, where the investigation relates to a European matter or the interview takes place in Europe, outside attorneys rather than in-house counsel should conduct the interview.

WHAT TO TELL EMPLOYEES DURING INTERVIEWS?

At the start of every employee interview, the interviewer should provide certain warnings to the interviewee. First, assuming an attorney is conducting the interview, the attorney should tell the employee he or she represents the company, not the employee personally. This warning is important so the employee cannot later claim he or she formed an attorney-client relationship with the attorney who conducted the interview. If the attorney who conducted the interview does not make it clear who he or she represents, that could prevent the company from disclosing what it learns during the interview to regulators or law enforcement personnel, or from otherwise using that information to protect the company. Moreover, if the employee reasonably believes the attorney was representing him during the interview, that could create a conflict of interest that could require the attorney (and his or her law firm) to withdraw from the investigation.

The interviewer also should advise the employee that the interview is covered by the attorney-client privilege. As a result, the employee should not discuss the interview with anyone outside the company under any circumstances unless directed to do so. Similarly, the employee also should be told not to discuss it with anyone inside the company other than with authorized personnel. The employee should be reminded that the entire subject of the investigation is confidential and that any unauthorized disclosures could impact the firm's investigation as well as its ability to invoke the attorney-client privilege. Another related warning the interviewer should give is that the privilege belongs to the company, and that the company later may choose to waive the privilege and disclose anything it learns to third parties, including to regulators or law enforcement agencies.

These warnings may prompt employees to ask whether they should have their own attorney to represent them in connection with the investigation.[9] Whether the employee should obtain legal counsel is a decision that is entirely up to the employee, not the company. Moreover, in most instances, there is no obligation for the company to pay for the employee to engage separate legal counsel. The company nonetheless should consider whether to provide such counsel for its employees, which at times may be helpful to the firm. For example, an attorney representing the employee may be able to facilitate the flow of information from the employee to the company to help the company understand what happened, thus advancing the investigation.

The interviewer should take notes of what is said throughout the interview, and after the interview is concluded, the notes should be turned into a formal memorandum that describes what was learned. The interview should not be recorded, however, nor should a stenographer create a verbatim transcript of what is said. Such an exact record of the interview is unhelpful for three reasons. First, it tends to intimidate interviewees, who are therefore less likely to be forthcoming in their answers to questions. Second, a recording or transcript causes the interviewer to lose control regarding what is chronicled from the interview.[10] Third, a verbatim record of the interview would be far less likely to be protected from disclosure by the attorney work-product doctrine. A memorandum summarizing the interview is protected because what is written has been screened by the attorney's thoughts and mental impressions regarding what is relevant and important to the case. On the other hand, a verbatim transcript or recording has not

[8] *Akzo Nobel Chems., Ltd. v. Comm'n*, Case C-550/07 P (E.C.J. Sept. 14, 2010).

[9] Employees might also ask whether they have any obligation to cooperate with the inquiry. Most companies have policies that require employees to cooperate with any internal investigations. Moreover, companies certainly are entitled to require an at-will employee to cooperate with an internal investigation as a condition of their employment.

[10] Any record of the interview should be crafted with the possibility in mind that it eventually will be seen by regulators or law enforcement personnel. If the investigation is eventually brought to the attention of regulators or law enforcement, they often will request that copies of interview memoranda be provided to them. Regardless of whether such materials are eventually turned over, when the interviewer prepares an interview memorandum, he or she should be aware of this potential audience when drafting the interview memo.

been screened by the attorney and thus does not reflect the attorney's thoughts and mental impressions. A recording or transcript therefore is more likely to be discoverable by third parties.

The interviewer should also record in the notes and interview memo each warning that is given to the employee at the start of the interview. Keeping a record of these warnings is important so the company can later prove it treated the employee fairly and that the employee has no reasonable expectation that the attorney represented him or her personally.

HOW TO COLLECT RELEVANT DOCUMENTS?

Another critical investigative tool is the collection and review of documents from employees. Documents often prove to be the key to unlocking what transpired. Once any documents revealing misconduct are uncovered, they can be used in subsequent interviews to prompt employees to explain what happened. Since documents are so vital to an internal investigation, it is important that the collection of documents be thorough, and must include both hardcopy and electronic files.

The first step in collecting documents is the issuance of a "litigation hold," which is a notice to employees to retain all documents that could be relevant to the investigation. It should be sent at the very beginning of the investigation, so that important documents are not destroyed, and it should be sent to all employees who might have relevant materials. The litigation hold should describe the issues covered by the investigation in sufficient detail so that employees understand what documents must be retained. The litigation hold also should specifically notify employees that the company's document destruction policy is suspended during the pendency of the inquiry. Finally, the litigation hold notice should tell employees that the investigation is confidential and should not be discussed without authorization, particularly with anyone outside the company.

Once the document collection begins, documents should be collected both from central sources, such as shared databases and servers, and from individual employees. While documents residing in central sources can be collected by the investigative team, the collection of documents from individual employees typically will require some assistance from the employees themselves. The amount of reliance on individual employees (and the thoroughness of the document collection effort) depends in part on the seriousness of the potential misconduct and the potential impact on the company. In cases of very serious allegations, for example, the investigative team might take the costly and time-consuming step of imaging the entire hard drive of certain employees, which ensures that all potentially relevant documents on the employee's computer are collected.

Where the investigative team is relying on employees to identify the documents in their possession that need to be collected, the employees' discretion in selecting documents should be minimized as much as possible. This reduces the risk that important documents are missed, either because employees do not fully understand what documents are relevant, or because employees implicated in any wrongdoing want to keep incriminating materials from coming to light. Thus, when documents are being collected from individual employees, the employees either (1) should be instructed to provide all documents even remotely related to the subject of the inquiry, or (2) should receive assistance from a member of the investigative team in identifying and collecting all relevant documents.

SHOULD EMPLOYEES BE DISCIPLINED WHILE THE INVESTIGATION IS ONGOING?

Once there is some evidence that a particular employee engaged in misconduct, the company is faced with the thorny question of what to do with that employee while the investigation is ongoing. Should the employee be terminated, or should he or she be placed on administrative leave or left in his or her position until the inquiry is concluded? The answer to that question depends on a variety of factors, including the seriousness of the employee's conduct, the strength of the evidence against the employee, the firm's supervisory obligations (such as in the case of a broker-dealer), the need to prevent further misconduct, fairness to the employee, and legal obligations under state and federal employment laws. Another factor to be considered is that in the securities industry, an adverse employment action may need to be reported on Form U-4 or U-5. Reporting a disciplinary action on these forms could cause the subject of the investigation to be known outside the firm earlier than planned.

The company also should consider the risk of increasing regulatory exposure if the employee is left in his or her position, even temporarily, after potential misconduct is discovered. If the investigation eventually determines that the employee did engage in wrongdoing, regulators may look unfavorably on the firm's decision to leave the employee in place after evidence of the misconduct arose.

Finally, the company should consider the impact on its ability to obtain cooperation from the employee in

completing the investigation. As long as the employee remains with the company, the company can exert some measure of control over the employee and require him or her to cooperate, for example, by agreeing to be interviewed. Once the employee is terminated, however, the employee likely will have little incentive to be helpful and may even want to harm the firm. If the company decides to terminate the employee, it should obtain as much information from the employee as possible before it takes disciplinary action.

HOW SHOULD WHISTLEBLOWERS BE TREATED?

Many internal investigations involve whistleblowers, whether they raised allegations that prompted the investigation, or they come to light as the investigation proceeds. At times, these whistleblowers raise their claims anonymously, which raises the question whether the firm should attempt to identify them. There is nothing wrong with the company attempting to determine the identity of an anonymous whistleblower. Identifying the whistleblower may be helpful as it allows the company then to interview the person about their claims. However, care must be taken so that identifying the whistleblower does not become the focus of the investigation. When there is an anonymous whistleblower, there is a strong temptation to make identifying the whistleblower the top investigative priority. But once credible claims of misconduct arise, the focus instead must be on determining whether wrongdoing occurred, and if so, identifying the perpetrators, ending the misconduct, and discovering what happened.

If the whistleblower has identified him or herself, or is otherwise identified, the whistleblower should be interviewed to obtain all relevant information regarding the allegations. That interview is also an opportunity for the company to "partner" with the whistleblower so that the whistleblower is satisfied the company is taking the claims seriously. The company should explain to the whistleblower that it is engaging in a thorough investigation. Moreover, the firm should assure the whistleblower that he or she did the right thing by speaking out and bringing the allegations to the company's attention. The whistleblower also should be encouraged to be patient and give the company time to thoroughly investigate the claims.

Further, the company should commit to reporting back to the whistleblower when the investigation is concluded. Such a commitment is important so the whistleblower feels satisfied the company is investigating the claims in good faith. If the whistleblower never hears back from the company, he or she may fear the company did little or nothing to look into the allegations, and may be more likely to take matters into his or her own hands by repeating the allegations to third parties.

While the company should commit to touching base with the whistleblower when the investigation is concluded, the company should not promise to reveal the results of its investigation to the whistleblower. Since the company cannot predict what the legal landscape will look like at the time the investigation is finished, there is simply no way the company can be sure it will be in a position to reveal the results. Thus, for example, the company should not commit to reveal whether it ultimately reaches a finding that misconduct occurred, or what disciplinary actions it is taking against any employees who might be implicated.

Finally, the company should be sure it has sufficient anti-retaliatory policies in place to protect the whistleblower. The company similarly should remind the appropriate supervisory personnel that they cannot take any actions that even create an appearance of being retaliatory, such as making changes to the whistleblower's workload or responsibilities, or choosing to withhold a promotion from the whistleblower. The company could face liability if retaliatory actions are taken against the whistleblower.

WILL COMMUNICATIONS WITH PUBLIC RELATIONS SPECIALISTS BE PRIVILEGED?

If the subject of the investigation becomes public, the company will need to decide whether it wants to engage the services of a public relations specialist. Such specialists are useful to help ensure media coverage is as balanced and fair to the company as possible. If public relations consultants are used, a key question becomes whether communications with them are privileged. This is particularly true since such specialists are much more effective if they are able to have open discussions with the company and with the attorneys regarding the status and findings of the investigation and the company's strategy for dealing with the problem.

Courts have had conflicting views as to whether communications between a company's counsel and a public relations firm are privileged. Some courts have found the public relations consultant's assistance is vital to assist the lawyer in providing legal advice regarding public statements about the case and thus is covered by

the attorney-client privilege.[11] In other cases, courts have found communications with the public relations firm were not privileged.[12] The real distinguishing factor in these cases is the purpose of the communication – whether it is to assist the lawyer in providing effective legal advice (privileged) or to assist the company in addressing its public relations issues (not privileged).

To maximize the likelihood that the attorney-client privilege will apply, the engagement agreement with an external public relations firm should state the engagement is for the purpose of providing public relations services to the company's attorneys to assist them in providing effective legal services. The argument in favor of applying the privilege will be even stronger if the public relations specialist is a company employee rather than an external public relations firm. In such instance, the public relations employee can simply be assigned to assist the attorneys conducting the internal investigation. If an inside public relations specialist is used, it may also be helpful to create a memorandum that states the employee is being assigned to provide public relations services to assist the attorneys in providing effective legal services, similar to an engagement agreement for an external public relations firm.

WILL DOCUMENTS PROVIDED TO OUTSIDE AUDITORS BE PRIVILEGED?

External auditors frequently request companies to provide information regarding internal investigations, consistent with their obligation to render an opinion on the accuracy of the company's financial statements. Such requests can place the company in a difficult position. While the company needs to cooperate with the auditor and provide requested information so the auditor can issue an opinion, providing information and documents to the auditor could cause the waiver of any applicable privileges that otherwise would protect the information and documents from disclosure to others.

Most courts agree that the disclosure of documents to an external auditor causes the attorney-client privilege to be waived. Since disclosure to a third party causes the privilege to be waived, and an external auditor qualifies as a third party, it is not surprising that courts find providing documents regarding an internal investigation to the auditor waives the privilege.[13]

Courts are split, however, regarding whether disclosure of documents to an auditor waives the attorney work-product doctrine. The majority of courts take the view that such a disclosure does not constitute such a waiver.[14] Unlike the attorney-client privilege, the work-product doctrine is not waived merely by disclosure to third parties. Instead, the work-product doctrine is only waived if the disclosure "substantially increases the opportunity for potential adversaries to obtain the information."[15] Thus, courts have concluded that where the disclosing party and the third party share a common interest, there is no waiver of the work-product doctrine.[16] In the case of disclosure to external auditors, most courts conclude that the company and its auditor share a common interest in detecting and eliminating corporate misconduct, and that disclosure to the auditor does not substantially increase the risk of disclosure to an adversary.[17] Thus, in most instances, disclosure of investigative materials to the company's auditor will not waive the attorney work-product doctrine.

If the company decides to disclose documents to its auditor, the company should draft an agreement stating that the auditor agrees to maintain the confidentiality of the materials and to protect the applicability of the work-product doctrine. The writing should also reflect that the company does not intend the disclosure to constitute a work-product waiver. Although such an agreement will

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[11] *E.g.*, *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 330 (S.D.N.Y. 2003); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001).

[12] *E.g.*, *In re New York Renu with MoistureLoc Prod. Liab. Litig.*, 2008 WL 2338552 at *6-8 (N.D.N.Y. 2008); *Haugh v. Shroder Inv. Mgmt.*, 2003 WL 21998674 at *3 (S.D.N.Y. 2003); *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 54-55 (S.D.N.Y. 2000). Even if communications with the public relations consultant are not covered by the attorney-client privilege, documents provided to the consultant may still be covered by the attorney work-product doctrine. *See Haugh*, 2003 WL 21998674 at *11.

[13] *Gutter v. E.I. DuPont de Nemours & Co.*, 1998 WL 2017926 at *3 (S.D. Fla. 1998).

[14] *E.g.*, *Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 448-49 (S.D.N.Y. 2004); *International Design Concepts, Inc. v. Saks, Inc.*, 2006 WL 1564684 at *2-3 (S.D.N.Y. 2006); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006). *But see Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 115 (S.D.N.Y. 2002).

[15] *In re Grand Jury Subpoenas*, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982).

[16] *Merrill Lynch & Co.*, 229 F.R.D. at 446.

[17] *Id.* at 448; *International Design Concepts, Inc.*, 2006 WL 1564684 at * 3.

not guarantee a waiver will not be found, it is a simple step that helps reduce the risk.

SHOULD A WRITTEN REPORT BE PREPARED?

Another critical decision that must be reached in any internal investigation is whether to prepare a written report summarizing the steps taken and the conclusions reached by the investigative team. There are a variety of advantages and disadvantages of preparing a written report. On the one hand, a written report can be a very useful tool to present the investigation's findings to management or the company's board of directors. This is particularly true if the issues involved are complex or the relevant evidence is voluminous. In such instance, a written report is helpful to connect the dots and lay out what has been discovered.

A written report can also be helpful to convince regulators or law enforcement to be lenient toward the company. If a written report is prepared, the government invariably will ask for a copy of it once the investigation is revealed to them. In some circumstances (although by no means all), a written report can help the government decide the company is not to blame, that it proactively sought to prevent the misconduct before it occurred, or that once the misconduct came to light, the company acted quickly to end the wrongdoing. The report can also highlight any corrective measures the company takes to prevent similar misconduct in the future. In addition, regulators and law enforcement may be more likely to find the company provided substantial assistance to them if the company provides a written report. Such a report can serve as a roadmap for the government's own investigation and possible prosecution of any individuals who perpetrated the wrongdoing.

On the other hand, the primary disadvantage in preparing a written report is the considerable risk the privilege protecting it will be waived and the report will become public. As mentioned, it is almost inevitable that the government will ask for a copy of the written report if one is prepared. While some courts have held that providing the report to the government does not necessarily waive privilege,[18] the substantial weight of authority is that such a disclosure does constitute a waiver.[19] Once the privilege has been waived, the report can be obtained by adversaries who could use it against the company to great harm in civil litigation.

If the company prepares a written report and a governmental agency requests a copy of it, the company should act proactively to minimize the risk of a privilege waiver. The company should prepare a written agreement that explicitly states the disclosure to the government is not intended to be a waiver, and that the government agency will protect the report's confidentiality. While most courts have held such an agreement will not prevent a waiver, some courts have reached the opposite conclusion, deciding that an express agreement may protect the privilege from being waived.[20]

CONCLUSION

As noted at the outset, an internal investigation requires planning at the beginning of the investigation. Nevertheless, it also is important to be familiar with the twists and turns an investigation may take and the decisions that must be made as the facts are unveiled and the circumstances dictate. ■

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[18] *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d. Cir. 1993) (noting that disclosure of materials to the SEC pursuant to an explicit agreement to protect confidentiality of the materials may not cause waiver).

[19] *E.g., In re Quest Communications Int'l, Inc.*, 450 F.3d 1179, 1192 (10th Cir. 2006); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.2d 289, 302-304 (6th Cir. 2002); *Westinghouse Elec. Corp. v. Republic of The Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991).

[20] *In re Steinhardt Partners, L.P.*, 9 F.3d at 236; *In re M & L Bus. Mach. Co.*, 161 B.R. 689, 696 (D. Colo. 1993); *SEC v. Amster & Co.*, 126 F.R.D. 28, 30 (S.D.N.Y. 1989).