Tuesday, October 21
2:30 pm-4:00 pm

603 The Government Investigator is Knocking: Now What?

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United States Steel Corporation

Callie Pappas
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Schnitzer Steel Industries, Inc.

Evan Slavitt
Vice President, Business and Legal Affairs
AVX Corporation

Jason Weintraub
Vice President, General Counsel, and Chief Compliance Officer
DRI Companies

Faculty Biographies

Joseph Napoli

Joseph Napoli is the senior general attorney--corporate of United States Steel Corporation. His practice centers on finance, M&A, domestic and international transactions, and securities.

He serves on ACC's Securities Law Committee and is president-elect of the Western Pennsylvania chapter. Mr. Napoli has written for *ACC Docket* and the Allegheny County Bar Association Business Law Council. He was named Outstanding Volunteer Attorney of 2003 by the Executive Service Corps and has made a number of presentations for ACC's Western Pennsylvania chapter and the Pennsylvania Bar Institute.

Callie Pappas

Callie Pappas is vice president and chief compliance officer for Schnitzer Steel Industries, Inc., headquartered in Portland, Oregon. Schnitzer Steel is one of the nation's largest recyclers of scrap metal, a leading provider of used and recycled auto parts, and a manufacturer of finished steel products. She is responsible for creating and overseeing the compliance department across all business units.

Ms. Pappas began her career in private practice in Washington, DC working for several national law firms. She also served as international counsel at United States Steel Corporation in Pittsburgh. She then assumed her current position with Schnitzer Steel.

She has been a speaker at a number of local and national seminars on the topics of international trade and the Foreign Corrupt Practices Act.

Ms. Pappas has a BA and JD from the University of Michigan and an MBA from the University of Pittsburgh.

Evan Slavitt

Evan Slavitt is the vice president of business and legal affairs for AVX Corporation, a NYSE-listed global manufacturer of electronic components and connectors. In that capacity, he is the general counsel and chief legal officer for the company and its subsidiaries.

Mr. Slavitt began his legal career in the United States Department of Justice, first in the antitrust division and then as an assistant United States attorney for the District of Massachusetts. In private practice, Mr. Slavitt worked in several large partnerships before becoming a founding member of Bodoff & Slavitt, LLP. In private practice, Mr. Slavitt concentrated on complex commercial litigation, white-collar criminal defense, and corporate investigation. Mr. Slavitt also was the general counsel for the Massachusetts Republican Party and its 2004 candidate for attorney general.

Mr. Slavitt has been an active member of a variety of bar associations, including helping to establish and acting as the first co-chair of the bankruptcy litigation committee for the American Bankruptcy Institute, chair of the environmental crimes committee of the ABA's section on environmental law, and participated in the educational committees of the Boston Bar Association and the Massachusetts Continuing Legal Education Foundation. He is a frequent lecturer on legal topics and has written or co-authored numerous articles and books. Currently, Mr. Slavitt chairs the publications committee for ACC's Compliance and Ethics Committee.

Mr. Slavitt has a BA and MA from Yale University and a JD from Harvard Law School where he was an editor of the Harvard Law Review.

Jason Weintraub

Jason Weintraub is vice president and general counsel of the DRI Companies, one of the largest residential and commercial roofing, waterproofing, and renewable energy subcontractors on the west coast.

Prior to joining DRI, Mr. Weintraub gained extensive experience in complex and class action litigation at Howard Rice Nemerovski Canady Falk and Rabkin, and at Horvitz & Levy LLP.

Mr. Weintraub is a frequently sought-after lecturer at continuing education seminars, speaking on such issues as product liability, construction defect law, insurance coverage, unfair competition law, and complex civil litigation. In the past two years, Mr. Weintraub has spoken at over 20 different conferences. He has earned various honors including the DRI Companies' legal department one of the Top 10 Most Innovative Legal Departments in Corporate America by *Inside Counsel Magazine;* and his peers selected him as a "Rising Star" lawyer in *Los Angeles Magazine*. Articles written by Mr. Weintraub have appeared in *California Litigation* and *Verdict* magazines. Next year, Mr. Weintraub will be published in the Defense Research Institute's *For the Defense* magazine and the Lexis-Nexis Mealey's Insurance Reporter.

Mr. Weintraub received his JD from Berkeley Law (Boalt Hall – University of California) and his undergraduate degree from Stanford University, with distinction and with departmental honors.

AGENDA/OBJECTIVES

- Provide background/context to various types of investigations
- Provide as much practical advice as possible
- Provide samples of documentation that counsel can adapt to each specific company's needs
- Help facilitate communications between counsel and outside experts
- Make sure that counsel remains part of the solution rather than putting himself/herself at risk

TYPES OF INVESTIGATIONS

- Criminal – The Major Players
  - FBI
  - DEA
  - DIA
  - Local Police
  - European Regulators
  - ICE

TYPES OF INVESTIGATIONS

- Routine and non-routine *regulatory*
  - OSHA
  - EPA
  - FDA
  - OIG (HHS)
  - DOL (OFCCP)
  - SEC

TYPES OF INVESTIGATIONS

- Criminal – Types
  - Ongoing crime/hot pursuit
  - Search Warrant
  - Subpoena/CID
  - OIG Subpoena
  - Civil Investigative Demands
    - Antitrust
    - Health Care

TYPES OF INVESTIGATIONS

- Indeterminate
  - Cross deputization
  - Resource Issues
  - Civil/Criminal
    - *Stringer* decision

RESPONSE STEP 1: NOTIFICATION

- In-House Counsel
- *Agreements re Records – Paper/Electronic*
- *Agreements re Procedure/Monitoring the Investigation*
- *Designate one person in each facility with responsibility to coordinate response*

RESPONSE STEP 1: NOTIFICATION

- Receptionist/Guard
- *Examination/Record of Credentials*
- *Requests to wait*
- *Notification*

RESPONSE STEP 1: NOTIFICATION

- Senior Employees/Executives
- *KEY: Segregation of Privileged Communications*

RESPONSE STEP 1: NOTIFICATION

- Other Employees
- *Potential Investigation Targets*
- *IT*
- *Consider notifying outside auditors*

RESPONSE STEP 2: ASSESSMENT

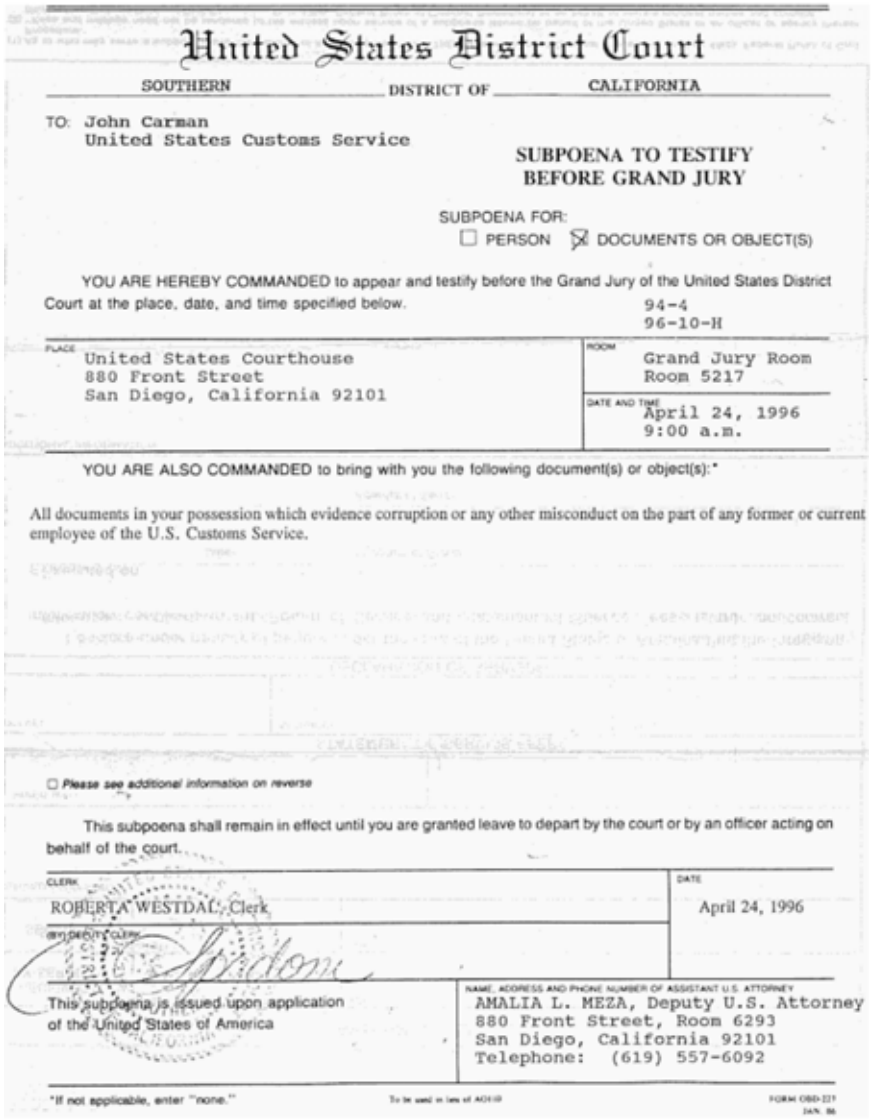
- Signature of authorized official.
- Appropriate service, often by personal hand delivery. In many, but not all, cases, service by mail is not sufficient.
- Service by appropriate person.
- Service upon appropriate recipient. Statutes sometimes will prescribe a particular person (e.g., the institution's registered corporate agent, president, or legal counsel) or category of persons (e.g., "a person of suitable age and discretion").

RESPONSE STEP 2: ASSESSMENT

- Ask for and verify each agent's or surveyor's identification and agency affiliation.
- Ask to speak with agent in charge to determine what officials are seeking and nature of the investigation.
- Communicate through the agent in charge.

RESPONSE STEP 2: ASSESSMENT

- *Scope of Investigation*
- *Relevant Regulations*
- *Agencies Involved*
- *Regulatory/Civil/Criminal*
- *Protect Privilege for Internal Discussions*



United States District Court

SOUTHERN DISTRICT OF CALIFORNIA

TO: John Carman
United States Customs Service

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:
☐ PERSON ☒ DOCUMENTS OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

94-4
96-10-H

PLACE: United States Courthouse
880 Front Street
San Diego, California 92101

ROOM: Grand Jury Room
Room 5217

DATE AND TIME: April 24, 1996
9:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

All documents in your possession which evidence corruption or any other misconduct on the part of any former or current employee of the U.S. Customs Service.

☐ *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK: ROBERTA WESTDAL, Clerk

DATE: April 24, 1996

DEPUTY CLERK:

This subpoena is issued upon application of the United States of America

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY
AMALIA L. MEZA, Deputy U.S. Attorney
880 Front Street, Room 6293
San Diego, California 92101
Telephone: (619) 557-6092

*If not applicable, enter "none."

RESPONSE STEP 2: ASSESSMENT

- *Legal Issues*
  - *Indemnification*
  - *Notice to Board*
  - *Advice to Board/Senior Management*
  - *Document Preservation/Litigation Holds*
  - *Insurance/Fidelity Bond Notices*
  - *Public Disclosure Obligations*

RESPONSE STEP 3: MONITOR

- *Observe actions of search team – take notes re items seized and areas searched*
- *Seek permission to videotape searches or interviews*
- *Ask to make copies of all documents seized*
- *Do not volunteer any information or documents*
- *Ask agent to wait for legal counsel to arrive – if they will not wait, have procedures to identify privileged documents*

RESPONSE STEP 3: MONITOR

- *Ensure investigation no broader than subpoena, warrant, etc. allows*
- *Agent may not access any document or property not described in warrant or subpoena*
- *Be courteous, but absent a search warrant, do not consent to a search*

What else do you do?

- *Engage counsel for officers, directors and employees?*
- *Do you disclose the investigation and if so —what, how much and when?*
- *Installing effective controls and monitoring.*

The Investigation is Over -- Moving Forward

Callie Pappas
Vice President & Chief Compliance Officer
Schnitzer Steel Industries, Inc. Portland, OR

Legacy of a Government Investigation

- Huge **disruption** to operations
- **Shock** and **disbelief** that this type of thing "could happen here"
- Likely personnel **changes**
  - People that were here yesterday are gone today
  - Uncertainty of reporting relationships

Legacy of a Government Investigation, Continued

- Possible **criminal** charges
- Possible **civil** suits
- **Negative** press articles
- Questions from **family** and **friends**

How do you
pick up the pieces?

Attention

How do you re-focus
attention on
the core business?

Follow the Rules…

The Board must be proactive.

The CEO must be brutally self -reflective

If the CEO is lacking in any of these traits, appoint someone to lead the "normalization" (with the CEO's full support)

You need the right leader for right now

- **strong**
- **compassionate**
- **good communicator**

If the CEO is gone (voluntarily or otherwise), the Board must move quickly to find a new CEO

Activate internal succession or look to the outside

The leader must lead

- no hiding in the executive suite
- no waiting to learn the business before acting

…with a clear message:

- We are a great company with great people
- You should be proud to work here
- We made some mistakes and bad choices but we are fixing them
- We must redouble our efforts to ensure nothing like this happens again
- Most importantly -- There will be no mixed messages from me – or anyone that works for me:

  We do the right thing. Not sometimes. Not often. ALWAYS.

  And we do it because it is the right thing to do

Above all, the leader must communicate…

- "all employee" meetings
- visit as many locations as possible
- mix with all levels in the organization

Limit gossip

While the general situation may be public, the number of people who know the details should be few…

and those few should be circumspect in their communications

**(Gossip occurs in a communication void –
if Rule Two is being followed – then less need for gossip)**

Re-focus energy on core business

- Keep making business decisions
- If major events were planned (new product launches, *etc.*) – don't scrap them
- Keep talking about the future in concrete terms
- Keep up schedule of continuous improvement, financial, offsite meetings
- Don't delay performance reviews, etc.

Above all, be Compassionate

Understand that people may be:

- hurt
- scared
- anxious
- feeling economic impact

Take steps <u>today</u> that will help if this event ever happens

- Establish <u>independent</u> Internal Audit and Compliance functions (to the extent that government can use these groups to assist in any investigation, there is less disruption)
- have a whistleblower hotline <u>and</u> handle reports properly;
- talk ethics at every opportunity; and

walk the walk – don't just talk the talk

Finally, never forget

The sun will come up tomorrow…

Tomorrow is just a day away

October 21, 2008

Evan Slavitt
General Counsel
AVX Corporation

Bridget Rohde
Member
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

DISCLAIMER/LICENSE

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I. Introduction

A. Overview

Site visits by representatives of federal or state regulatory or law enforcement agencies do not invariably betoken a targeted enforcement effort. Nonetheless, because of the possibility that the visit is part of such an effort, and because of the extraordinary array of administrative, civil, and even criminal penalties available to regulatory authorities, each visit must be treated with care and with a view toward possible enforcement implications. On other occasions, however, such as the execution of a search warrant, the visit cannot be interpreted as other than an auger of troubled times.

Corporate counsel face complex challenges as they respond to such visits. Few corporate counsel have current criminal defense expertise; fewer still have experience with all the possible types of regulatory interactions that may occur. Nonetheless for most such counsel, there will come a time when the phone rings and a panicked voice on the other end says something like "The agents from X are here, they are demanding entry and they don't look like they are going to wait around. What do I do?" When that call comes, in house counsel must be ready to do more than update his or her resume.

As with so much of inside practice, proper planning and anticipation can vastly improve the speed and quality of counsel's response. Being able to discern the different types of investigations and their implications also serves the lawyer well. Finally recognizing when the immediate crisis is over, and being able to make a smooth transition to experts in the field, giving them the information and the strategic position necessary for the best outcome will demonstrate that counsel has represented the corporation well.

B. Objectives of Presentation and Materials

It is, of course, not possible to convert in house counsel into an expert in all aspects of regulatory investigations, nor would such an objective make much sense. Instead, these materials and the presentation they support are intended to

- Give some background and context to the various types of visits that may occur
- Provide as much practical advice as possible
- Set forth samples and prototypes of documentation that counsel can adapt to each specific company's needs
- Help facilitate the communications between counsel and outside experts that are called in as needed

  - Make sure that counsel remains part of the solution rather than putting himself/herself at risk

As always, the information provided is not a substitute for specific legal advice in particular situations. Further, while various laws, both domestic and international are discussed, there may be differences in local laws that require modification in response or procedure.[1]

C. How To Use These Materials

While the authors have written these materials as an overall introduction to this topic, they recognize that not every reader will start at the beginning and read straight through. Accordingly, for the more selective reader the authors suggest that, the Table of Contents and §§ II, III, and IX be reviewed to get a general sense of the contents and the context of these materials and to focus on planning possibilities that must be addressed before an actual investigator shows up. In order of precedence, §§ IV and X should be the next sections taken up.

The authors also recommend that anyone who may need to use these materials keep a separate copy in their car or residence. While most of the investigations addressed will take place during business hours, there are a variety of circumstances that could lead to the initiation of entry outside of those hours.

Please note that although the materials were current as of the date due to the ACC (August 2008), there may be significant changes since that date. Further, although there may be references to the laws of countries other than the United States, the focus is on United States laws, and more particularly federal law.

II. Types of Investigation/Agencies

A. Routine and Non-Routine Regulatory

1. Commonly Seen Players

a) OSHA

Of the forty thousand or so inspections conducted by the Occupational Safety and Health Administration ("OSHA") each year, more than half are routine (or, as OSHA call them, "programmatic"). Each year, OSHA picks several industries as a focus, but it still engages in routine inspections of some non-focus activities within its jurisdiction. The other half of

[1] For example, one of the recommendations that arises in various contexts suggests videotaping the inspection or search. While this is generally not a problem, it may constitute "wiretapping" under a rather strange Massachusetts statute. Thus, counsel will either have to instruct the videotaper to keep the sound off or post warnings at the facility that anyone coming onsite will be deemed to have consented to observation and sound recording.

OSHA's inspections are non-routine. Most of them arise from investigations of workplace fatalities or serious injury, referrals from other agencies, or direct complaints. Such inspections will have two objectives. First, OSHA will seek to identify safety issues that can or must be cured. Second, OSHA will be establishing the factual background for the imposition of regulatory fines.

OSHA has the power to impose administrative penalties. There are different classifications of violations and penalties structured for the workplace: "Other than Serious Citation," "Serious Violation," "Willful Violation," and "Repeat Violation."

An Other than Serious Citation is given for violations that are not a threat to cause death or serious harm. For instance, lack of a label marking a refrigerator for biohazard storage. The fine for an Other than Serious Citation can be as large as $7,000.00. This can be adjusted based on the history of the business, previous violations and the good faith efforts of the employer.

A Serious Violation is when death or serious physical harm could result, and the employer knew or should have known about the hazard. An example of this is not locking out or tagging out equipment. The fine for this is up to $7,000.00 for each violation. This may be decreased through negotiations or good faith on the part of the employer.

A Willful Violation is one of the most serious violations an employer can have. This occurs when the employer intentionally and knowingly commits a violation. This type of violation also increases the penalty significantly. The penalty can go as high as $70,000 per violation with a minimum of $5,000.00 per violation. If an employee is killed on a job resulting from a willful violation, the employer, if convicted, can result in very large fines and possibly imprisonment.

A Repeat Violation where the violation has not been corrected can also result in a $70,000.00 fine, plus $7,000.00 a day until corrected.

b) EPA

The United States Environmental Protection Agency ("EPA") has broad jurisdiction to enforce the federal (and to some extent international) environmental laws. EPA is not only divided into a headquarters and regions, but also into several divisions, each responsible for different sets of laws or media (*e.g.*, water/Clean Water Act, air/Clean Air Act, etc.). As a result, even though EPA intermittently tries to establish cross-media programs, it is not uncommon for a facility to see different EPA agents without any apparent coordination. EPA also has a separate set of agents who investigate possible criminal activity.

Because of its broad mandates, EPA conducts a variety of types of inspections. Some inspections are simply paperwork reviews to ensure that the company has maintained mandatory records. Others will focus on physical examinations or testing of effluents. Further, EPA can, under many permits, require the company to provide a broad variety of documentation or to conduct testing and provide EPA with the results.

Almost all of the environmental laws provide for both civil and criminal penalties. Further, because of the structure of the laws, the potential size of civil/administrative penalties can be enormous. For example, if a company has an unauthorized discharge that violates four of the technical criteria set forth in a permit, and that discharge continues for only ten days, the fine could be calculated as 4x10x$50,000 = $2 million. In practice, of course, EPA rarely attempts to collect the maximum potential fine, but it does use that potential as a tool to persuade companies to "voluntarily" comply with EPA's demands.

c) FDA

The Food and Drug Administration ("FDA") has jurisdiction over all locations that make, store, or distribute food, pharmaceuticals or medical devices. It has always asserted the right to conduct administrative inspections. Those inspections do not materially differ from administrative inspections performed by other agencies. The FDA's Office of Criminal Investigations ("OCI"), established in 1992, has, however, increasingly used search warrants, a trend that shows no signs of decreasing. Such warrants have been executed even when there is neither an imminent threat to public health nor an articulated basis to conclude that evidence will be hidden or destroyed if a less intrusive form of investigation were pursued. Initially, these searches tended to focus on generic drug manufacturers, but it has expanded beyond the drug industry. There have been a number of investigations and prosecutions directed against medical device manufacturers and against food manufacturers believed to have engaged in economic adulteration.

d) HHS OIG

One agency almost always involved with health care fraud cases is the Department of Health and Human Services through its Office of the Inspector General, otherwise known as the OIG/HHS. The involvement of HHS in health care fraud cases is pervasive. Defendant's counsel must understand the authority of HHS and the role the agency can play in determining the ultimate outcome of a negotiated settlement or in a trial. The OIG serves as a liaison to state licensing boards and other outside entities with regard to integrity, compliance, and enforcement activities. It monitors ongoing compliance, exclusion, and suspension agreements. Potential administrative penalties often are much more critical to a defendant's survival than are the money damages and even incarceration. To be barred from participation in all government health care programs profoundly affects the ability of the health care practitioner to reestablish as a viable provider at the termination of the prosecution. For these reasons, defendant's counsel should place administrative claims issues at the forefront of settlement discussions.

e) DoL (OFCCP)

The Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP")[2] is responsible for ensuring that contractors doing business with the federal

[2] Technically OFCCP is part of the Labor Department's Enforcement Standards Administration.

government do not discriminate and take affirmative action. OFCCP administers and enforces three legal authorities that require equal employment opportunity:

- Executive Order 11246, as amended
- Section 503 of the Rehabilitation Act of 1973, as amended
- Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212

Broadly speaking, these prohibit Federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, national origin, disability, and protected veteran status. Their embodying regulations can be found at Title 41 CFR Chapter 60.

OFCCP generally uses a tiered approach (also commonly known as the three-part trigger test) to investigations. At the first level, OFCCP uses pay grade (or other aggregated compensation) information submitted in response to Item 11 of OFCCP's compliance review scheduling letter to conduct simple comparisons of group average compensation data. If this comparison indicates a significant disparity, OFCCP will ask the contractor for employee-specific compensation and personnel information. OFCCP will then take this employee-specific compensation information and conduct a cluster regression analysis. Should such analysis confirms significant disparities, OFCCP will then conduct a comprehensive evaluation of the contractor's compensation practices.

These compensation investigations are generally lengthy and burdensome for employers given the resources that HR and compensation staff will devote to the audit. As part of its investigation, OFCCP gathers information on employees' job duties, responsibility levels, skills and qualifications, and other pertinent factors through review of job descriptions and interviews of employees, managers, and HR and compensation personnel.

f) SEC

The U.S. Securities and Exchange Commission ("SEC") has broad authority to investigate actual or potential violations of federal securities laws. The SEC also has broad authority to determine the scope of its investigations and the persons and entities subject to investigation. The following statutes authorize the SEC to investigate past, on-going, or prospective violations of federal securities laws, SEC rules or regulations, and self–regulatory organizations rules:

- Section 20(a) of the Securities Act of 1933 (the "Securities Act");
- Section 8(e) of the Securities Act;
- Section 21(a)(1) of the Securities Exchange Act of 1934 (the "Exchange Act");
- Section 21(a)(2) of the Exchange Act;

- Section 209(a) of the Investment Advisors Act of 1940 (the "Advisers Act");
- Section 42(a) of the Investment Company Act of 1940 (the "Investment Company Act");
- Section 18(a) of the Public Utility Holding Company Act of 1935 (the "Public Utility Holding Company Act");
- Section 321(a) of the Trust Indenture Act of 1939 (the "Trust Indenture Act"); and
- portions of the Sarbanes-Oxley Act.

The SEC can conduct various types of investigations. It often starts as an "informal investigation," which depends on the voluntary cooperation of individuals and companies to obtain information, documents, and testimony. Informal investigations are non-public, and the SEC cannot administer oaths or affirmations as it can in formal investigations. However, the SEC often conducts interviews with a court reporter and the production of a transcript.

To begin a formal investigation, the SEC must obtain permission from the Commissioners in Washington, D.C. through the issuance of a formal order of investigation. The formal order describes the nature of the investigation, and it grants their attorneys and staff the power to issue subpoenas and to administer oaths. Generally these are also non-public. Under a formal investigation, the SEC can subpoena documents and witness statements, administer oaths, compel production of documents, and take "testimony."

g) State Enforcement

As a general matter, there are state counterparts to almost every federal agency. Some, but not all, can issue administrative warrants in their state, issue subpoenas, or obtain search warrants. Accordingly, much of the analysis relating to federal agents will apply equally to state investigations. In house counsel are, however, advised to familiarize themselves with the general outlines of agency enforcement in each state in which the company operates.

h) Other Countries

As noted below, the general principles set forth in this document are, *mutatis mutandis*, reasonably applicable in other common law jurisdictions such as Canada or the United Kingdom. Within the European Union, there are some common aspects, but corporate counsel should seek outside counsel's advice on the rules and the best way to prepare. In other areas, the rules can be so divergent that they are entirely beyond the scope of these materials.

i) Fire Marshal/Fire Inspector

In general, there are two situations that would trigger an inspection by a fire marshal or fire inspector.[3] First, particularly for facilities that store or use hazardous chemicals, biohazards, or radioactive materials, regular inspections are required in many jurisdiction. Second, a fire that either caused injury/death or is of suspicious origin will cause an emergency inspection.

The first type of inspection can and should be considered routine. The inspector will generally review the facility's fire and emergency planning, check records for fire drills, and walk through the facility reviewing fire suppression and response equipment for functionality and current inspection certificates. Although most inspectors have the authority to impose fines or to refer deficiencies to an enforcement authority,[4] except in egregious cases their focus will be on achieving compliance.

The second type of inspection is unplanned and will take place on an expedited basis, sometimes beginning only minutes after a fire is put out. When this inspection takes place, the company has several interests:

- **Fines/Penalties** – In the event of company negligence, it may be subject to significant fines or penalties.
- **Civil Suits** – A finding of fault by the inspector may be dispositive of civil liability
- **Insurance Implications** – Depending on the specifics of the company's insurance coverage, the inspector's findings may affect the company's recovery and protection from future liability.

2. Types

a) Scheduled

By far, the most common government investigation is a scheduled review. This does not necessarily mean that the company has a long lead notice; it only means that the investigation is not a complete surprise. Thus, for example, many agencies will provide less than a week's notice of an inspection, either out of an intention to give the company only a limited time to prepare or, just as likely, because of some internal agency scheduling issue.

In any event, regardless of the actual lead time, a scheduled inspection, at its initiation, poses the least amount of concern. By definition, the agency is giving the signal that it does not believe that there is any imminent problem nor that it is concerned that the company or any

[3] For purposes of this analysis, there is no meaningful difference between a fire marshal and a fire inspector. The term "inspector" will be used for both.

[4] In some jurisdictions, the inspector also has the authority to declare an imminent hazard condition and require evacuation and closure until the problems are resolved.

employee is likely to alter records or flee. Thus, although such an inspection must still be given due attention, counsel can deal with such an inspection as part of standard corporate procedure.

b) Unannounced

Of somewhat more concern is an unannounced inspection. There are a variety of reasons for such a visit. First, it can be a response to a specific event such as a chemical spill, a fire, an industrial accident, or the like. In such case, the company will have no time to prepare, but at least the reason for the agency presence can be inferred. Of course, if counsel determines that there were underlying violations of law, there will be a great deal of work to do on the fly, but it is likely that the agency has not had much time to prepare either.

A second reason for a surprise inspection is that the agency is fulfilling a goal or quota. Thus, while it will not be apparent, at least at the beginning of the visit, that there is no specific crystallizing event, such inspection does not signal a critical problem. Eventually the nature of the investigation will become clear.

A third type of unannounced investigation results from a whistleblower complaint. In these contexts, the agency is seeking to confirm the allegations before the matter is cured or swept under the rug. The recent investigations of food processing plants demonstrates this principle.

There are a potpourri of other, less common reasons for an unannounced civil inspection. In general, such causes should create moderate, but not necessarily great concern. Frequently the agency will be candid and disclose the reason that the investigation is being conducted without prior notice.

c) Warrant Investigations

The highest level of concern at the civil level arises when the agency arrives with a warrant. Since agencies conduct most investigations, even unannounced ones, without a warrant unless the corporation demands one, when an agency shows up with a warrant in hand, it means that it has a reason to believe that the company has major violations and will be uncooperative. While either or both of these beliefs could be unfounded, in house counsel should anticipate that the corporation starts out in a hole and must dig itself out.

3. National Security Letters

In connection with certain international terrorism and counterintelligence investigations, the FBI and some other federal agencies can order the production of certain communications records and other records. These "national security letters" are, in effect, a form of administrative subpoena.

B. Criminal/Quasi-Criminal

1. Players

a) FBI

The Federal Bureau of Investigation is the agency generally charged with the investigation and enforcement of all federal criminal laws. Except in unusual circumstances, the FBI does not get involved in civil matters. A substantial number of FBI investigations are supervised by one or more prosecutors from the Department of Justice, either from one if its divisions (*e.g.*, criminal, tax, antitrust, environmental) or by an Assistant United States Attorney working in one of the districts.

b) DEA

The Drug Enforcement Agency has general jurisdiction over the federal drug laws. Except in unusual circumstances, a non-pharmaceutical company will see the DEA only in the course of investigation of its employees.

c) ATF

Alcohol, Tobacco and Firearms focuses on its eponymous subjects. Again, except for companies that manufacture or use one of its nominal foci, corporate counsel will encounter them only because there is some problem with one or more employees.

d) DCIS/DoD OIG

The Defense Criminal Investigative Service is the criminal investigative component of the Office of Inspector General of the Department of Defense. DCIS missions include:

- Terrorism
- Product substitution (selling counterfeit or inferior parts to the DoD)
- Contract fraud
- Computer crimes
- Illegal export of defense technology
- Other crimes related to the DoD (e.g., bribery, kickbacks, and thefts)

Although the focus of DCIS is on companies that do business directly with DoD, other companies can get involved in investigations. They can either be viewed as conspirators, as indirect malefactors, or as holders of material information. Because of the ubiquity of federal military procurement, there are few companies that can say for certain that DCIS will never appear on its doorstep.

e) Local Police

Corporate counsel will see the local enforcement in the context of enforcement of general criminal laws as opposed to "white collar" offenses. For example, corporate counsel can expect to see local or state police in the event of a death or serious injury of an employee, a fight amongst employees, or a fire or explosion. Similarly, when local law enforcement believes that company employees are using or dealing drugs in the workplace, it may conduct investigations, searches and arrests without prior notice to legal counsel. Such activities can be just as disruptive and problematic as the more mainstream inspections. One exception to the foregoing occurs when the local or state police are part of a task force or if they are working at the direction of a state attorney general who is focusing on federal-type white collar crime.

f) ICE

The Immigration and Customs Enforcement Agency is the successor to the investigative arms of Immigration and Naturalization and Customs. ICE investigates a wide range of national security, financial and smuggling violations including drug smuggling, human trafficking, illegal arms exports, financial crimes, commercial fraud, human smuggling, document fraud, money laundering, child pornography/exploitation and immigration fraud.

2. Types of Site Visits

a) Ongoing Crime & Hot Pursuit

This type of entry is not frequent but can occur. When it does, it can be very disruptive. In essence, if law enforcement is responding to an ongoing crime – a shooting, a hostage situation, or the like – or is pursuing a suspect in a crime, the officers or agents may come onto private property without a warrant or permission. Further, within broad limits they may eject company personnel from part or all of the premises, use corporate facilities, or even cause physical damage as part of their activity.

As a practical matter, there is very little that legal counsel can do in such a situation. Once the situation has stabilized, counsel will then have to try to pick up the pieces.

b) Search Warrant

Investigations conducted pursuant to a search warrant should give counsel the greatest level of concern. In essence, whether a civil warrant or a criminal warrant, the company has no ability to control the schedule, the scope, or the method of execution. Search warrants are described in more detail in § V below.

c) Subpoena

Although government agents may come onto company property to serve a grand jury or trial subpoena, provided counsel accepts or arranges for acceptance, there are no immediate

consequences. Even subpoenas with a relatively short return date still permit the company to consult with outside counsel and negotiate the breadth and method of response.

Nonetheless, the service of a subpoena, especially grand jury subpoena, is a warning sign of danger. Counsel should begin the process of notifying the relevant parties, assessing corporate liability, and ensuring that the company is ready in the event that matters escalate.

d) OIG Subpoena

In lieu of grand jury subpoenas, Inspector General (IG) subpoenas are widely used. The Inspector General of HHS has the power to issue administrative subpoenas duces tecum requiring the production of documents to support the agency's audits and investigations. Evidence obtained through IG subpoenas may be used in criminal, civil, and administrative proceedings. The IG subpoena is limited to documentary evidence. Testimony cannot be compelled, except to obtain a certification upon production that the requested documents are complete, accurate, and in compliance with the subpoena. IG subpoenas are enforced through the civil division of the U.S. attorney's office. Moreover, courts have held that the use of IG authority can be proper after initiation of a criminal investigation by the Department of Justice, even if the IG serves as a conduit of information for the Justice Department investigation. Rule 6(e) does not bar a U.S. attorney's office from conducting a joint investigation with an IG office, nor does it bar a U.S. attorney's office from making use of information obtained by the IG's efforts to further a grand jury investigation.

e) Civil Investigative Demands

Civil Investigative Demands are the equivalent of a subpoena except that they are issued by agencies given that authority before any litigation or grand jury has begun. Like subpoenas, they can and will be enforced by court order if the recipient does not properly respond. The two most common types seen in corporate practice are issued by the Antitrust and Civil Divisions of the United States Department of Justice and by the OIG of the Department of Health and Human Services.

In enacting and amending the Antitrust Civil Process Act ("ACPA"), 15 U.S.C. §§ 1311 *et seq*. (1994), Congress provided the Antitrust Division (the "Division") with broad pre-complaint powers to investigate possible violations of the federal antitrust laws. More specifically, 15 U.S.C. § 1312(a), empowers the Attorney General and the Assistant Attorney General in charge of the Antitrust Division to issue a CID to any person who they have reason to believe "may be in possession, custody, or control of any documentary material, or may have information, relevant to a civil antitrust investigation." Such a CID may require the recipient "to produce such documentary material for inspection and copying or reproduction, to answer in writing written interrogatories, to give oral testimony . . . , or to furnish any combination of such material, answers or testimony."

The process contemplates that the response may implicate confidential information. To the extent that a company has legitimate interests in preserving the confidentiality of documentary material and information required by the CID, those interests are protected by the express restrictions against disclosure embodied in 15 U.S.C. §§ 1313(c)(3) & 1314(g).

The 1986 amendments to the federal false claims act equipped the Civil Division with a the same CID investigative device available to the Antitrust Division. Several dimensions of this authority bear particular notice. First, Civil Investigative Demands ("CIDs") under section § 3733 can consist of (a) a request for the production of documents; (b) a demand for oral or deposition testimony; (c) service of interrogatories requiring written response; and (d) combination of these devices. Consequently, the False Claims Act CID is a much more potent device than most administrative subpoenas, which usually are limited to requesting documents. Second, CIDs can be used until DOJ files a complaint or until it declines or enters a *qui tam* action. Therefore, the government is in the enviable position of being able to conduct investigative discovery prior to any ability of the potential defendant to conduct its own discovery. Finally, as with Antitrust CIDs, § 3733 imposes substantial limitations upon DOJ's ability to disclose any of the information it gathers through their use. One helpful feature of § 3733 is that its procedures, limitations, and bases for judicial challenge are all spelled out in precise detail. Therefore, when a CID is received, the first step should be a thorough review of section 3733 which will dispose of most questions that may arise. The existing case authority interpreting § 3733, while growing, is not yet extensive.

On August 21, 1996, President Clinton signed into law the Health Insurance Portability and Accountability Act, Pub. L. No. 104-191. Among other things, this law added a new statute, 18 U.S.C. § 3486, empowering the Attorney General, or the Attorney General's designee, to issue investigative demands to obtain records for criminal investigations relating to federal criminal health care fraud offenses. As is usual, the Attorney General's authority was delegated to the U.S. attorneys as well as to the assistant attorney general for the criminal division. Most importantly, records obtained with this new investigative demand are not subject to the constraints applicable to grand jury matters as set forth in Fed. R. Crim. P. 6(e).

The use of authorized investigative demands is limited to investigations relating to "federal health care offenses." The term "federal health care offense" is defined in 18 U.S.C. § 24(a) to mean a violation of, or a criminal conspiracy to violate, 18 U.S.C. §§ 669, 1035, 1347, or 1518. The term also includes violations of 18 U.S.C. §§ 287, 371, 664, 666, 1001, 1027, 1341, 1343, or 1954 if the violation or conspiracy relates to a health care benefit program. The term "health care benefit program" is defined in 18 U.S.C. § 24(b) as any public or private plan or contractor, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

These new authorized investigative demands differ from inspector general subpoenas in that the scope of the IG subpoenas is limited to the statutory authority of the specific inspector

general and civil investigations, whereas investigative demands can be directed more broadly to various public and/or private entities. They are, however, limited to cases which involve criminal investigations. Although some testimony can be required by the investigative demand, its authority to compel is limited to testimony concerning the production and authentication of records, much like IG subpoenas.

The new statute further provides for judicial enforcement of the investigative demands through contempt actions and immunizes persons complying in good faith with such demands from civil liability for disclosure of the information demanded. Authorized investigative demands also may be used in furtherance of an ongoing investigation after an indictment has issued provided the demands are not directed to a defendant.

Counsel should expect that criminal prosecutors will notify and involve the civil side of their offices on all criminal referrals, indictments, declinations, pleas, and convictions that have any potential civil ramifications. Furthermore, because the IG subpoenas and authorized investigative demands are not subject to the constraints applicable to grand jury subpoenas and because the information to be acquired pursuant to those subpoenas is well suited for civil and administrative actions, counsel for health care companies should expect frequent use of these tools by government investigators and government attorneys.

f) Court Order

Under a variety of circumstances, a court can issue an order that permits government agents to enter onto property for a variety of purposes. The most typical are entry orders permitting environmental agencies to inspect and take samples of one or more media. Although entry pursuant to court order is somewhat less problematic, counsel should treat such entry as if it were pursuant to a search warrant.

g) Anticipated

While such investigations must be treated with full respect, there is less urgency when the government agents make an appointment before entering company property. In general, this means that the government is not concerned about document destruction, is not looking for public impact, and is simply working a long-standing case. For example, when the government is conducting an industry-wide investigation, the surprise is gone after the first few entries. As a result, everyone settles back a little bit and can approach agency entry in a calmer, more routine way.

C. Indeterminate

1. Cross-Deputization

One issue that is becoming increasingly common is that agencies are entering into arrangements that, in effect, cross deputize one agency to conduct investigations on behalf of another as they go about their regular duties. For example, the U.S. Department of Labor's (DOL) Employee Benefits Security Administration and the SEC have entered into a Memorandum of Understanding ("MOU"), setting forth a framework for consultation and

exchange of information. The MOU was publicly announced as a formal recognition of the agencies' effective and informal working relationships and their expectation of continued cooperation.

Specifically, these two agencies have pledged to conduct regular meetings to discuss regulatory requirements that impact each agency's responsibilities, examination findings and trends, enforcement cases, and any other matters that the SEC and DOL staffs believe would be of interest to the other regulator for fulfilling its respective regulatory responsibilities. In addition, the agencies have agreed to cross-train appropriate staff in order to enhance each agency's understanding of the other's mission and investigative jurisdiction. Further, the agencies have agreed to a bilateral exchange of examination-related information concerning investment advisers or other firms of mutual interest. The MOU clarifies that, as appropriate, either agency may transfer any such shared files to criminal law enforcement authorities, and the SEC may transfer the files to any self-regulatory organizations subject to the SEC's oversight.

Perhaps the most critical aspect of this interagency agreement is that the SEC has granted the DOL "standing access" to nonpublic examination information that SEC staff determines is relevant to the DOL's mission (subject to safeguards to protect the confidentiality of the shared files). Some have asserted that this MOU may signal that the SEC staff will become an integral part of the ERISA compliance examination process.

This arrangement is not unique. OSHA and EPA have a similar arrangement, as do a variety of other agencies. From the corporate counsel's perspective, it means that he or she must exercise much more caution in assuming that simply because a particular agency appears the issues will be limited to matters within the scope of such agency.

2. Resource Issues

A second problem that muddies the waters arises from lack of federal investigative resources. Thus, when the FBI is overtaxed, matters may be delegated to other agencies ranging from the Secret Service to Postal Inspectors. This was most evident after 9/11, but is a perennial issue.

3. Civil/Criminal

The issues raised by joint civil and criminal proceedings are set forth in more detail in § XI below.

III. Notification, Roles and Responsibilities

A. Receptionist/Guard

The original contact with law enforcement is a critical stage for all corporate responses. It is at this point that (i) the appropriate cascade of responses is or is not triggered, and (ii) the

relationship with the investigators can get off on the right foot or go horribly wrong. It may be a bit daunting to realize how much depends on a person that the general counsel may not even know.

The first line of contact for almost all corporations is either the receptionist or the facility guard. The best way to assuage that concern is to make sure the receptionist/guard is prepared and has the tools to respond quickly and correctly. Further, because there can be a substantial amount of flux in those positions, it is appropriate to verify that all new employees are familiar with the recommended procedures.

1. Examination/Record of Credentials

As a first step, the receptionist/guard must examine the credentials that are presented and make a record of them. Government investigators (except those in hot pursuit) must identify themselves in the execution of a search or arrest warrant or in conducting an investigation. The receptionist/guard should not be satisfied with a flash or wave of something metallic and shield- or star-shaped; he or she is entitled to a meaningful look at the credentials. Cautious counsel may even provide prototypes of what actual government credential look like.

Technically, only the lead agent is required to show credentials. As a practical matter, except in the most hostile of investigations, each of the participants will be willing to show their identification. The receptionist/guard should not assume that all of the persons with the lead agent are from the same agency (or are even law enforcement personnel).

If possible, the receptionist/guard should make a record of the name, agency, and badge number of each of the persons seeking to enter the facility. This will be useful not just for the immediate issues of tracking all those entering and exiting the facility, but in the longer term, it may help determine that nature and scope of any investigation.

2. Requests to wait

To give time for in house counsel to initiate the corporate response and physically get to the entrance or arrange for someone to do so, the receptionist/guard should request that the agents wait until the designated corporate officer can arrive. If possible, the receptionist/guard should give an estimate of the time it will take the corporate designee to arrive. If the agents resist, a backup position will be to ask the agents to talk to corporate counsel by phone.

It is essential that the receptionist/guard understand that their job duties DO NOT permit them to impede agents who refuse to wait. He or she should never touch the agents or obstruct their path. Further, if they control a door or gate, they must open it upon demand. Not only is failure to do so potential obstruction, but agents are generally authorized to break down such barriers to execute warrants.

3. Notification

One way or another, the next step for the receptionist/guard is to notify corporate counsel or his/her backup or designee that the government investigators have arrived. This is a simple

but imperative step. The receptionist/guard simply cannot be satisfied by leaving a message or failing to successfully contact a responsible corporate officer. If necessary, the receptionist/guard should be able to contact the CEO if all other steps have failed.

4. Practical Steps

Counsel should consider taking some or all of the following actions:

- Prepare a procedure form for receptionists/guards. *See* § XII.B
- Prepare training materials or directly train those in such positions
- Intermittently verify that the documentation and instructions are available and current

B. In House Counsel

1. Keep Calm

Perhaps one of the most important, yet little discussed, responsibilities of in house counsel in the event of a government investigation is to keep the corporations wheels from falling off. Particularly when the investigation is unexpected, there will be a substantial amount of anxiety – perhaps even panic – together with unhealthy doses of anger, fear, and recrimination. It is corporate counsel's job to get everyone settled, to keep a bad situation from spiraling out of control, and to focus on the practical responses and actions.

Counsel can only accomplish this if counsel remains calm. If counsel becomes unglued, then all others will take that as a sign that Armageddon has indeed arrived. The thinking will be, in essence "If the lawyer is panicking, this must be really bad." Accordingly, it is part of the job to maintain an even keel even in stormy times. Counsel should move quickly but without appearing rushed or flustered. A few minor things can make a big difference:

- Keep your voice level – do not yell or become shrill
- Take the time to say "please," "thank you," and maintain the normal level of courtesy
- Outside of metro New York, avoid swearing or other expletives
- If you have just dressed, take one moment to check your appearance – nothing says panic like an untucked shirt or a shirt-tail sticking out from one's fly
- Remember that this is what you do – it is part of your job description. If you can't stand the heat, you shouldn't have taken a job in the kitchen
- Take deep breaths. No one benefits if you hyperventilate

- Relax your face and practice an easy smile. Avoid the natural impulse to clench your jaw when nervous or tense

- Recall Marcus Aurelius: "Never let the future disturb you. You will meet it, if you have to, with the same weapons of reason which today arm you against the present."

2. Take Charge of the Situation

Either the counsel or a designee must get to the investigation site(s) as soon as possible. As noted above, the agents may not wait. If they do, they will not do so forever. If counsel cannot physically get to the site in a reasonable time, or if the investigation occurs at multiple sites, a backup or substitute should be available. This person should know the basic outlines of the response to be taken and will also know how to stay in contact with counsel.

Upon arriving at the location, counsel should:

- Identify himself/herself

- Make clear that counsel is a lawyer representing the corporation

- Identify the lead agent and attempt to engage on the issues set forth below

3. Reach Agreements re Records – Paper

If the matter is a non-criminal matter, then it should be relatively easy to reach agreement on the mechanics of document review and production. OSHA, for example, will typically ask for the same set of records in all investigations. Thus, in the absence of a concern that the corporation will alter or destroy records, there can be an agreement that any normal corporate record that the investigator wants can be copied on request. This will also allow the corporation to comply with any special rules for marking or designating records as confidential or containing trade secrets. It will also allow any issues of privacy or privilege to be worked out. For example, an OSHA inspector may ask for "all records" relating to a particular type of industrial process or activity without realizing that production of such record relating to workers in the EU is problematic.

In the event of a search warrant, matters will not be so simple. Typically, at least part of the justification for the warrant was a concern that records would be destroyed. Further, because of the special rules and concerns that arise in the criminal context, the agents will almost always want the original documents. Nonetheless, there are still a number of points that can be raised and, with luck, resolved. Further detail with respect to documents is set forth in § V.G below.

4. Reach Agreements re Records – Electronic

A separate set of issues is presented by electronic documentation. Again, regardless of the type of investigation, it is best if counsel and the agent can agree on a set of procedures. These issues are addressed in more detail in § V.G below.

5. Reach Agreements re Procedure

One of the earliest tasks of corporate counsel is to make sure that the procedure for the investigation is clear. In some cases, such as OSHA, the procedures are very standardized. It will, therefore, be relatively easy to make sure that all involved in the investigation are aware of their various obligations. The less routine the investigation, the more likely that the procedure will be undefined.

a) Where will the agents be going?

The agents may have a very specific location they seek to inspect. If so, then time will be saved if they can be guided to that location, preferably in a path that interferes least with the rest of the company's operations. For example, there may be two ways to get to the location that an OSHA investigator seeks to examine, one directly through the factory floor and the other around the building to a perimeter door. Wise counsel will realize that unless the inspector insists, it is much better to use the perimeter door. The company is not well-served by giving the inspector an unasked-for opportunity to look at a plethora of other industrial operations.

In other cases, the investigator may desire to see a number of locations. If some level of cooperation is possible, corporate counsel can minimize disruption by seeking to sequence such review in a way that is most efficient. Further, some areas may have limited accessibility and entry will have to be arranged.

Some inspections, such as those by ICE and conducted pursuant to search warrants, do not lend themselves to this approach. Nonetheless, the agents may still make some accommodations, particularly if the facility is large. In those cases, counsel should listen carefully to any conditions requested by the government. If those cannot be accomplished – such as truly controlling all exits for example – counsel should not agree and hope that everything works out.

b) Will the agents need special equipment?

Some areas of the facility may require special equipment or safety gear. As a general rule, the government investigators will comply with reasonable requests. Thus, if the company requires hard hats in certain areas, the investigators should be provided with them if they have not brought their own. Similarly, if areas of the plant have special protocols for eye protection, the use of clean-room uniforms and the like, corporate counsel should make sure that the proper equipment is available and provided to the agents.

c) Will the agents be bringing anything onto the site?

It is not unknown for the government to bring specialized equipment or materials on-site. These can range from drilling and coring equipment if the EPA is concerned about an imminent release of hazardous materials to trailer trucks if the agents anticipate taking a significant amount of paper or computer hardware to drug-sniffing dogs. Since the agents may not have detailed knowledge of the facility, there may need to be special accommodations made for this to take place.

d) Will the agents be interviewing employees?

If the agents intend to interview employees, corporate counsel can offer to make conference rooms available and to arrange for the employees to be brought down. The agents benefit because the process is much easier for them. The company also benefits because (i) the agents will not be going around the facility looking for the relevant people, (ii) the company can ensure that the employees are given such warnings or instructions as are appropriate, (iii) the company can be sure it knows the identity of all the interviewees, and (iv) the company can observe the length of the interviews even if counsel is not allowed in the room.

e) To what extent will the agents permit company employees to observe?

As noted in more detail below, *see* § V, there are a variety of steps that should be sought in the event of a physical inspection of a facility or the execution of a search warrant.

6. Monitoring the Investigation

Once the investigation begins, inside counsel should monitor its progress. The level of involvement depends on the nature of the investigation. Thus, a routine permit review by EPA probably needs little more than an update at the end of the review once it has begun. A surprise inspection by OSHA requires more direct attention. The execution of a search warrant, discussed in more detail in § V below, requires counsel's personal and undivided attention.

C. Outside Counsel

There are often times when it is appropriate to have an outside lawyer present for certain types of standard inspections, particularly when the issues are highly technical. Thus, for example, a review of ITAR compliance at an industrial facility often justifies attendance by an attorney familiar with the complex requirements of that statute. Such reviews, however, are generally pre-scheduled and not surprising.

Outside counsel's immediate role at an unexpected investigation depends entirely on its nature. In most non-criminal cases, counsel can assist primarily by phone or email, giving advice or answering questions as necessary. Thus, while outside counsel should be given prompt notice and consulted when such administrative review arises, it will be comparatively infrequent that an immediate unplanned summons of outside counsel will be required. On the other hand, when a search warrant or arrest warrant is being executed, counsel should be called in unless inside counsel has directly relevant experience.

D. Senior Employees

1. Implications for Operations

Once notified of a government investigation, senior employees should make an initial review to determine whether and how the investigation could impact operations. For example, in the event of an order to shut down some industrial process pending permit compliance, can the company move production or substitute procedures to avoid disruption?

A second issue that will arise is employee scheduling. If employees must be interviewed or re-assigned to respond to the crisis, the company may need to recall other workers or to arrange for temporary transfers to cover key operations. Similarly, if some raw materials must be segregated pending further review, there may be a need to arrange for substitute supplies or suppliers.

2. Segregation of privileged communications

A second task that may be appropriate is for senior employees to make sure that privileged communications are easily identifiable. They should be instructed that separation does not mean destruction; it simply means that if privileged documents are intermingled in desk files with non-privileged documents, quick sorting can save a substantial amount of trouble.

E. Other Employees

1. Possible contact by government

Unless directly involved, notification of other employees should be limited to a few key matters. Counsel should resist the temptation or the suggestion that a news blackout will be useful or effective. It is an unassailable fact that all employees will, in a matter of hours or perhaps even minutes, know much more about the investigation than corporate counsel would want. Accordingly, it is better to get out some accurate information rather than relying entirely on rumor and guesswork.

a) General description of investigation

At the minimum, those employees at the facility or with responsibilities relating to the scope of the investigation should be told of the existence of the investigation, the general nature and scope, and any timing issues that will be important.[5] Thus, if EPA is conducting an air permit compliance review, this fact may assuage concerns that a hazardous waste spill has occurred that is being kept secret.

[5] Issues relating to document retention are discussed in more detail in § IV.H, below.

b) Employee rights

If there is any likelihood that employees will be interviewed, whether formally or informally, during the course of the government intrusion, then those employees should be given a brief overview of their rights. If the exercise of those rights involves others, such as labor union stewards or the like, then those people should also be given notice that they may be needed on short notice.

The key aspects to cover are as follows:

All employees have a right to have counsel present when interviewed by the government. Sometimes the union will provide counsel for its members. The corporation should also make clear what its policy is with respect to payment of legal counsel's bills. If the corporation will be paying bills, then the method for provision or selection of counsel should be explained as well.[6] If corporate counsel or outside counsel will be present, the fact that counsel does ***not*** represent the employee as such should be explained carefully.

The employee has the right to take notes of the events of the interview.

The employee has the right to select the time and location of any interview. This means that if the investigators want to interview the employee right away or show up at his or her house at 6 p.m. just as the family is sitting down to dinner, as they are wont to do, the employee can decline to admit them and can tell them to contact his or her legal counsel to set up a more convenient time or location.

c) Request for voluntary notification before interview

Corporate counsel can suggest – but not require – that employees provide notification if contacted for an interview. Any attempt to make such notification mandatory or to establish any penalty for failure to give prior or subsequent notice may be construed as obstruction.

d) Suggested protocol

Most corporate employees are not experienced in dealing with government agents. Accordingly, they tend to be excessively deferential. It is appropriate to remind employees that they are entitled to ask some questions themselves.

[6] Conflict issues are discussed in more detail in § X, below.

It is always in order for anyone being interviewed to ask for and verify the identity of the person or persons interviewing them. In addition to a verbal recitation of their names, position, and agencies, they can also request a card. If the interview is sought by telephone, best practice is to get the name of the agency and then call back using a number provided by a telephone book or directory rather than the number given over the phone.

Another question that employees can reasonably ask is for an explanation of why they are being interviewed. Strictly speaking, the government agents are not required to respond, but the nature and tenor of any reply, or refusal to reply, can be useful.

e) Reminder to tell truth

Counsel should always take the opportunity to remind employees that if they do choose to talk, they are obliged to tell the truth. This serves two interests. First, it can keep employees from getting themselves into trouble either protecting themselves or in an attempt to protect the company. Second, the more times counsel makes this reminder, the easier it will be to reject any allegations of interference.

f) Neutral or Cooperate?

There are only two possible positions a company can take with respect to a government investigation. First, it can take a neutral stance. Second, it can encourage its employees to cooperate. It cannot discourage employees from cooperation. What position to take is a policy decision of the corporation, usually finally determined by the CEO of the board.

g) Disclaimer of representation

As a matter of routine, corporate counsel should always begin or end each employee interaction with a reminder that he or she represents the corporation and not any individual employee. The employee should be reminded that while counsel may try to keep matters confidential, ultimately the decision on what, if anything, to disclose belongs to the company.

F. IT

In some investigations, there will be little need for IT involvement. In other investigations, IT will be important or essential. In the event of the latter, the necessary IT personnel together with their supervisors should be updated regularly. The need for prompt attention depends on the attention that will be given by the investigators to the company's IT resources. In the worst of all worlds, the IT department will have to bring down some or all of the system during the investigation.

G. Outside Auditors

Section 10A of the Securities Exchange Act of 1934 states that if, in the course of an audit, a registered public accounting firm detects or otherwise becomes aware of information indicating that an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred, the firm shall, in accordance with generally accepted auditing standards, determine whether it is likely that an illegal act has occurred. If it has, the firm must determine and consider the possible effect of the illegal act on the financial statements of the issuer, including any contingent monetary effects, such as fines, penalties, and damages. 15 U.S.C. § 78j-1.

As a result of those obligations, any public company now must keep auditors apprised of any investigation. Almost immediately, legal counsel must determine the company's strategy with respect to such auditors. This can be particularly troublesome when a reporting period is at or near its conclusion.

IV. General Guidelines

A. Overview

Although each type of investigation has its own particular requirements, there are many steps any response shares. This section reviews those common practices.

B. Assess Problem

The very first step for in house counsel, even if only preliminary and done on the fly, is to begin to assess the nature of the problem. Just as counsel does not want to overreact, he or she also does not want to compromise the company's position by failing to respond aggressively.

1. Scope

The core question is how broad the investigation is. Thus, for example, even a very hostile EPA inspection of one facility is still much easier to control than a wide-ranging albeit less focused OSHA investigation of every company factory and office in the United States. Similarly, if the government is looking into just one transaction because it is convinced that it constituted an illegal campaign contribution, the company is still better off in many ways than if the SEC and DOJ are conducting an investigation that may be only civil but relates to the entire way the company keeps its books.

Corporate counsel should use every tool available – the nature of the documents requested, the areas of the facility inspected, the comments of the agent – to begin to gauge the nature of the investigation. At the same time, counsel must resist the tendency to lock in too early to one theory.

2. Relevant Laws and Regulations

Another early step is for counsel to try to determine the relevant laws and regulations. Knowing what it is that the agency is trying to enforce can help the company respond effectively and efficiently.

3. Agencies Involved

As noted above, the mere fact that agents from one agency turn up does not necessarily limit the potential consequences to matters within that agency's jurisdiction. Nonetheless, this is information that can be given some provisional weight. Further, even if the agent is assisting in enforcement outside his or her agency's jurisdiction, that will not generally expand the scope of the agent's knowledge and experience. Thus, a DEA agent thrust into an ITAR case will not magically gain the understanding of international sales that many ICE agents take for granted.

Even with the inherent risk in drawing conclusions from agency membership, corporate counsel can rely on some very general categories. Any investigation conducted by government employees who carry guns and badges is more serious than all others. When some or all of the agents come from headquarters, this is more serious than if they come from a satellite office.

4. Regulatory/Civil/Criminal

Another initial point of assessment is the fundamental basis for the investigation. Even though later developments may change this nature, the initial conduct of the agents will be governed by their perception of their mission.

C. Protect Privilege for Internal Discussions

From the inception of any investigation, counsel must continuously work to protect privilege issues. This ranges from advising all participants to clearly mark their notes as made at the direction of counsel to ensuring that any conversation takes place out of earshot of the government.

D. Initial Determination of Validity

Each form of request has certain formalities that must be observed in order to make the request legally effective and binding. While these formalities can vary both by type of request and by jurisdiction, they typically include at least the following:

- The signature of an authorized official
- An appropriate form of service, often by personal hand delivery; in many, but not all, cases, service by mail is not sufficient
- Service by an appropriate person. You can and should confirm the identity and credentials of the person serving the request, particularly when it requires an immediate response

- Service upon an appropriate recipient. Statutes sometimes will prescribe a particular person (*e.g.*, the institution's registered corporate agent, president, or legal counsel) or category of persons (*e.g.*, "a person of suitable age and discretion")

E. Assess Need for Outside Counsel

1. Expertise

Counsel must be able to assess his or her own skills fairly and objectively. If counsel does not have the experience or expertise to respond appropriately, then outside counsel becomes critical. In principle, the company should not be upset by such decision; it is rare that the incremental cost of outside counsel outweighs the risks. This is especially true for companies with small legal departments.

2. Independence

There are several dimensions to the issue of independence. The most intuitive is that the advice should not be colored by counsel's need to demonstrate that his or her previously given advice was correct. Essentially, if counsel has a personal or emotional stake in the outcome, then there is an independence issue. Even if counsel can rise above that issue, there will still remain the lingering suspicion that counsel was affected.

A second aspect of independence arises from the inherent nature of in house counsel's role as part of the corporate structure. Investigations of company CEOs or boards raise ticklish issues when the general counsel reports to such persons and they have the ability to reward or punish counsel in the long term. The use of outside counsel can obviate such concerns.

A final independence aspect arises from the impact of delivering the bad news. There are times when a government investigation requires that legal counsel recommend that employees should be fired, large fines should be paid, or cooperation agreements be made. One of the advantages of outside lawyers is that, at the end of the investigation, they can leave. In house counsel, in contrast, will have to live with the consequences of the advice and events.

3. Conflicts

a) Nature of Issue

A more detailed treatment of conflict of interest issues is set forth in § X below. In essence, one of the first and continuing obligations of legal counsel is to ensure that no representation of the company or its employees or directors constitutes a conflict. This is a dynamic judgment that cannot be made only at one point of time but must be re-evaluated as additional information becomes available.

b) Possibility of Grouping

One consideration that may save the company substantial sums and make the representation better and more efficient is to group the employees into similarly situated categories. Thus, sales managers could be one group, the sales force below them a second, and the customer service representatives a third. This requires attention at the beginning of the investigation; it cannot reasonably be put in place after time has passed.

4. Independent Counsel for Outside Directors/Audit Committee

This decision is a very sensitive one. In theory, the general counsel should be able to give impartial advice to the board as a whole and to the outside directors. In practice, however, there can be situations in which it is prudent for the outside directors or the audit committee to have separate counsel. Typical situations include:

- Some of those in the scope of the investigation serve on the board
- The general counsel has reported "up the ladder" about the issues leading to the investigation
- The investigation involves accounting or disclosure irregularities
- In house counsel is personally within the scope of the investigation

If the decision is made that such independent counsel is appropriate, they should be selected and hired by the outside counsel or the audit committee rather than inside counsel. Further, the counsel used should not be one that does regular work for the company.

5. Need for "Internal Investigation"

The conduct of an internal investigation is beyond the scope of these materials. Nonetheless, one if the early matters to be considered is the need for the company to initiate its own investigation. Although almost universally conducted by outside counsel, these investigations are considered "internal" because they are done at the behest of the company and the report, at least initially, goes to the company. There are several reasons to trigger an internal investigation even after the government has started its own process. An efficiently done investigation can catch up or front-run the government, giving the company perspective and preparation time.

F. Indemnification Issues

1. Company Obligations

The first step in approaching indemnification issues is to determine the company's legal obligations. Thus, many Delaware corporations have explicit and mandatory indemnification provisions in their bylaws. Because those covered by such provisions may need to have access

to legal counsel on an expedited basis, in house counsel should be prepared to provide advice on the scope and nature of the company's responsibilities on very short notice. Because some indemnification obligations can lead to expenditures of millions of dollars and may implicate both insurance and conflict issues, they can be very difficult to unravel under the immediate pressure of a government investigation. Accordingly, many corporate counsel prepare for themselves a quick summary sheet to include in their response plan.

2. Company Policy

Broader than a company's legal obligations is its indemnification policy. The company may determine, in a non-binding way, that it will indemnify employees – or at least pay legal fees on an interim or contingent basis. In general, this is a decision for the board of directors, but may be initially determined by the CEO pending such a meeting.

There are advantages to providing indemnification that can far outweigh the pecuniary cost. First, in government investigations employee morale can be critical in maintaining operations and in avoiding disgruntled employees who may feel the need to unburden themselves to the government agents. As it has been said, "it is better to have even problematic employees inside the tent looking out than outside the tent looking in."[7] Second, while any counsel retained to represent individual employees has an ethical duty to those employees and not the company, the company can still benefit from ensuring that such additional lawyers are competent and known to the company's inside or outside counsel.

When such counsel are retained, inside counsel must make sure that all ethical matters are carefully documented. For example, the agreement letter relating to fees should make clear that the payment of such fees does not affect the attorney/client relationship between the company employee and the lawyer. Similarly, although inside counsel may be accustomed to reviewing detailed legal bills, he or she may have to forego that ability because such billing records may reveal matters breach privilege.

G. Initial Advice to Board/Senior Management

1. Description of Problem

From the very early stages of almost every government investigation, corporate counsel will be expected to report to either senior management or the board concerning its status and nature. On occasion, corporate counsel will be compelled, either by internal procedures or by the "up the ladder" rules to report possible misbehavior of senior employees either to those above them or to the board itself.

The consequences of mis-reporting, or even laggard reporting can be grave, not just for the company but for corporate counsel individually. This means that it is imperative for counsel to stay current and informed. It is often useful to set up regular reporting intervals (preferably in

[7] There are a number of more colorful versions of this saying that have the same implication.

person or by conference call) for updates rather than allowing upper management to grow anxious when counsel makes no contact because, in his or her view, nothing of significance has occurred. The process of providing information and coordinating its dissemination is made much easier if the company has a response or crisis management plan already in place. *See* § VIII.

In addition to providing accurate and timely information, counsel should also consider critical operational, regulatory, labor, and public relations issues. Typical outside counsel will focus in a laser-like fashion on the legal issues. It is the essence of inside counsel's job to maintain general situational awareness for the company as a whole.

2. Suspension of Trading

On occasion the nature and significance of an investigation is so profound that counsel for a public company should consider whether to recommend that the company request that trading in its stock be suspended. This is a profound decision, and should only be taken with the advice of outside counsel (especially if corporate counsel owns stock in the company), but must be considered immediately. Given such an investigation, it is very likely that the price of the company's stock will drop. As night follows day, that will trigger attention by securities litigation plaintiff firms who will allege that the company failed to provide timely information. If trading is to be suspended, then it is only effective if it is done promptly.

3. Warning on Stock Sales

Even if the company is in one of the periods in which senior executives may buy or sell stock, in the event of any investigation of any significance, they should be informed that they should refrain from any stock purchases or sales. Again, once the timing becomes known, any trades will be scrutinized with the perspective of hindsight and any indication that an employee traded on inside knowledge will be examined carefully. Indeed, even if neither the government nor any private litigant engages in that examination, most company's corporate policies will require that counsel review the transaction.

4. Need for 8K

Even if trading of a public company's stock is not suspended, the nature of the investigation may still require the issuance of an 8K filing. Again, outside securities specialists should be consulted, and there will be a time window before any such filing must be made. Nonetheless, if senior management have the inclination – both natural and common – to try to minimize discussion of the investigation in the public sphere, inside counsel may have some work to do to convince them that such public filing is necessary.

5. Response to inquiry

It is impossible in these times to put a lid on the fact of an investigation. No matter how rigorous the company's policies may be, some employee will email or text someone outside the company and the news will get out. Only if the company is lucky will it avoid simultaneous pictures or videos as well. Thus, assuming the company decides to avoid the pit of the "no

comment" response, inside counsel should be thinking from the very beginning how best the company should respond to inquiry. If the company has an investor relations or public relations function, or has hired someone to fulfill that role during the investigation process, corporate counsel should keep them in the loop. It is bad for a company to release information that later turns out to be incorrect; it is worse if it turns out that at the time of such statement, the company actually knew better. *See* § IV.I, below.

6. Filings or conferences

a) Upcoming

Although it would be convenient if all government agents scheduled their arrival to take place well before any formal filing or disclosure date, such is not the case. As a result, inside counsel may be faced with an imminent filing with the SEC or other agency, or a disclosure to lenders that could be affected by the breaking events. There is no universal answer to this problem. In some cases, the fact of the investigation may not be a disclosable event. In other cases, the company should seek an extension from the SEC.

b) Correction of past statements

Depending on the nature of the investigation, corporate counsel should monitor whether a previous filing or disclosure must be amended or restated. No company likes to contemplate a restatement, but it may be unavoidable. Although this need not be determined within the first hours or day of an investigation, nonetheless it should not be delayed. At the minimum, the company may be obliged to announce that a restatement will occur even if the specifics have not yet been determined.

7. Putting Employees on Paid Leave

a) Basic considerations

It is rarely appropriate to summarily fire any employee. In the early stages of an investigation, there is generally not enough information to make a reasoned determination. On the other hand, it is often necessary to create some separation between the employee and the company. Counsel may be concerned about destruction of evidence, the possibility that employees may seek to coordinate their stores or intimidate subordinates, or the very nature of the allegations (*e.g.*, sexual assault or harassment, theft, or downloading child pornography). In such circumstances, the easiest and least prejudicial action is to place the employee on paid leave.

As circumstances develop, this leave can be converted to unpaid leave, the employee can be brought back or fired, or the period can be extended. Nonetheless, because the initial step is not immediately financially detrimental, the company will not be perceived as making a rush to judgment.

In general, paid leave truly means that the employee is temporarily not working for the company. Accordingly, the employee's access to company email, computer systems, and

information should be suspended. In rare cases, it is sufficient for the employee simply to be banned from the company premises and he or she can be permitted to work from home.

b) Whistleblower issue

Under section 302 of the Sarbanes-Oxley Act (codified at 18 U.S.C. § 1514A), public companies are prohibited from retaliating against an employee for providing to certain parties, including someone within the company who has the authority to investigate, information that the employee reasonably believed constituted a violation of federal fraud statutes or securities laws. If a complaint is filed, the Department of Labor must conduct an investigation, and the employer must show by clear and convincing evidence that it would have taken the same unfavorable employment action even in the absence of the whistle-blowing activity. Accordingly, any action that could be deemed retaliation – including paid leave – must be done carefully and even-handedly to avoid creating collateral litigation.

8. Issues of Representation and Conflict

Although issues of representation and potential conflicts of interest can be complex, they are unavoidable even at the beginning of any investigation. If counsel is not careful, outside corporate counsel could wind up conflicted out of representation of anyone in the investigation, including the company. These issues are discussed in more detail in § X.

H. Document Preservation/Litigation Holds

1. Description

A "litigation hold" is a mandatory suspension of a company's document retention/destruction policies and activities for all documents that may be relevant to an investigation, subpoena, or lawsuit that has been actually filed, or even one that is "reasonably anticipated." A litigation hold ensures that relevant data is not destroyed and that key employees are notified of document preservation requirements.

2. Key Components

- Directive regarding preservation of potential discovery materials and electronic data
- Description of scope of document request
  - Define potentially relevant information
  - Explain breadth of definition
- Definition of "document"
  - Expansive meaning includes hard-copy paper, electronic data, email and attachments, databases, drafts, notes, calendars, etc.
  - Reminder that meta-data is part of a document and should not be changed or destroyed

- The Litigation Hold
  - Specific instructions to halt routine destruction of each document type as appropriate: paper, email, text tiles, databases, etc.
- Distribution list:
  - all "key players"
  - others with potentially relevant records
- Sender – someone with "corporate heft"
  - GC or other in house counsel
  - Company's compliance officer
  - Other
- Identify who the employees can call for help
  - In house contact
  - Possible alternative contact
- Instructions highly contingent on:
  - Sophistication of Company's IT infrastructure
  - Company's IT resources
  - Volume of implicated data
  - Amount at stake in litigation

3. Need

The issues of the effective litigation hold in the electronic age were brought to the forefront almost 10 years ago with the seminal decision in the *Prudential Sales Practices* case. *In re Prudential Ins. Co. of Am. Sales Practices Litig*., 169 F.R.D. 598 (D.N.J. 1997). In that case, the court entered an order early in the case requiring all parties to preserve all documents and other "records" relevant to the litigation. Despite this mandate, key documents were destroyed at four Prudential offices, largely because the litigation hold order issued by Prudential management was mishandled. While Prudential management had distributed document retention instructions to agents and employees via e-mail, some employees lacked access to e- mail and others routinely ignored it. Senior Prudential executives never directed distribution of the court's order to all employees.

In a holding that now seems prescient, the court found that Prudential lacked a "clear and unequivocal document preservation policy," and imposed a one million dollar sanction. The court held that once the court entered its order to preserve relevant documents, "it became the obligation of senior management to initiate a comprehensive document preservation plan and to distribute it to all employees." Since Prudential, numerous courts, including the oft-cited *Zubulake* opinions, have repeatedly driven this point home. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. May 23, 2003) ("*Zubulake I*"); *Zubulake v. UBS Warburg LLC*, 216

F.R.D. 280 (S.D.N.Y. July 24, 2003) ("*Zubulake III*"); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. Oct. 22, 2003) ("*Zubulake IV*"); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. July 20, 2004) ("*Zubulake V*"); *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002); *Mosaid Techs. Inc. v. Samsung Elecs. Co.*, 348 F. Supp 2d 332 (D.N.J. 2004).

The obligation to preserve documents has been extended to metadata.[8] *Williams v. Sprint/United Management Co.*, 2005 WL 2401626 (D. Kan. Sept. 29, 2005), was one of the first decisions specifically extending a responding party's duty to preserve to the metadata associated with relevant material when the requesting party specifically requests production in native format. In that case, an agreement had been reached embodied in a court order that required the defendant to produce over 2,000 Excel spreadsheets in native format which would allow plaintiffs to manipulate data electronically without it being manually re-entered. In fact, plaintiffs discovered that all metadata had been "scrubbed" from the spreadsheets, and the cells locked, to prevent access to some of the data. While metadata is not as crucial to understanding a spreadsheet as it is to a database application, a spreadsheet's metadata may be necessary to understand the spreadsheet because the cells containing formulas, which arguably are metadata themselves, often display a value rather than the formula itself. To understand the spreadsheet, the user must be able to ascertain the formula within the cell.

Plaintiffs objected to the Court, which issued a show cause order to the defendants for possible sanctions based on non-compliance with his prior order. In granting the plaintiffs relief (but without awarding sanctions), the court held, "when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order."

This decision and its progeny have effectively expanded the scope of a responding party's duty to maintain and produce data in relevant material that is normally kept in the "background," requiring the producing party to object to the production of metadata rather than placing the burden on the requesting party to specifically request metadata. Unless relief from the preservation burden is obtained by agreement or from the court, it is triggered whenever a requesting party asks for native format files as maintained in the ordinary course. Because of the very fragile nature of many types of metadata, which can be altered even by simply copying or viewing a file, the prospect raised by the *Williams* decision of eventually having to produce some material with the new burden of keeping metadata intact may dictate a heightened sense of caution by practitioners during the preservation and collection process. Failure to adequately preserve metadata at the earliest opportunity may forever foreclose the ability to replicate what was lost, and possibly trigger spoliation risks.

[8] Metadata, commonly described as "data about data," can be defined as "information describing the history, tracking, or management of an electronic document."

Sanctions were recently imposed under Rule 26(g) for errors in the collection and preservation of computer files. *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed,* LLC, 2007 WL 684001 (D. Colo. March 2, 2007). Rule 26(g) requires an attorney to sign all discovery requests, responses, and objections. The Rule further states that:

> The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

Moreover, Rule 26(g)(2) provides that by signing, an attorney is certifying that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is: ". . . (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation."

After the written hold notice was sent, there were interviews with key witnesses, but the Land O'Lakes employees were essentially on their own to locate and preserve the emails and other files that they considered to be related to the trademark dispute. The employees looked through their files, and although they located 50,000 pages of documents related to the mark "Profile", they only found 415 emails. Counsel simply accepted all of this as correct. No attempt was made by either in house counsel or by outside counsel, who signed the discovery responses under Rule 26, to independently verify their efforts. Counsel simply took the files they produced and assumed that it was complete and the search was thorough. Further, no system-wide key word search was ever run on defendant's systems, or the key employees, as plaintiff argued strenuously should have been done.

The plaintiff argued that defendants failed to comply with the following "duties" set forth in *Zubulake V*

- once litigation is commenced or a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents
- in furtherance of the "litigation hold," counsel must become fully aware of the client's document retention policies and data retention architecture
- counsel must communicate with "the key players" in the litigation in order to understand how they stored information
- counsel must take reasonable steps to monitor compliance with the "litigation hold" so that all sources of discoverable information are identified and searched; and,

- having identified all sources of potentially relevant information, a party and its counsel are under a duty to retain that information and produce information responsive to the opposing party's requests

The court was clearly troubled by this borderline negligent approach under the circumstances. But the court found even more troubling the failure of counsel to prevent the "wiping" of hard drives from computers of employees who left the company after the suit was filed, at least one of whom was undeniably a "key player." The court considered this a failure to preserve evidence that constituted spoliation. Nonetheless, for a variety of reasons, the court imposed only a small sanction.

Even though the sanctions imposed in that case were relatively minor, the case is still important, not only because Rule 26(g) was applied, but also because of the facts found to be sanctionable. The case makes clear that it is not enough for counsel to simply issue a litigation hold to key employees, and then assume they will properly locate, preserve and produce the relevant computer files and other ESI. Counsel have an affirmative duty under the rules to follow-up on the hold notice and make reasonable efforts to independently verify that the hold directive has been followed and the relevant ESI has been preserved and produced. *See Zubulake V*.

4. Procedure

a) Halt routine disposal of documents and electronic data

The first preservation task is to make sure that all routine disposal practices that could even conceivably be relevant to a government investigation. Hopefully, counsel has prepared for this task by becoming acquainted with the Company systems (*see* § VIII). The critical problem here is that many tasks that are conducted as a matter of routine – or even programmed to take place automatically – are very hard to identify and stop on short notice. While there is no doubt that reformatting a hard drive constitutes document destruction, *Johnson v. Wells Fargo Home Mortgage, Inc.*, 2008 WL 2142219 (D. Nev. May 16, 2008), even something as mundane as disk-defragmentation may later be deemed to be inappropriate document destruction. Making counsel's job more complex, many of these tasks are not centrally controlled but take place as a matter of local choice at each computer or laptop. For example, many laptops are set to dispose of documents or emails every time the computer is closed. This is discussed in more detail below.

As also described in more detail below, a separate problem is now posed by the multitude of storage devices. In addition to the drives located on office computers and laptops, data may exist in PDAs, laptops, zip or flash drives, voice mail or rewritable cds. Even if a warrant or subpoena does not explicitly call for the preservation of such documents, it is critical to make sure that they are secured.

b) Issue a formal litigation hold

It is just as important to document the company's compliance with a document preservation program. Accordingly, in house counsel should issue a formal litigation hold either

to all persons who might have documents relevant to an investigation or, if necessary to the company as well. It is also critical to document the response to such hold, including an acknowledgement from all recipients, and to renew the hold periodically.

For very limited investigations, counsel can use his or her regular email service – such as Microsoft Outlook – to send out the holds. For more extensive investigations, or investigations of large companies with multiple locations, there are a number of document/litigation hold management services that may be of assistance. Counsel should make sure that the costs of such service are fully explored; they can be pricey.

c) Remember departing employees

Either as a result of the government investigation or simply as a part of the normal course of business, employees may leave the corporation. When they do, it is essential to apply certain practices to their electronic records. In particular:

- **Custody of laptops** – Even if the company routinely gives or sells laptops to the departing employee, this practice must be reconsidered and, in all likelihood suspended.
- **Replacement of hard drives** – At the very minimum, the company should take custody of the hard drives of the laptops of departing employees. If appropriate, the employee can be given a copy of personal and other appropriate files.
- **Routine deletion practices** – Whatever the routine IT practices are concerning deletion of files from returned laptops, they must be suspended as long as the litigation hold is in effect.

5. Documentation of preservation efforts

The substance of the preservation effort is critical, but almost as important is the documentation of that process to demonstrate that the company has conformed its conduct to the legal requirements. As a result, inside counsel should make extra effort to keep a clear, contemporaneous record of all steps taken to issue and implement the litigation hold.

6. Electronic Records

a) Overview

• Electronic records create special problems for corporate counsel. Because they are so easily modified or deleted (or, more accurately, perceived to be) and because sorting and review of such documents can be so complex, it is much easier for mistakes can be made. The consequences of errors can be grave. They include forfeiture of claims or defenses, imposition of substantial fines, or the requirement for a much more intrusive search of company or employee records. For example, in house counsel's inadequate electronic record preservation

was held to justify a full forensic search of a corporate founder's laptop. *Treppel v. Biovail Corp*, 2008 WL 866594 (S.D.N.Y. April 2, 2008).

b) Computer Searches

Although every computer search is unique, the government's search strategies often depend on the role of the computer hardware in the offense. If the hardware is itself evidence, an instrumentality, contraband, or a fruit of crime, agents will usually plan to seize the hardware and search its contents off-site. If the hardware is merely a storage device for evidence, agents generally will only seize the hardware if less disruptive alternatives are not feasible. If computer hardware is contraband, evidence, fruits, or instrumentalities of crime, a warrant will generally describe the hardware itself. If the probable cause relates only to information, however, the warrant will instead describe the information, rather than the physical storage devices which happen to contain it.

Federal agents contemplating a search that may result in the seizure of legally privileged computer files are strongly advised to create a post-seizure strategy for screening out the privileged files and should describe that strategy in the affidavit.

Neither Rule 41 nor the Fourth Amendment creates any specific time limits on the government's forensic examination of seized computers. However, some magistrate judges have begun imposing such limitations.

As a result, inside counsel cannot predict what will happen during the search nor can they determine when any tapes or machines will be returned. Accordingly, it is useful for counsel to strategize ahead of time with IT to determine how best to respond to the various possibilities.

c) Special Rules for Electronic Communications

The Electronic Communications Privacy Act established a complex set of protocols for law enforcement access to records of or concerning electronic communications, including e-mail, web traffic, and other forms of Internet communication. While those protocols are too complex to describe here in full, in general they provide greater protections for, and require more formal process to access, real-time communications than stored communications, unretrieved communications than retrieved ones, and contents than subscriber or transaction ("envelope") records. A summary is set forth in XIII.L.

d) Resources

United States Department of Justice, Criminal Division, Computer Crime and Intellectual Property Section, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations (July 2002).

US Department of Justice, Criminal Division, Office of Professional Development and Training, Federal Guidelines For Searching and Seizing Computers, (July, 1994)

A. Marcella , R. Greenfield, Cyber Forensics: A Field Manual for Collecting, Examining, and Preserving Evidence of Computer Crimes (CRC Press, 2002)

I. Relevant Notices & Statements

Failure to provide timely notice in a variety of contexts may waive the company's rights in a variety of contexts. If counsel is not directly in charge of giving notice, he or she should, at the minimum, make sure that such notice is properly given.

1. Insurance

The principal concern is that D&O policies are properly triggered to avoid losing the obligation to defend. Even if the company has a substantial retention amount, prompt notice is still essential.

2. Fidelity Bond

A special type of insurance that may be implicated is the fidelity bond. Again, these policies typically require very prompt notice to avoid prejudicing the issuing entities rights.

3. Mandatory Reporting

In some industries, such as banking, the law requires that the company make reports even of possible criminal activity. In such industries, the regulators take this requirement seriously and will impose significant penalties for a delayed or inaccurate report.

4. Key Investors/Customers

Although not mandatory, it is rarely beneficial for critical customers or investors to learn of core investigations by reading the papers or watching television. As part of a company's plan to minimize long term impact, it may have to undergo the unpleasantness of bearing bad news about itself. As noted above, however, for anything but the most trivial event, it is unrealistic for a company to hope that the facts will go unnoticed.

5. Statement to Employees

Finally, the company should consider some way of keeping employees informed. What often occurs is that the employees hear rumors or partial reports about an investigation and, as is human nature, they assume the worst. Their suspicions are made more intense by the failure of the company to address the issue. Then, time passes and the company resolves the matter, possibly even favorably to the company. Senior management, however, has forgotten the original impact and wants to move on so that no notice of the resolution is given to employees. As a result, the employees have no idea that the matter is concluded and it remains a concern for some time.

In this situation therefore, inside counsel should work with others in the company to fashion a meaningful message to employees that is kept current. With the rise of internal websites, it has become much easier to accomplish this task.

6. Consider Public Disclosure

The initial tendency of most companies is to keep to itself during the course of the investigation. This is, however, rarely the best outcome.

a) Advantages

If the press does not already have the story, then the company can control the timing of the release of the information. Typically, the best day to release adverse information is on a Friday. By arranging for the release of the information, the company can ensure that its executives and employees are prepared, that the appropriate resources are available, and that the company spokesperson is available.

If the company does not frame the message, then it will be framed for it. By taking the initiative, the company can help to shape the nature of the story. The specifics of this approach are beyond the scope of these materials, but one only has to compare the contrast between the way Perrier handled its problems with the way that the makers of Tylenol responded to those allegations.

By releasing the information itself, the company can avoid assertions that it concealed the issues from the public. Corporate credibility is very difficult to restore once lost. The public is very suspicious when they believe that a company has failed to "come clean" about possible issues.

Perhaps one of the hidden advantages of public release of information is that it solves the dilemma posed when an inquiry comes in during the time that the company is trying to keep the investigation quiet. Before news is released, the person responsible for speaking to the public can either tell an untruth, admit to the events at a time when the timing is adverse to the company, or avoid any comment which, in current times, will be deemed to be tantamount to an admission.

b) Disadvantages

The only real disadvantages to the company are emotional. Because the probability that the information will never come to light is so low, the company is not really giving up anything by taking the initiative.

J. Assessment of Company Status

In every government investigation, everyone will look to counsel to explain where the company stands. The challenge for inside counsel is to answer that question while at the same time making sure that the following is also heard:

- Any assessment must be treated as tentative until all the facts are in
- Even if the company does know all the relevant facts – which is rarely the case – the government may not, thereby reaching the wrong conclusion
- In fact, the government may be affirmatively misled by disgruntled or misinformed employees or former employees
- The more public the investigation, the harder it will be for the government to go away empty-handed. Thus, the company may have to take a hit – or may have to sacrifice one or more of its employees – simply to get closure.
- No matter what the outcome, no one will step forward to reimburse the company for its time trouble and expense, nor will the company be able to convince everyone that its conduct was not problematic
- Regardless of the merits, news organizations get viewers/readers by reporting bad news
- Even if the company is completely and fully exonerated, the government never, ever apologizes

1. Target/Witness/Subject

In criminal investigations, it is customary to divide the world into targets (those whom the government already believes have committed a crime), witnesses (those whom the government believe have committed no crime), and subjects (the rest of the world). While the prosecutors are not required to divulge their view of the status of a person or company, if they do so, it is generally reliable. Inside counsel should recall, however, that the status is accurate only at the time that the government makes its assessment – status can change over time.

V. Search Warrants

A. General Legal Framework

1. United States

A search warrant is a written court order issued by a federal[9] judge or magistrate or a judge of a state court of record with jurisdiction over your company's premises, directing a law enforcement officer to search specific premises and seize specific types of property. In the federal system and under Federal Rules of Criminal Procedure Rule 41, a federal warrant must be requested by a federal law enforcement officer or an attorney for the government. It must be based upon a finding that grounds for the warrant exist or that there is probable cause to believe that the grounds exist. Those grounds are usually set forth in a sealed affidavit to the court. Warrants must be executed within 10 days of the date they are issued and generally must be served during the daytime. That means between the hours of 6 a.m. and 10 p.m. The agents may use force when necessary to execute the warrant. The warrant can be issued to search for and seize any property that constitutes evidence of a crime, contraband or fruits of a crime, and property designed or intended for use in the commission of a crime. The judicial officer is supposed to ensure that the warrant describes with particularity the places to be searched and the items to be seized. The particularity requirement is intended to prevent the government from conducting a generalized search of the property of a person or entity under suspicion.

The officer taking property under the warrant is required to deliver a copy of the warrant and a receipt for the property taken. When execution of the warrant has been completed, the government must provide the responsible person with an inventory of the items that have been seized. In the business context, this inventory is often nothing more than a very generalized list that designated boxes contain "business records," and the source of those records may be noted. The inventory prepared by the government could be useless in locating important documents that have been seized and removed from the facility

The use of a search warrant, particularly in the early stages of an investigation, gives the government significant advantages. It allows the immediate seizure of documents when a grand jury subpoena might not secure full compliance for several months. It entitles the agents to enter the facility without warning, and provides an opportunity to attempt to interview managers and employees before they have been able to secure legal counsel. Also, it provides a justification to seize product that is believed to be in violation of law.

2. Canada

The laws of search and seizure are, in general outline, similar to those of the U.S. In order to lawfully search individuals or property or to lawfully seize evidence, law enforcement agencies must, with some exceptions, first obtain a warrant from a judge. The test for obtaining a search warrant varies depending upon the kind of warrant in issue. The general warrant power

[9] In general, the procedure under state law is very similar to the federal system.

requires reasonable and probable grounds to believe both that an offence has been committed (or in some cases will be committed) and that the search will furnish evidence or valuable investigative information. Narrower search powers authorize warrants to be issued on a lesser standard – reasonable grounds to suspect.

While a search warrant allows law enforcement agencies to search and seize property, a production order compels a third party to produce evidence. Canada's *Criminal Code* currently provides for a general production order for data or documents, a specific production order for telephone records, and a specific production order for financial institutions (*e.g.*, in money-laundering investigations). All require judicial authorization, the first on a "reasonable grounds to believe" standard, and the other two on a "reasonable grounds to suspect" threshold.

B. Practical Comments

Search warrants are usually the result of a preliminary investigation or an "insider" complaint by a disgruntled current or former employee or a dissatisfied patient. In order to apply for a search warrant, the enforcement agency must file an affidavit with a court setting forth facts demonstrating that "probable cause" exists that a crime has been committed. The agency must identify in the warrant the files that it desires to search. The warrant must normally be executed in a reasonable manner during daylight hours. Although great latitude is provided by the courts to the agencies, abusive or unnecessarily oppressive behavior or the filing of false affidavits can have significant consequences in the courts. In a federal action against Home Health and Hospice Care, the 4th Circuit Court of Appeals ordered the return of 5 million documents seized as a result of a recklessly false affidavit filed to obtain the warrant. The company thereafter sued the government to recover approximately $5,000,000.00 in attorneys' fees expended in defense of the action.

While many agents executing the warrant will wait for a brief time while the subject of the warrant contacts its attorney before commencing the search, the officers are under no obligation to do so. Waiting until the FBI or the State Medicaid Fraud Unit has arrived before contacting one's attorney about what to do in the circumstances misses the opportunity for an efficient, orderly and controlled response to what otherwise may be a totally chaotic and dangerous circumstance.

The sudden appearance of federal or state agents can be a frightening prospect. While the FBI normally appears in business dress, they have been known to arrive in battle fatigues with weapons drawn. Having an educated staff with explicit written procedures in place is the best defense to an unexpected search warrant.

C. Warning Signs

Not infrequently company employees are questioned by federal or state investigators prior to a raid. Employees should be advised that such inquiries and the prospect of a raid is a possibility in any health care enterprise receiving governmental funds and not to be surprised if it occurs. Employees should be encouraged to advise the employer when they are contacted by an agent or investigator and they should be appropriately debriefed as to the areas of questioning.

This can provide a useful early warning as to the existence of and area of exploration of a state or federal fraud or abuse investigation.

The employer should advise its employees that they have no obligation to speak with federal investigators, but should in no way interfere with their doing so. Interference in the investigation by the company could lead to it being charged with obstruction of justice. Employees should be encouraged to be polite, but circumspect in their dealing with the agents.

D. Implications of Use of Search Warrant

1. Concern Re Loss of Evidence

One of the critical reasons for use of a search warrant is a concern that evidence will be lost or tampered with. Otherwise, a subpoena is much more convenient. Thus, the execution of a search warrant should suggest to inside counsel that he or she should also be concerned about this problem. Uncomfortable as it may be, counsel must be on guard that one or more of the executives and employees with whom he or she works cannot be trusted.

2. Avoidance of Motion Practice

A second reason for the use of a search warrant is that it avoids the motion practice associated with a subpoena. Because a search warrant is *ex parte*, the prosecutor can avoid pesky assertions of relevance, burdensomeness, and the like.

3. Public Comment/Public Relations

Matters occurring before the grand jury are at least nominally secret. *See* § VI. That means that prosecutors who are seeking publicity are substantially constrained. The execution of a search or arrest warrant, however, is a public matter. One only has to recall the parade of stock brokers taken out of their offices in handcuffs. While prosecutors are still somewhat limited in their public statements, they have comparatively more freedom. This is in addition to the coverage that occurs if the prosecutor tips off the news media before the warrant is executed.

E. General Goals

1. Control flow of information

As noted above, it is impossible to control information in the long term. Nonetheless, during the actual execution of the warrant, the company should consider trying to limit access to the areas being searched or where the arrest is taking place. As long as the company fairly promptly addresses the issue, it can control information in the very short term.

2. Verify legality and scope of warrant

It is critical at the early stage of the search for counsel to verify that the warrant was legally issued and determine its scope. As to the former, counsel should verify that the address of the location to be searched is accurately identified, that the warrant has been signed by an

authorized official, and that the warrant conforms to other legal requirements. While counsel cannot actually impede agents even if a warrant is invalid, he or she must establish a record that the company protested, did not consent, and drew the issue to the attention of the agent in charge.

As to the second, in principle, the warrant should be issued with a clearly defined scope in terms of the nature of the documents or the areas to be searched. Counsel should make sure that all those assisting in monitoring the search are aware of the limits and keep careful record if they are exceeded.

3. Protect privilege

It is very important that counsel attempt to protect the privilege of documents that are present in the search area.

4. Gain information

Throughout the process, counsel should seek to gain as much information as possible. This may come directly from statements of the agents or by implication from the nature of the documents specified, the areas searched, or the affiliation of the agents conducting the search.

5. Minimize disruption

The execution of a search warrant is never an easy experience. Inside counsel should look for opportunities to minimize the disruption to the company. As noted below, sometimes the best course is to maintain business as usual; other times it will be best to sequester the search areas, relocate workers, and the like.

F. Immediate Response

1. Notify Security – isolate search warrant area

In the event that counsel learns of a search or impending search other than from security, the first step is to notify security or the closest thing to it that the company has. Security should be given the tasks set forth above in § III.A, isolate the search area so that the agents are not interfered with and the employees are not in a position to make statements to the agents. If counsel cannot be physically present, security should stay in constant contact.

2. Go yourself or get legal counsel to the search site

There is no substitute for the physical presence of legal counsel during the execution of a warrant. Because of inside counsel's familiarity with the company, he or she should try to be present if it is physically possible. It may also be appropriate to get outside counsel present as well, but that is not a perfect substitute for inside counsel.

In the event that counsel cannot be there, or if warrants are executed at multiple sites, then outside counsel should be present. Preferably, they have been identified previously, are

already under an engagement letter, and have some familiarity with the company and with its senior employees.

G. At Search Warrant Site

1. Identify self as legal counsel

As a general rule, the agents will at least give the time of day to identified legal counsel. In most cases, legal counsel can facilitate the search. As a result, there is some mutuality of interest in creating at least a working relationship.

2. Make clear that consent is NOT given

Without being emotional or offensive, counsel should make clear that the company does not consent to the search. The agents will not be surprised or offended by this. If consent is given, a panoply of possible defenses are waived.

3. NEVER INTERFERE

Regardless of the provocation, counsel can never interfere with the agents. To do so constitutes a crime. Further, the agents are authorized to use force to remove the interference and are not necessarily reluctant to do so. There are many ways to preserve the company's or employees' rights; they are much harder to accomplish if inside counsel is imprisoned.

a) Even if agents act improperly

This prohibition applies even if one or more of the agents acts improperly. The cases are clear that such conduct does NOT justify interference. Specifically:

- **Never** touch an agent
- **Never** block the pathway of an agent
- **Never** threaten an agent
- **Never** call into question the agent's parentage, relationship with a family member, or make suggestions as to activities the agent may engage in, either alone or with the warrant.

4. Identify each person

The agents are required to identify themselves and show their credentials. This is not a mere formality; it is important that the company keep track of the agents.

a) Get cards

Most agents carry cards even if they are required to pay for them. By and large, they will provide those cards on request.

b) If not, get pictures

If the agents will not provide their cards and the company has not captured their identities, someone should take pictures of the agents. Regardless of what they, this is perfectly legal. That being said, if the agents are in such a mood as not to give their cards, taking their pictures will not improve that mood.

5. Attempt to Engage with Agents

a) Seek Information

In house counsel should try to identify the lead government attorney that is handling this matter. In general, this information will be provided except in the most hostile search. From the agents or the attorney, counsel should also try to find out what the nature of the investigation is, whether the company is a target/subject,[10] whether any company employee is a target/subject, and whether there is a grand jury involved. Do not panic if they won't immediately tell you. Someone will eventually tell you before any further serious legal action is taken.

b) Cooperation

Cooperation should be differentiated with consent. While counsel should never consent to the search – in the sense that the search is no longer pursuant to warrant – but there is no reason not to maintain a general level of civility during the process. This is in the company's interest for several reasons. First, it will help to expedite the search and the company is always better off to shorten the time agents are on site. Second, to the extent that inside counsel are seeking some accommodation in terms of logistics, questioning, and the like, he or she must show the same level of courtesy. Remember, except in the most extreme cases, the agents have no personal animus towards counsel or the company; they are just doing their jobs. More pointedly, the agents also have the power of arrest and are armed.

In this context, therefore, be prepared to provide an office or workplace for the lead agent. Try to resolve any problems related to the search with the lead agent, as opposed to having multiple discussions with the various agents. In the same vein, make clear that you can and should be the conduit for all requests. Areas that are locked should be opened; they have the

[10] In general, a target is a person or company that the government already believes has committed a crime. A witness is a person or company that the government believes has no involvement. A subject is the residual category for those whom the government has no firm belief. It is essential, however, to remember that although the prosecutor will not lie, they may refuse to answer. Further, any response is accurate as of the time it is given, and may change at any time.

authority to force locks if necessary so this is another extension of convenience. As discussed in more detail elsewhere, it may be appropriate to identify someone from IT to give technical assistance if the search involves computers or electronic records.

c) Process/Procedures

Counsel should attempt to reach agreement over the procedures for a search. This will make each side's job easier because there will be fewer opportunities for conflict or confusion. This agreement will not be formal, nor will the discussion be extended. Nonetheless, if counsel is organized and clear, the agents will generally engage in this discussion.

d) Assist or not?

Beyond non-interference and some minimal amount of coordination, the company can choose whether to give actual assistance. There are justifications for either decision. For example, cooperation in identifying relevant electronic files can reduce the time of the search and reduce the chances that the agents will feel compelled to take the actual computers or servers. On the other hand, the agents may not know exactly what they are looking for, and assistance will bring focus to their investigation.

e) Ask if removed documents can be copied

Try to obtain copies of the documents before they are taken off the premises (it is almost a given that the agents will want the originals). You may not succeed, but ask anyway. Certainly if the agents are removing documents that are essential to carry on the business (*e.g.* computer software or engineering drawings) you have a legitimate claim, especially if they can be easily copied on the spot without damaging the originals or impeding the search. This is an area in which you can be a bit more insistent. Remember that everyone has a boss. Do not be timid about escalating the request to a higher level of authority.

f) Request inventory

Before the agents leave the premises with anything they have seized, obtain a detailed inventory. You are entitled to receive one and you will probably notice that they are making that inventory as the search progresses. If you have had adequate time to instruct the people accompanying the agents you may want them to make their own inventories of the documents/things seized by the agents. You are not required to sign a receipt or the inventory and you should not do so if you are asked.

6. Consider Sending Employees Home

The temptation is to try to pretend that the search is not happening and that the company is just conducting business as usual. This temptation should be resisted; it is pure denial. The company should strongly consider sending home the employees in the areas that will be searched or at least pull them from that location. Before sending any employees home, counsel should review a few issues:

- Request to call company attorney if contacted – This cannot be made mandatory, but most employees will comply

- Request not to discuss – Again, counsel cannot mandate that employees refrain from discussing the events, but they can ask. Again, most will agree

- Refer all media inquiries to spokesperson – Most employees will not want to speak to the media in any event, and giving them the referral information will give them an easy way to avoid this

7. Response to Questioning of Employees

During the execution of a search warrant, counsel should be prepared for the possibility that the agents will questions some employees.

a) First seek agreement

If possible, counsel should try to reach an agreement concerning the questioning of employees. In the best of all possible worlds, the agents will agree to defer questioning upon agreement that they will be produced later. If that is not accepted, counsel should request that the employees be given a chance to arrange for their own counsel. Even that is not permitted, counsel can at least arrange for the questioning to take place in a comparatively non-hostile environment – in a conference room with water and bathroom facilities available.

b) Take position that all questions must be directed through counsel

As an initial step, the agents should be told that they may ask logistical questions (how to open a cabinet, how to access email), but only if the questions are directed through counsel. In practice, of course, this does not require that each time the agent asks a questions, the attorney must repeat the question back to the employee, but it does mean that legal counsel can approve the substance of the question and ensure that it is appropriate for the purposes of the search and not for any extraneous reason.

c) Instruct employees on obligations/rights

At the very minimum, counsel should take the opportunity to give the employees a brief overview of their rights. It should be made clear that counsel is providing general legal knowledge and is not undertaking to represent the employee. While this can be a difficult line to draw, failure to give such advice can be very detrimental to the company and the employees.

The employees have an absolute right to decline to answer any or all of an agents questions. If they begin answering, they can terminate the interview at any time. Further, unless they have been arrested, once they have provided sufficient proof of identity and have shown that they do not possess any documents, they are free to leave.

(a) Do NOT Tell Employees Not to Answer Questions

It is absolutely imperative that legal counsel make very clear that they are not instructing the employees not to answer questions. That decision is entirely up to them. Such an instruction may constitute obstruction of justice.

If employees do choose to speak, they can establish conditions. One typical condition is that the agents must ask questions through either company counsel or their own counsel.

Even if the employee chooses to be interviewed directly by a government agent, they can insist that legal counsel be present for the duration of the process.

The government may not require any person either to sign a document or create a new one. They may try to imply that such a signature is required, but they cannot even require signature that a person has been read his rights.

Employees should be reminded that regardless of their decision to talk or not, they are absolutely prohibited from destroying or altering any records. This will benefit the employee as well as demonstrate due diligence by corporate counsel.

d) Press for company counsel to be present

8. Track Each Agent

This process can take many hours. Be patient and be prepared to spend the whole day. Make sure all of the persons on the company response team can participate or arrange for necessary substitutes.

a) Do Not Interfere

It has been repeated elsewhere in these materials, but it is sufficiently important to require frequent restatement.

b) Attempt to Videotape

Response team members will try to accompany the agent to every location searched. If possible a videotape will be made of the entire search. If the agents object, the response team

will ask for the reasons "on tape." In the absence of a videotape a handheld dictaphone[11] can be used to record all events and impressions. As noted elsewhere, however, counsel should take into account any local laws relating to tape recording the sounds. Further, the agents may not be pleased by this process.

c) Track What is Taken

9. Closing Activities

Personally escort the lead agent from the premises after the search. Ask him/her to confirm that the inventory is a complete list of everything seized. Check with your security guards to make sure that all the agents have left the facility. Note the time the search warrant was completed. Finally, reassure your fellow employees. They will be, in all likelihood, anxious and upset about the search, and they have some reason. Make it clear that in this day and age, this is not uncommon and it does not necessarily mean that there will be adverse consequences for them or the company.

10. Post-Closing

a) Compile Record of Search

As soon as the agents leave, careful note should be made of all the offices and other areas searched. For each area match up the names of the people who work there. Have the people go through the area and identify what was taken and interview each person about the items taken. This will be very helpful in the ensuing investigation – both the company's and the government's. Also, carefully inquire whether any agents spoke to any employees. If any conversation took place, gently but firmly get the specifics of that conversation from the employee. At the minimum, gather the following information:

- Where did they look?
- What did they take?
- What questions did they ask?
- How familiar did they seem with office, records?
- How specific were they?

[11] Younger in house counsel may not be familiar with this technology. Instead of "dictaphone," they may read the word I-Pod or other computer assisted recording mechanism into the sentence.

- Did they refer to company documents they already had?
- Did they suggest other areas would be searched?
- Did they photograph or videotape anything?
- Did any employees make any statements?

Make sure your summary gets to outside counsel as soon as possible.

11. Response if Privileged Documents Are At Issue

Law department files or other attorney-client privileged materials may be part of the search. Any attempt to search or seize these files must be met with an immediate response. Guidelines in the manuals issued to U.S. Attorneys provide that a search warrant should normally not be used to obtain attorney-client materials.

- **First raise issue with agents** – ask the person conducting the search to stop because of the nature of the materials involved or at least to call the lead agent. Make sure they understand that the materials constitute privileged materials and, therefore, must be given special treatment in any search context. As an interim step, ask them to consult with the lead government attorney.
  - Exclude the documents from the scope of the search. In this context, you should be prepared to agree to preserve all documents until the matter can be resolved.
  - Seal the documents before they are taken into custody.
  - Defer this part of the search, seal off the area, and seek clarification.
- **Call or Arrange Call to Issuing Magistrate** – If you cannot reach the lead government attorney or your persuasive powers have failed, contact the Magistrate-Judge who issued the warrant or, if that fails, any judge you can. This is an important issue worth pressing.
- **Notice of Need to File Motion for Protective Order** – The actual motion will probably be filed by outside counsel. Nonetheless, even if no immediate relief can be obtained, inform the clerk if the company's intent to file an expedited motion for a protective order.
- **Seek to Schedule Hearing** – If possible, save your outside counsel time and try to get a date and time for a hearing either the next day or the day after that. This is of such importance that outside counsel will meet any schedule you set. If not, get a different outside counsel.

- **Seek Protective Order** – Make an immediate call to outside counsel to start the process of filing for a protective order.
- **Document Objection to Lead Agent/Attorney** – Make sure you keep a detailed record of all conversations and events relating to these records. It is very likely that you will be asked to sign an affidavit under the pains and penalties of perjury, so you want it to be impeccable.

12. Classified Documents

Classified information presents special problems in the context of search warrants. Try to determine if the agents have appropriate security clearances. They may have some but not others. Contact your resident government security officer quickly and seek his/her guidance. Take careful notes of everything said or done with regard to classified documents, especially any directions given to you by the security officer. If you do not have resident security officers, contact the local office of the Defense Investigative Service (DIS) , which is the federal agency responsible for security oversight for classified materials at your plant, or contact the customer's security representative for special access programs.

13. Check Inventory

The agents are required to provide an inventory at the end of the process. Such inventory will need to be verified for accuracy.

14. Debrief Witnesses

After the investigators have left, each of the persons involved in assisting counsel should be debriefed, individually if possible, as soon thereafter as possible. The key issues to ask about are (i) what was taken, and (ii) what was said by all persons involved. Inside counsel should be very sensitive if any employee is reluctant to discuss matters or seem evasive.

15. Prepare Spokesperson for Response

As noted elsewhere, the best strategy for the company is often to take a public position. Outside counsel will, in general, resist. Any such statement will make their lives more difficult even if they are in the more general interests of the company. Unless the spokesperson happens to be an attorney, counsel should make sure that the spokesperson understands the process, understands what counsel can or can't determine, and what statements will have legal implications. Counsel should also review any written statements, help with any practice session, and, if possible, be present at any briefing.

VI. Subpoenas

A. Overview

A subpoena is an order directing a person to appear and to testify at a given time and place. A subpoena duces tecum requires the recipient to produce certain documents and things to a designated agency at a specific time. In this context, subpoenas may be issued by a court, by a grand jury, or by an agency authorized to do so. The most common type of non-administrative subpoena is the grand jury subpoena. Rule 17(c) of the Federal Rules of Criminal Procedure authorizes a grand jury to compel the production of "books, papers, documents, data, or other objects the subpoena designates." Indeed, the grand jury's power to subpoena non-testimonial information is quite broad, and the Government's demands, are often quite sweeping. Moreover, the Government's documentary subpoena power is not subject to the strictures of the Fourth Amendment, which governs only "searches and seizures" of information.

All of these subpoenas have the authority of either a court or a statute behind them and carry the threat of punishment, fines and imprisonment for noncompliance. Nevertheless, compliance with a subpoena may not be required if the recipient convinces a court or an administrative authority that the subpoena's terms are unreasonable or oppressive. Note, however, that until formal steps are taken to limit the subpoena, compliance is technically required. Subpoenas typically provide recipients with a few days to a few weeks' notice. This notice period allows the recipient time to gather the requested information or to prepare to give testimony.

The good news about a subpoena is that it is less intrusive than a search warrant. Although burdensome, a subpoena gives the company time to organize itself, hire counsel, and respond. Also, the company will have an opportunity to copy those documents that are necessary and important. The severity of the bad news depends on the nature of the subpoena. If it is an administrative subpoena, it is likely – but not certain – that the problem is civil or administrative.[12] If, on the other hand, the subpoena is issued by a court or grand jury, then corporate counsel should prepare the company for the worst. The key question for grand jury subpoenas is whether the corporation and its employees are targets, subject or witnesses. Does the subpoena seek documents pertaining directly to the actions of the corporation, its officers or employees, indicating that the corporation is the target of an investigation? Is the corporation being directed to produce documents and/or provide testimony to supply a piece of the puzzle in the government's case against a separate and distinct entity or individual, indicating that the corporation is more likely a witness? Or is the status of the corporation, its officers and employees as yet ill defined, such that corporation is a subject? These are questions that the corporation, through counsel, must answer.

[12] *See* § XI on parallel proceedings.

B. Types of Subpoenas

As noted, there are a number of types of subpoenas. A subpoena may be issued by a court. This is usually a trial subpoena. *See* Federal Rule of Criminal Procedure 17. Sometimes, a subpoena will be so ordered by the court under Rule 17(c)(1), requiring production of documents before the actual trial date and likely allowing the requesting party to review them beforehand. A party may move to quash or modify a subpoena if compliance would be unreasonable or oppressive. Fed. R. Crim. P. 17(c)(2); *see also U.S. v. R. Enters., Inc*. 498 U.S. 292, 298-300 (1991) (*citing U.S. v. Nixon*, 418 U.S. 683, 776 (1974) (trial subpoena must clear hurdle of seeking relevant, admissible evidence with specificity, unlike grand jury subpoenas discussed below)). Failure to abide by a subpoena is punishable by contempt. Fed. R. Crim. P. 17(g); *see also* 28 U.S.C. § 1826(a).

When a trial subpoena is a corporation's first indication that it has documents that the government wants, the case is usually a reactive one – a case in which arrests have already been made and the existing case is being built or augmented, rather than a proactive one -- an ongoing investigation that might lead to charges and arrests. An example of the former is a telephone service provider receiving a trial subpoena for records, records that the government might not have know the significance of until it was engaged in trial preparation. In this example, the corporation is a witness more often than not.

Another type of subpoena is the grand jury subpoena. While the grand jury technically issues the subpoena, the prosecutor typically drafts it and it is served by a law enforcement officer. An initial subpoena often calls for documents only, although it or some subsequent subpoenas may seek testimony. Often, a subpoena requesting documents will provide on its face that the subpoena may be satisfied by forwarding the requested documents to the officer before the return date. Such an arrangement can also we agreed upon with the prosecutor. Sometimes, a subpoena will have a non-disclosure order signed by a magistrate judge, typically on the basis of an application by the government under the All Writs Act. *See* 28 U.S.C. § 1651. Some jurisdictions – in instances where they have not obtained a non-disclosure order pursuant to the All Writs Act – have begun including on the face of the subpoena language to the effect that disclosure may be viewed as obstruction. While this is not enforceable as a violation of a court order, it does put the recipient on notice of how the government will perceive disclosure, which may be detrimental in the context of a corporation's cooperation and may be some evidence of intent for obstruction charges.

When a corporation receives a grand jury subpoena, there is an ongoing government investigation. This raises more issues to be considered as the corporation's status can run the gamut from witness to subject or target. An internal investigation – review of the subpoenaed documents and interviews of certain employees – should be conducted so that the corporation is aware of any problems or vulnerabilities and prepared to deal with prosecutors and other investigators.

As to challenging a grand jury subpoena, it is important to keep in mind that the grand jury's power is broad and virtually unrestrained. *See R. Enters., Inc*. 498 U.S. at 299-301; *United States v. Calandra*, 414 U.S. 338, 343 (1974). A motion to quash a grand jury subpoena

on grounds of relevance must satisfy a very heavy burden of proof, basically that there is no reasonable possibility that the documents the government seeks could yield relevant evidence. *R. Enters., Inc*., 498 U.S. at 301. Rule 17(c) also covers grand jury subpoenas for documents and allows that a subpoena may be challenged as being too indefinite or overly burdensome, but again the subpoena recipient must satisfy this burden in the context of the grand jury having exceedingly broad investigative powers and being shrouded in secrecy such that the recipient has little information to support a motion to quash. *See id*. at 299-301. Failure to provide documents or appear as a witness is punishable by a finding of contempt and confinement. *See* 28 U.S.C. § 1826(a).

If a law enforcement agency is not conducting a criminal investigation or if a grand jury has not yet been empanelled, the agency may issue an administrative subpoena. There are numerous types of administrative subpoenas and the court's aid may be enlisted in cases of refusal to obey a subpoena. *See, e.g.*, 21 U.S.C. § 876(a).

C. Review of the Subpoena/Consultation with Outside Counsel

Preliminarily, to avoid delays and misunderstanding that can hamper compliance with a subpoena and jeopardize a corporation's standing with the court or government, the corporation should have clear guidelines in place regarding what an employee is to do upon receiving a subpoena, including politely accepting it but without engaging in a substantive discussion with the agent serving it and immediately routing it to general counsel or another designated in house representative.

Through reviewing the face of the subpoena and any attachment, general counsel should ascertain the following:

- the court, agency or other entity who has issued the subpoena as well as the contact person and their organization (*e.g*., the subpoena was issued by the U.S. Attorney's Office, specifically by a named Assistant U.S. Attorney, and documents are returnable to an identified FBI agent)
- the date that documents are due and/or testimony is to be given
- the scope of information requested
- the likely locations/media involved (*e.g*., hard copy files, electronic documents including emails and back-up tapes).

If it appears from the subpoena that the corporation itself is the object of the inquiry or potentially has issues arising from or related to the inquiry, general counsel should consult with outside counsel. Separate and apart from the broader issue of the nature of the inquiry and the corporation's status, counsel should discuss the immediate game plan for document retention, recovery, review and production. It is typically advisable for outside counsel to call the prosecutor issuing the subpoena and ask what the prosecutor can divulge about the nature of the

inquiry, where the corporation fits into the inquiry, whether additional time to respond is available if necessary and whether a rolling production might be acceptable.

D. Subpoena Duces Tecum

1. Document Search and Recovery

It is imperative that all potentially responsive documents are preserved and available for production. The corporation will want to present itself in the best light possible to the government and any court that might become involved, which requires a timely, orderly and complete document production. Moreover, an incomplete document production may make a corporation look not only sloppy but obstructionist. Among the statutes addressing obstruction are 18 U.S.C. § 1519, which criminalizes destruction, alteration or falsification of records in a federal investigation, and 18 U.S.C. § 1517, which criminalizes obstruction of the examination of a financial institution.

The term "document" includes hard copy files and electronic records such as email. It is important to emphasize this point to employees as many do not consider emails when thinking about the universe of potentially responsive documents. By contrast, the government is often especially keen to receive emails.

To the extent that there are corporate policies in place mandating the destruction of hard copy documents or the deletion of emails on a specific timetable or a corporate practice to recycle back-up tapes, thus writing over information, these policies or practices must be suspended pending completion of the governmental inquiry. It is critical to meet with administrative and IT personnel to understand the records management system and avoid unintentional destruction of documents. All employees with access to relevant documents must likewise be alerted to the need to preserve documents.

In house counsel should have a plan for document search recovery and should manage the process. Because hard copy and electronic records are typically sought, the administrative and IT personnel charged with records management are the logical choices to collect the documents. They are knowledgeable as to the locations and organization of documents and can most efficiently do a comprehensive recovery. Another plus is that they are often the least substantively involved and thus the most dispassionate staff available to do the job. They should be briefed regarding their responsibilities, supplied with the subpoena and given direct access to counsel managing the production in order to seek and receive advice while they are assembling the documents.

Sometimes, the facts – for example, pervasiveness or pernicious conduct raising a concern regarding document destruction – will convince counsel that it is ill-advised to have corporate personnel perform document recovery. In that event, outside counsel should be involved, including by managing document recovery. They will want to hire forensic consultants with document recovery expertise. (The consultants should be hired by outside counsel rather than the company to protect the privilege). Document recovery will need to be

done immediately, with no notification to staff of the government inquiry, and likely during non-business hours when the recovery can be done unbeknownst to staff.

2. Document Review

Counsel must next review the documents that have been recovered both as to form and to substance. Counsel must review the documents for legibility, completeness, inclusion of related attachments and any other leads that suggest additional documents. Counsel must also review the documents to ascertain that they indeed fall within the scope of the subpoena in terms of their date, type, content and any other criteria provided. It is critical that counsel make a comprehensive disclosure in a fashion that gives the government confidence in the corporation's production.

In addition to being essential to subpoena compliance, counsel's document review has the important purpose of attempting to ascertain as much as possible about what the government is investigating as well as the corporation's potential vulnerabilities or problems. This review is in effect the first step of the internal investigation. If the corporation has a potential issue, the documents will provide facts that should be developed through witness interviews.

An important point to keep in mind while reviewing documents is whether any are covered by the attorney-client privilege or work product protection.[13] Again this applies to not only hard copy files but electronic records including emails. For example, an email string where an attorney forwards emails to the corporation or vice versa may be covered by the privilege. *But see In Re Universal Service Fund Telephone Billing Practices Litigation,* 232 F.R.D. 669, 672 (D. Kan. 2005). If counsel determines that documents are privileged or protected, a privilege log should be created, indicating key items regarding the documents such as type of document (*e.g.,* email), number of pages, date of document, date it was prepared if different, identity of person who prepared document, identity of person for whom it was prepared, recipients, purpose of preparing the document and basis for withholding the document and information pertinent thereto. Id. at 673 (this case arguably reflects a more stringent standard and care should be taken not to risk breaking the privilege by providing privileged information). The noted documents should be segregated from those slated for production and kept with the privilege log. When documents are produced, the government should be alerted that certain documents have not been produced based on privilege but that a privilege log has been created and privileged documents are being retained. There may come a time when the court will review these documents in camera to rule on whether they have been properly withheld or need to be disclosed.

[13] The attorney-client privilege protects from disclosure confidential attorney-client communications made in connection with seeking or rendering legal advice. *See generally* Jack B. Weinstein & Margaret Berger, *Weinstein's Federal Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates*, Chapter 503 (2d ed. 1997). The work product protection shields from discovery an attorney or his agent's legal theories, opinions, mental impressions, analyses and conclusions as well as material collected by counsel in the course of preparing for possible litigation. *See, e.g., Hickman v. Taylor*, 329 U.S. 495 (1947).

3. Document Production

Document review will enable production of those documents that fall within the letter and spirit of the subpoena. Engaging in a dialogue with the prosecutor will further facilitate the production, as well as a general understanding of the investigation and the corporation's status. Hard copy documents should be Bates-stamped and electronic documents should be copied on to numbered discs. A cover letter should memorialize what has been produced, with reference to the Bates-stamped document numbers and disc numbers. Copy sets should be maintained. If original documents were required, that fact should also be memorialized. Some counsel draw comfort from obtaining a receipt from the government.

E. Subpoena Ad Testificandum

As previously noted, a subpoena may seek testimony as well as documents or testimony only. Some individuals may be pure fact witnesses acting essentially as surrogates for the corporation, for example, a records custodian. Others may not be and an initial issue will be whether they should have separate independent counsel.

The corporation's general policy on receipt of subpoenas should cover subpoenas for testimony as well as documents. These subpoenas should be routed to general counsel or the designated contact. Corporate employees should know through the policy and tone from the top that if an employee speaks to law enforcement, he must be completely truthful. Corporate policy should also cover the circumstances in which counsel will be provided and whether the corporation will advance or reimburse for attorney's fees. Having a policy in place will both provide for fair and consistent treatment of employees and give employees some basis of knowledge if investigators approach them at some place other than their place of employment.

When a subpoena seeking testimony of an employee is actually served, in house counsel or outside counsel representing the corporation and seeking to interview the employee must first advise the employee that counsel represents the corporation, that the privilege belongs to the corporation and that the corporation may ultimately choose to cooperate and share privileged information, including information the employee has provided with government investigators. Counsel must explain and endeavor to ensure that the employee understands that counsel does not represent the employee but the corporation. If it seems at all advisable that the employee have his own counsel, corporate counsel should provide the employee with names of attorneys that he might wish to choose from and remind the employee of corporate policy regarding advancement or reimbursement of attorney's fees.

Assuming the employee ends up retaining independent counsel at the corporation's expense, there will be options for that counsel to address in conjunction with receipt of a subpoena for testimony. Options will have to be reviewed including whether immunity can be obtained for the witness, whether the government – and witness – are willing to proceed by proffer or whether there is some charge that the government seeks to bring against the witness in conjunction with a cooperation agreement.

F. Action Items

In the event you are served with a subpoena, consider the following steps:

- Determine exactly when the subpoena was received, by whom, when the document production is required, and what efforts will be necessary to comply with the subpoena
- Identify the court, agency or other entity who has issued the subpoena
- Call outside counsel and provide the following information:
    - when the subpoena was served;
    - the law enforcement or regulatory agencies involved
    - the scope of the information requested by the subpoena
    - the return date or time for responding to the subpoena
    - the level of effort required to comply with the subpoena and any ambiguities created by the language of the document
- Determine if the subpoena is part of a broader investigation and, if so, after discussion with counsel:
    - advise employees that they may be contacted by investigators either on or off the work site, and that the employees have the right either to talk or not to talk, to consult with an attorney before answering questions, and to have counsel present during the interview
    - advise employees that if they choose to submit to an interview, it is critical that they tell the trut
    - advise employees not to discuss the subpoena or any related events with members of the press.
- Determine whether it is appropriate to conduct an internal investigation.

VII. Regulatory Inspections

A. OSHA

If an OSHA inspector shows up unannounced, an employer's rights are only preserved by a request for an inspection warrant. The inspection warrant is a procedural device; it is not a criminal warrant and the showing necessary to obtain one is relatively low. Facility managers

who do not ask for a warrant will have committed to a "voluntary" inspection. Such warrants can only be served upon an authorized employer representative (usually a corporate officer), and arrangements can be made for the inspection to be conducted at a reasonable time. It does not authorize an inspector to march into a facility accompanied by armed guards. It does mean that the inspection will be conducted at some time during a 30-day period.

Whether to object to a warrantless inspection is a matter of some dispute. On the one hand, failure to object waives rights that might be asserted later in the process. On the other hand. OSHA warrants are very easily obtained and any objection may create unnecessary animosity that may taint the rest of the investigation.

OSHA inspections generally consist of three parts. First, when OSHA arrives at a facility, the compliance officer will explain why it was targeted for inspection and should explain the scope of the inspection, the purpose and standards and, if applicable, provide a copy of the employee complaint with the identity of the employee redacted. It is at this point that the OSHA representative will ask for various types of paperwork. This means that he or she will check injury-reporting logs, training records and sometimes personnel files should these include parts relevant to who works in high-risk areas. Technically, records that are not specified in a warrant do not have to be provided. Even for those that are specified, the OSHA representative cannot require the company to provide copies or to allow use of copying equipment. If the inspector wants to copy information by hand, he/she may do so (29 CFR § 1903.3(a)). In practice, it is usually best to agree to provide copies of the requested documents. Such agreement not only shortens the inspection time, but will maintain as much cordiality as possible. The company should always retain a record set of anything given to the inspector.

Typically, the following records are reviewed:

- The Hazard Communication written program for the facility. This includes provisions for labeling, material safety data sheets, employee training, and a list of hazardous chemicals.
- The Lockout/Tagout written program will be reviewed and the employers representatives knowledge of it questioned.
- The Injury & Illness Log (OSHA Form 200) will be inspected (29 CFR § 1904).
- Exposure & Accident Records (OSHA Form 101) will be required for any hazardous materials to which employees are exposed.
- Safety Programs will be checked to see if they are being observed.

Key questions to ask an inspector include:

- What is the scope of the inspection – that is, what does the inspector plan to inspect?

- What's the reason for the inspection – is it a random visit, a programmed inspection or in response to a complaint?
- What workplace records does the inspector propose to review?
- Which workers and company officials does he want to interview?

If a supervisor or manager isn't available to ask these questions, the next-highest level official at the jobsite should. Or, somebody should ask the inspector to wait until a company representative arrives. It is at this point that trade secrets will need to be identified and confidentiality assured for all records. Label all documents, photographs and video tapes as "Confidential—Trade Secret" (29 § CFR 1903.9).

All workers should be instructed to be courteous and cooperative. They should also be advised not to befriend the inspector or offer information that isn't asked of them. Nor should they offer opinions such as about whether something is in compliance. In addition, all workers should be instructed to keep a detailed record of any conversations they have with OSHA/OHS inspectors and list any documents they hand over.

Next, the OSHA inspector will ask to see some or all of the facility. The destination and duration of the inspection are determined by the compliance officer and will usually consist of a methodical inspection of the facility. If the inspection arises from a fatality, injury, or complaint, the inspection will focus on the area in question. If the inspector wants to see a specific spot, take the inspector directly there, rather than walking through the plant. The employer will be asked to select an employer representative to accompany the compliance officer during the inspection. Such representative should answer such questions as are asked if he or she is able to do so. If not, they should never give estimates without accurate information, he or she together with the company may be providing OSHA with false information which is a criminal offense. The company representative should understand that detailed explanations are not encouraged as they may tend to confuse or unduly prolong the scope of the investigation. Instead, they should answer the question and only the question and never volunteer information. An authorized representative of the employees, such as a union steward, also has the right to attend the inspection.

The compliance officer may consult with a reasonable number of employees, privately if desired. This is where a safety program is most likely to reveal weaknesses, as employees can be asked a series of questions related to the complaint or general questions about their understanding of the company's safety program. They will be informed that OSHA prohibits discrimination in any form by employers against workers because of anything they say or show the compliance officer during the inspection. If an inspector does interview workers, make sure they know they can have a lawyer or company representative present at the interview. This is important because it protects the company and lets you know what the inspector may use in a subsequent prosecution.

Questions might include:

- the employees' safety orientation
- specific job training
- safety meeting occurrence
- understanding of safety rules
- what employees have been trained to do in case of an accident or emergency
- whether employees feel that their job function is safe

Finally, at the end of the inspection, OSHA will have a closing meeting. During the closing conference, the inspector will discuss all non-compliant conditions identified and violations for which the company may be cited. The company will have the opportunity to produce records that show compliance efforts or that will assist OSHA in determining the time needed for abatement of the hazards. NEVER admit to any violation. If any violations were voluntarily corrected on the spot, it is essential that the inspector states that it was abated before he leaves the premises with date, time, place and a witness present. The inspector will not indicate any proposed penalties as penalties are determined by the area director. The company must post a copy of each citation received at or near the place in which the violation occurred. It must remain there for 3 days or until the violation is abated, whichever is longer.

B. Immigration

1. ICE Agent With Notice Of Inspection Seeks Immediate On-Site Inspection/I-9 Forms Are Kept On-Site.

The law states that an employer shall be provided with at least three days notice prior to an inspection of I-9 forms. At the time of inspection, the I-9 forms must be made available in their original form or on microfilm or microfiche at the location where the request for production was made. Therefore, when presented with a Notice of Inspection, the employer may insist on the three days notice. Please note that, although no subpoena or warrant is necessary to inspect I-9 forms, an employer can insist upon a subpoena before granting ICE access to other personal information.

2. ICE Agent With Notice Of Inspection Seeks Immediate On-Site Inspection/I-9 Forms Are Not Kept On-Site.

If I-9 forms are kept a location other than the location where the request for production was made, the employer must inform the official of the location where the forms are kept and make arrangements for the inspection. Counsel should make this contact in writing for two reasons. First, a letter to ICE serves as proof that the employer acted in good faith. Second, as a

practical matter, this means that the inspection may never occur, since the ICE office nearest to where the forms are kept may have its own enforcement agenda.

3. ICE Agent Requests Copies or Originals of I-9

I-9 forms must be made available in their original form (or on microfilm or microfiche) at the location where the request for production was made. The law also states that inspections may be performed at an ICE office. Some counsel take the position that this language does not mandate that employers furnish copies of I-9 forms or allow the forms to be copied by ICE. Instead, the employer's willingness to make original I-9 forms available for inspection at the employer's place of business and in accord with the ICE notice of inspection is all that is required. To date, there is no clear statement to the contrary. Officers will almost always want to have original or copies of I-9 forms so that they can scrutinize them in a leisurely manner back at the ICE office. Whether to accommodate ICE or resist is a policy decision for the company. Some of those involved in representing companies in these types of investigations assert that the more time the officer has to review the forms, the more violations the officer is likely to find, if so inclined. Thus, counsel may seek a brief delay to make determine how best to respond.[14]

4. ICE Agent Appears with Notice of Inspection and Subpoena

As stated above, no subpoena or warrant is required to inspect I-9 forms, but an employer can insist upon a subpoena before granting ICE access to other personal information. Assuming the officer has given three days notice (ICE has recognized that the use of subpoenas does not obviate the three-day notice rule), the employer should allow inspection of I-9 forms. ICE will usually subpoena I-9 forms and "any and all books, lists, payroll records, and personnel records for each employee hired after November 6, 1986." The standard ICE subpoena is very broad, and the employer can usually negotiate what must be produced. Also, since ICE subpoenas are not self-enforcing, there is no immediate legal liability for failure to produce subpoenaed items (other than the I-9 forms). Of course, failure to comply with the ICE subpoena may have adverse practical consequences, and unless the subpoena is unreasonably burdensome, ICE will usually be able to get a federal court order requiring the employer to comply with the subpoena.

5. Official Appears With A Search Warrant.

A search warrant may be used to compel production of I-9 forms or other documents and to search for a person. Officials are required to establish probable cause to a judge or magistrate in order to obtain the warrant. ICE takes the position that officials with a warrant to search I-9 forms are not required to give the employer three days advance notice. Although subpoenas are not self-enforcing, warrants are. Do not resist a search warrant. Retain a copy of the warrant and monitor the search, but stay out of the way. There are procedures for challenging a warrant, but

[14] When an employer resists the ICE request to take original or copied I-9s off-site, ICE often asserts that the I-9 forms are government property. This is incorrect. Nothing in the law suggests that I-9 forms belong to the government. In fact, the ICE regulations specifically state that the employer must retain the forms.

all involve an after-the-fact challenge. Generally, access must be granted to the extent authorized by the warrant.

6. ICE Agent Appears With No Warrant And Wants To Look For An Employee Believed To Be An Illegal Alien.

As a general rule, an officer may not make a warrantless inspection of a business premises. The public areas of business, *i.e.*, those areas for which the employer has no reasonable expectation of privacy, can be searched without a warrant. Of course, the company may, after consultation with outside counsel, decide to give permission.

7. ICE Agent Conducting I-9 Inspection Asks To See A Particular Employee.

During the course of conducting an I-9 inspection, an officer may begin to suspect that a particular employee is an illegal alien and may wish to interrogate that employee. ICE officials can ask to speak with employees during an I-9 inspection, but the employer may refuse the request. ICE has stated that officials cannot use access to the workplace for an I-9 inspection as the sole basis for interrogating employees about their immigration status.

VIII. Preparation

A. Specific Resources

At the minimum, there are specific resources that should be available at every corporate facility (including warehouses and sales offices) in the event of a government investigation.

1. Relevant equipment ready & available

a) Camera

A good quality camera is an essential resource. The only way to document the situation as it existed on the day in question is to take clear pictures. If possible, not only should the camera be high resolution, it should have the ability to insert the date and time of the picture. Although there are certain technical, evidentiary advantages to a traditional camera, in practice, a digital camera is acceptable. Pictures should be taken as unobtrusively as possible, As soon as possible after the investigation, either the memory chip should be set aside (after a download of the pictures) and preserved or the pictures should be downloaded to a limited access or locked file. In an absolute emergency situation, a cell phone with a camera will do.

b) Video Recorder

A video recorder creates a permanent recording of the events during a government investigation. As with a digital camera, the files should be preserved as soon as possible.

c) Safety Equipment for Agents

Some agencies such as OSHA and EPA come prepared to visit industrial workplaces. Others may be less well prepared. Accordingly, as with any other visitor, government agents should be given appropriate safety equipment and, if necessary, given the basic level of instruction. In the best of all possible worlds, there should also be stickers that can be attached to hard hats or the like that say "GOVERNMENT AGENT". In addition to the benefit of making sure there is no confusion about the identity of persons that the employees may talk to, it will also alert workers that the people are not necessarily familiar with the operation or safety issues for equipment.

2. Contact Information

a) Inside Counsel

It goes without saying that each facility must be able to contact in house counsel, even if a government investigation occurs after hours.

b) Outside Counsel

During office hours, outside counsel's office should be relied on as the contact point for inside counsel to reach outside counsel. To ensure that outside counsel's office can fulfill this responsibility, inside counsel should verify that such office is appropriately prepared. Key questions are as follows:

- What system is in place to contact lawyers who are not in their office?
- Does the receptionist have the ability to call counsel's cell or home?
- Is there a system to back up unavailable lawyers, particularly specialty lawyers?
- Does the firm have an office near the company's facility(ies)?
- Does the firm have the necessary specialty attorneys who may be needed on short notice?

Lawyers with criminal defense practices are (or should be) prepared for calls during off hours. In any event, in house counsel should not be satisfied with outside counsel who are

unwilling to respond to emergent situations. This availability (with at least one appropriate back up) is partial justification for the rates outside counsel charges.

c) Company Spokesperson/PR Firm

The days when a company, particularly a public company, could credibly say "no comment" in the face of an ongoing investigation are long past. Plainly speaking, if the company does not write the story, someone will write it for the company. Further, because of the internet, the world is now on a continuous 24/7 news cycle. Accordingly, the company must respond to the events promptly or it will be forever playing catch-up.

Accordingly, at the minimum, the company should have a designated spokesperson who is prepared to respond to a government investigation. Such person needs to be in the loop with the entire response team to ensure that the message is clear, responsive, and truthful. In the alternative, there are public relations firms that specialize in crisis communications.

d) Senior Management

There should be at least one member of senior management who is "on call" at all times. For companies with many facilities, having someone on call at headquarters and at each facility. It is also important to remember that with the global economy, it is quite possible that a normal, daytime inspection will take place at one facility where it is business hours even though it is after hours at the company's home location.

e) Technical Assistance

Depending on the nature of the investigation, corporate counsel may need immediate technical expertise. The following are the most typical.

Almost every government investigation will call for the production or creation of electronic documentation. Thus, corporate counsel should have IT expertise immediately available. In fact, if IT personnel are not available, the investigators may insist on the company calling one in.

When the EPA turns up, the company will frequently be required to answer technical questions. These questions simply cannot be safely answered by someone without environmental expertise.

For investigations conducted by OSHA or by law enforcement in the event of an industrial accident, corporate counsel should have the company's health and safety expert available. Quick understanding of the focus of the investigation, the nature of the problem, and

the situation as presented by the immediate scene will be essential in evaluating corporate strategy.

B. Document Retention

1. Overview

As noted above, it is essential for corporate counsel to be able to implement an effective hold policy on any relevant documents. It is very difficult to do this in the middle of any kind of investigation. Accordingly, legal counsel should prepare for this eventuality.

2. Understand Company's IT systems ahead of time

In house counsel should work with the IT department to acquire a basic understanding of the company's computer systems and the steps necessary to preserve electronic documents on an expedited basis. This will also assist in designation of IT employees either to facilitate the search, protect the system, or be interviewed by a government agent. A checklist of matters that counsel should review on a periodic basis is set forth in § VIII.B.

3. Prepare "litigation hold" mechanism

The specifics of litigation holds is discussed in § *. This action will go even more smoothly if inside counsel has already put in place the appropriate procedure. In addition to preparation of the written/electronic documents, counsel should brief the relevant units that will almost inevitably be involved – IT, Human Resources, senior management.

C. Crisis Management Plan

1. Overview

To prepare for an unexpected government investigation, a company should put in place either a specific investigation response program or embed such a program into a more general crisis management plan. The details of such plans is beyond the scope of these materials and is its own independent subject of study. Nonetheless, this section will give a brief review of the essential elements of such plans.

Before turning to the substance, one comment is appropriate. Many in house counsel can be daunted by the efforts necessary to prepare a comprehensive response plan. Further, it may be difficult to get senior management to commit to a process that does not have an immediate bottom-line impact or to allocate sufficient resources. This should not, however, mean that in house counsel should give up on the idea. Even a sketchy or partial plan is better than no plan at all. Thus, even if all that counsel can prepare is a memo to file of critical steps and contacts, that will be better than addressing a government investigation entirely cold. The summary memo will form a base for a later, more detailed effort.

2. Manual/Written Documents

A central element of any crisis management plan is a written set of internal procedures, often embodied in a manual directing the company's response to a crisis such as a raid or surprise audit. Such manual should:

- Contain the phone numbers and addresses of all response team, including in house and outside counsel
- Set forth the specific procedures and responsibilities for each situation addressed
- Contain the necessary forms to be completed or handed out
- List the location of relevant resources or the contact information to get such resources
- Contain current organizational charts
- Contain a directive from the CEO or Board officially endorsing the plan

3. Response Team

A second key component of a crisis management plan is the identification of the response team. These are the people who will respond to the investigation or other crisis. While different crises call for different teams, the core members will include

- Member of senior management (not necessarily CEO)
- In house counsel
- Compliance employee (for relevant substantive area)
- Representative from IT
- Security
- Human Resources
- Media/Shareholder relations

In addition to contact information, each person's responsibilities should be set forth in detail. If possible, a back-up should be designated for each member. If the company has more than one facility, each location should have a response team for matters that principally affect that location.

D. Individual Training/Checklists

Given the inevitable flux in employees at any company, counsel can avoid re-inventing the wheel by creating and disseminating specific procedural lists and conducting or arranging for training sessions. Some examples are contained in § XIII.

E. Relevant Manuals

1. *USAM* – General manual for federal prosecutors.

2. *Seaboard 21(a) Report* – This report outlines specific factors that the SEC deems relevant in evaluating what credit, if any, a company may be given for cooperating with investigators.

IX. Dangers

A corporation must be aware of numerous potential dangers when it is a target or subject of, or a witness for, a government investigation. Committing or suborning perjury, making false statements to investigators, obstructing justice whether by harassing or intimidating witnesses, destroying, altering or failing to produce documents or misleading investigators, and failing to cooperate fully are among the dangers.

The expression that the cover-up is worse than the crime indicates how serious these dangers are. In recent history, there is the example of the Martha Stewart case, where a questionable securities fraud case was strengthened by charges that Ms. Stewart made false statements to investigators. Indeed, in the end, the judge dismissed the securities fraud charge and the jury convicted Ms. Stewart of other misconduct. *See, e.g.,* CNNMoney.com, *Stewart Convicted On All Charges*, March 10, 2004.

The point that the corporation must make in its tone from the top, policy and procedures and training is that falsely testifying, obstructing investigators and being uncooperative will not be condoned. The first step is educating employees as to precisely what the dangers and consequences are.

A. Perjury and Subornation of Perjury

Section 1621 of Title 18 of the United States Code prohibits perjury. Perjury is defined as knowingly, willfully and while under an oath to tell the truth stating or subscribing a material matter believed to be false. Section 1622 provides that "[w]hoever procures another to commit any perjury is guilty of subornation of perjury." Both offenses are punishable by up to five years in prison and a fine.

Committing perjury or procuring it is pernicious because it risks causing the judge or jury to make a decision of importance to the parties based on false information, thus working an injustice to the parties and potentially undermining faith in the judicial system. In the grand jury context, perjury can mislead the prosecutors and grand jurors as they attempt to make charging decisions.

It goes without saying that a corporate employee should not lie under oath while testifying before a grand jury, at trial or in any other proceeding. Nor should a corporate representative in any way pressure an employee (or other person with knowledge) to lie under oath. Understandably, many corporations believe that their employees will not perjure themselves or suborn perjury. It is important to keep in mind, however, that an employee may have concerns about keeping his job and receiving money for attorney's fees. He thus may be susceptible to what he believes is encouragement to shape his testimony or that of another person. Or he may simply think that giving a less than truthful version of the facts is the best approach for him because of his employment-related concerns. Good corporate governance thus demands that the tone from the top be unequivocal: Perjury and subornation of perjury is unacceptable and such conduct will be met with swift remedial action.

B. False Statements

Federal investigators have a tool in their arsenal that states typically lack, specifically, 18 U.S.C. § 1001. Section 1001(a) provides that "whoever, in any matter within the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully -- (1) falsifies, conceals, or covers up by any trick, scheme or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry" may be sentenced up to five years and fined.

Section 1001(a)(2) is the subsection typically employed. Anyone who agrees to speak with an investigator must do so knowing that lies or misleading statements are criminally actionable even if they are not made under oath. An employee might not think there is any danger in shading the truth to an investigator who visits him unannounced and has a casual conversation with him. He may think he can get away with less than the truth in a proffer. In these situations and numerous others, the key is for the employee to know that corporate policy requires employees to communicate honestly with investigators whether an oath is administered or not. Again, this message must be unequivocal.

C. Obstruction of Justice

Chapter 73 of the United States Code includes several statutes criminalizing types of obstructionist behavior. Historically, prosecutors often employed 18 U.S.C. §§ 1503, 1505 and 1512. With the introduction of the Sarbanes Oxley Act in 2002, Section 1519 was added to the government's arsenal. Charges of this nature bear significant penalties standing alone. More importantly, they often augment a weaker case, as impeding an investigation is not only a crime in and of itself but also provides evidence of consciousness of guilt bolstering the underlying

criminal charge. One ill-advised action thus strengthens the government's case and increases the corporation's and its employees' exposure.

The more commonly used statutes are discussed below:

1. 18 U.S.C. §§ 1503 and 1505

While Section 1503 is titled "Influencing or injuring officer or juror generally" and contains language prohibiting specified actions directed at those individuals, it also contains an omnibus clause providing that "[w]hoever corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the *due administration of justice*" may be imprisoned for up to 10 years. (Emphasis added). "The phrase 'administration of justice' has been authoritatively construed to require a pending federal judicial proceeding, such as a federal grand jury proceeding." *U.S. v. Schwarz*, 283 F.3d 76, 105 (2d Cir. 2002)(citing *U.S. v. Aguilar*, 515 U.S. 593, 599 (1995)). An individual with knowledge or anticipation of a judicial proceeding must act with specific intent to impede the proceeding to be prosecutable. *See Schwarz*, 283 F.2d at 105-06.

Section 1505, titled "Obstruction of proceedings before departments, agencies, and committees" is designed to address similar behavior in the regulatory and Congressional contexts and provides for imprisonment up to five years and a fine.

Clearly, these are very broadly written statutes that arguably encompass a wide range of behavior.

2. 18 U.S.C § 1512

Section 1512 prohibits tampering with a witness, victim or informant. There are a couple of subsections that are particularly pertinent to corporations.

Sections 1512(b)(2)(A), 1512(b)(2)(B) and 1512(b)(3) provide that "[w]hoever knowingly . . . corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward a person, with intent" to influence, delay or prevent testimony in an official proceeding, to cause or induce the withholding of testimony in or documents for an official proceeding or to "hinder, delay, or prevent the communication to a law enforcement officer or Judge of the United States of information relating to the commission or possible commission or a Federal offense …" may be imprisoned for up to 20 years and fined.

In *Arthur Andersen v. United States*, the Supreme Court addressed the intent and nexus elements of the statute in connection with the conviction of Arthur Anderson for violation of § 1512(b)(2)(A) and (B) based on its alleged instructions to employees to destroy documents pursuant to a document retention policy. 544 U.S. 696 (2005). The Court, as well as the parties, all recognized that "[i]t is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances." *Id*. at 704.

The Court reversed, finding the jury instructions infirm for two reasons. First, the instructions had watered down the knowingly corruptly persuades requirement by advising the

jury that it should convict "if it found [the company] intended to 'subvert, undermine or impede' governmental factfinding by suggesting to its employees that they enforce the document retention policy." *Id*. at 706. The instructions also allowed that "even if [the company] honestly and sincerely believed that its conduct was lawful, you may find [the company] guilty." *Id.* at 705. The Court made plain in its reversal that consciousness of wrongdoing had not been required and should have been.

Second, the Court found that the jury instructions were infirm because "[t]hey led the jury to believe that it did not have to find any nexus between the 'persua[sion]' to destroy documents and any particular proceeding." *Id*. at 707. Specifically, the government had relied upon § 1512 (e)(1) (now 1512(f)) to the effect that an official proceeding need not be pending or about to be instituted at the time of the offense. The Court stated "[a] 'knowingly . . . corrupt[t] persuade[r]' cannot be someone who persuades other to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which these documents might be material." *Id*. at 708.

The Court thus made plain that there are limits to this broadly worded statute. That said, great care must be taken not to encourage continued compliance with a document retention policy knowing that certain conduct is or will likely be the subject of a governmental investigation and with the dishonest purpose of impeding the investigation. The Sarbanes Oxley Act of 2002 reinforces this point.

3. Sarbanes-Oxley

Section 802 of the Sarbanes-Oxley Act of 2002 (18 U.S.C. § 1519) provides that "[w]hoever knowingly alters, destroy, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States" [or in a bankruptcy case], or in relation to or in contemplation of any such matter or case" may be imprisoned up to 20 years and fined. See S. 2010, 107th Cong., 2d Sess. (2002).

Section 1102 of the Act (18 U.S.C. 1512(c)) provides that "[w]hoever corruptly . . . "alters, destroys, mutilates or conceals a record, document or other object, or attempts to do so, with the intent to impair the objects integrity or availability for use in an official proceeding; or . . . otherwise obstructs, influences, or impedes any official proceeding" may be imprisoned up to 20 years and fined. *See* H.R. 5118, 107th Cong., 2d Sess. (2002).

Both sections hold an actor directly responsible for destruction of documents, that is, he need not corruptly persuade someone else. Both contain language requiring intentionality, consistent with the teachings of *Arthur Andersen* and with the principles upon which that case was based. Only those with a certain level of culpability, indicated by consciousness of wrongdoing, should be subject to criminal liability. *See* 544 U.S. at 705-06.

Importantly, § 1519 criminalizes the destruction of documents even if there is not be a pending or imminent official proceeding. Preemptively destroying documents that would be relevant to a government investigation provides the basis for charges. The legislative history

confirms that § 1519, a general anti-shredding provision, is "'meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct' an investigation or matter within U.S. jurisdiction, or in anticipation of such a matter." *United States v. Ionia Management S.A.*, No. 3:07 CR 134, 2007 U.S. Dist. Lexis 91203 (D. Conn. Dec. 12, 2007) (quoting 148 Cong. Rec. S7418-19 (daily ed. July 26, 2002 (statement of Sen. Leahy)).

Cases have accepted § 1519's broad reach. *See, e.g., U.S. v. Ionia Management S.A.*, No. 3:07 CR 134, 2007 U.S. Dist. Lexis 91203 (broadly defining proper administration of matter within agency's supervision); *U.S. v. Fumo*, 2007 U.S. Dist. Lexis 79454 (E.D. Pa. Oct. 26, 2007) (rejecting challenge that § 1519's "in contemplation" language was unconstitutionally vague, at least as applied to primary defendant).

4. Health Care

Section 1518 applies specifically to obstruction of criminal investigations of health care offenses, providing "[w]hoever willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to violation of a Federal health care offense to a criminal investigator" may be imprisoned up to five years and fined.

Section 1518 is largely redundant of other obstruction statues. The message is that as with securities fraud and related white collar crimes obstruction in connection with health care fraud carries sanctions.

5. Practical Points

The general lessons from the perjury, false statements and many overlapping obstructions statutes are:

- Maintain policies and procedures and provide training emphasizing the law and corporate policy prohibiting perjury, subornation of perjury, making false statements and obstructing government investigations
- Reinforce this message with a consistent tone from the top and corporate environment demanding compliance with all laws and corporate policies
- Never speak to or act toward a potential witness in a way that directs, suggests or persuades him through incentives or otherwise to lie about, omit or minimize facts to government investigators
- Never speak to or act toward a potential witness in a way that directs, suggests or persuades him to decline to speak with government investigators
- Never destroy, hide or alter a document

- Exercise caution not to say or do anything that could be construed as encouraging the withholding of information or documents

- Protect yourself by having a witness present when you conduct interviews

D. FIRREA And Other Non Disclosure Orders

In the wake of the Savings and Loan Crisis in the 1980s, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 presented revisions to Title 18 of the United States Code, including additions to 18 U.S.C. § 1510. *See* House Committee on the Judiciary, Financial Institutions Reform, Recovery and Enforcement Act of 1989, H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 5 (1989).

Section 1510(b)(1) provides that an officer of a financial institution who, with intent to obstruct a judicial proceeding, notifies any person of the existence or contents of a grand jury subpoena for records of that financial institution or of information the institution has supplied in response to grand jury subpoena may be imprisoned for up to five years and fined. Section 1510(b)(2) provides that notifying a customer whose records are sought by the subpoena or any other person named in the subpoena is punishable by up to a year in prison and a fine.

In practice, issuing a subpoena to a financial institution is a step often taken in the early stage of a white collar investigation. Investigators may not want a customer whose records are being subpoenaed from a bank to be alerted to the existence of the subpoena. Investigators might wish to conduct the investigation discretely, so as not to risk the loss of information, movement of assets or flight of suspects. The bank, on the other hand, likely wants to maintain a good relationship with its customer. While Rule 6(e) of the Federal Rules of Criminal Procedure requires that prosecutors, persons receiving authorized disclosures from the prosecutor, grand jurors and stenographers maintain grand jury secrecy, generally, witnesses are not so constrained. Section 1510(b) constrains officers of financial institutions, with officers being defined broadly to include officer, director, partner, employee and agent.

As discussed in the Subpoena section, it is additionally the case that the government might obtain a non disclosure order for a subpoena by making an application under the All Writs Act. Such an order typically appears on the face of a subpoena, is signed by a magistrate judge and instructs that the existence and contents of the subpoena are not to be disclosed to anyone. Such an order, of course, should also be heeded.

E. Non-Cooperation

Another important danger that a corporation must consider is the danger of not cooperating with a government investigation. While declining to cooperate is not in and of itself a violation of a criminal statute, it may be a factor weighed by the government when deciding whether to indict a corporation. This is addressed in more detail in § XII.B.

F. Misprision

"Misprision of Felony" is an offense under United States federal law which dates back to 1790 and is now codified in 18 U.S.C. § 4:

> Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

This offense, however, requires active concealment of a known felony rather than merely failing to report it. *See United States v. Adams*, 961 F.2d 505, 508 (5th Cir. 1992); *United States v. Ciambrone*, 750 F.2d 1416, 1417 (9th Cir. 1984) (holding affirmative step of concealment element of misprision); *United States v. Davila,* 698 F.2d 715, 717 (5th Cir. 1983) (requiring some positive act to conceal felony from authorities); *United States v. Hodges*, 566 F.2d 674, 675 (9th Cir. 1977) (ruling government must show accused took affirmative step to conceal crime)*; United States v. Johnson*, 546 F.2d 1225 (5th Cir. 1977) at 1227 ("The mere failure to report a felony is not sufficient to constitute a violation of 18 U.S.C.A. § 4."); *United States v. Daddano,* 432 F.2d 1119, 1124 (7th Cir. 1970) (agreeing with defendant's assertion prosecution must show some act of concealment). In the corporate context, although little used, it still has relevant when it comes to failing to correct known errors in corporate books and records by senior management.

X. Representation: Corporation, Management & Employee

A. The Right to Unconflicted Counsel

The Sixth Amendment entitles a defendant to be represented by counsel. This right attaches "at or after the initiation of adversary judicial criminal proceedings, " whether by way of "indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). In the investigative context, even though the right to counsel may not have attached yet, it behooves the corporation to retain outside counsel for matters beyond relatively minor, isolated wrongdoing by a rogue employee. In this way, the corporation can identify problems and vulnerabilities, correct them and avoid their repetition in the future by revising policies and procedures. The corporation will simultaneously best position itself for dealing with governmental authorities. In those situations where an investigation has progressed to the point of the corporation, management or employees being charged, the entitlement to counsel, of course, attaches.

Part and parcel of the entitlement to representation by counsel is the right to representation that is free from conflicts of interests. The potential for conflicts of interest is rife in the investigative context, where the corporation, directors and officers and, possibly, employees may require representation. Once charges have been brought, potential conflicts may

become actual ones. Care must be taken at the outset and on a continuing basis to ensure unconflicted representation for reasons of basic fairness as well as corporate prudence.

The focus below is on issues regarding representation in the investigative context as it is imperative for the corporation not to wait until theories have ripened into charges and potential conflicts have ripened into real ones.

B. The Corporation's First Step: Establishing the Client

Whether a corporation discovers possible wrongdoing on its own or is alerted to the possibility through a visit by a government agent or receipt of a subpoena, the first step is to establish who the client is. This is critically important because it is through the client that all communications will proceed and the privilege will attach. Often, rather than the corporation itself, the audit committee or a special litigation committee is established as the client. Communications of privileged information to anyone other than the specifically established client will likely compromise the privilege.

C. Basic Tenets to Keep in Mind

1. The Attorney-Client Privilege

The attorney-client privilege protects from disclosure confidential attorney-client communications made in connection with seeking or rendering legal advice. The client, be it the corporation, audit committee or some other special litigation committee, enjoys the privilege. Audit committee and special litigation committees are not equal to the corporation itself, its board of directors or the individual officers, directors or employees.

Sharing privileged information with uncovered third parties will waive the privilege. For example, if a special committee conducts an investigation and shares results with individual directors who have a personal interest in related litigation, the privilege may be waived. *See Ryan v. Gifford*, 2007 WL 4259557 (Del. Ch. 2007) (Ryan I); *Ryan v. Gifford*, 2008 WL 43699 (Del. Ch. 2008) (*Ryan II*); *see generally* Jack B. Weinstein & Margaret Berger, Weinstein's Federal Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates, Chapter 503 (2d ed. 1997).

2. Work-Product Privilege

The work product privilege is a qualified privilege – in the sense that it can be overcome by a showing of particularized need – that protects an attorney's thought processes, analysis, impressions and the like. Those can be embodied in work prepared directly by an attorney or by a non-attorney working for the attorney.

A recent case, *Steptoe & Johnson v. UBS AG* (*In re HealthSouth Corp. Securities Litigation*), No. 08-mc-116, 2008 U.S. Dist. LEXIS 34602 (D.D.C. April 29, 2008), is illustrative of the process that a court will use to determine whether an attorney interview memo constitutes opinion work product or fact work product. In that case, Investors in HealthSouth brought a

securities class action against UBS and other defendants. The plaintiffs alleged that UBS helped HealthSouth commit accounting fraud and based their allegations largely on the sworn statements of Michael Martin, HealthSouth's former Chief Financial Officer. Some years earlier, the United States had investigated HealthSouth for accounting fraud; during that investigation, the government convinced Martin to cooperate and Martin attended two debriefing interviews conducted by the FBI in late 2003 and early 2004. At these interviews, Martin spoke about various aspects of HealthSouth's operations, including its relationship with UBS. Both the FBI and Martin's own counsel, Steptoe & Johnson ("Steptoe"), took notes and subsequently produced interview memoranda. Some of Martin's statements (as recorded in the FBI interview memos) seemed to conflict with his later statements in support of plaintiffs in the securities suit. When UBS asked Martin about these discrepancies during a deposition, Martin replied that the FBI memos were inaccurate, and that Steptoe's interview memos would more accurately reflect what he had said during the FBI interviews.

Not surprisingly, UBS issued a third-party subpoena to Steptoe, seeking production of the firm's interview memos from 2003 and 2004. Steptoe moved to quash on the ground that the interview memos represented inviolate opinion work product. The district court denied Steptoe's motion, holding that because the memos constituted "fact" work product and not – as Steptoe had argued – "opinion" work product, they warranted reduced protection from discovery. The court acknowledged that even without overt editorializing, interview notes or memoranda might reveal an attorney's "mental impressions, conclusions, opinions, or legal theories" in one of two ways: *first*, through the questions asked, and, second, through the way in which the memo winnowed the many answers given during the course of the interview. The court found that neither concern was present on these facts. First, the FBI had set the agenda, selected the topics to cover, and conducted the interview, so there was no danger that the selection or ordering of questions would reveal Martin's lawyers' legal theories or thought processes. *Id.* at *14. Second, the memos merely related, in a question-and-answer format, everything that the FBI and Martin said; Steptoe "did not carefully weed the material in any manner that would reveal attorney mental processes." *Id*. at *15. Since neither danger was present, the Steptoe interview memos were merely fact work product. *Id*. Thus, since UBS had s a substantial need for the materials, the court ordered Steptoe to turn over the relevant portions of the memoranda.

3. The Joint Defense Privilege

In many investigations, the corporation (or any special litigation committee), directors and officers and sometimes employees will have separate counsel. If they wish to speak about strategy and accomplish that in a privileged context, they will enter a joint defense arrangement. (Some agreements are oral, some written, depending on the applicable jurisdiction or the preference of the participants.) The joint defense privilege is an extension of the attorney-client privilege, serving "to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon or undertaken by the parties and their respective counsel." *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989). For the privilege to be asserted, communications must have been made in connection with a joint defense strategy and designed to advance that strategy; moreover, the privilege cannot have been waived. *United States v. Weissman*, 1996 WL 737042 at *8 (S.D.N.Y. 1996).

4. Protecting the Privilege by Formation of a Special Litigation Committee

A special litigation committee of disinterested directors with the power to exercise the authority of the board or to take action without board approval will more likely be able to preserve the privilege. *See Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981); *see also Ryan II*, slip op. at 2. This type of committee will not need to seek review from and obtain consent of directors who may have an adverse interest. The committee is thus well-positioned to have privileged communications with counsel and make decisions without breaching the privilege.

Establishing a special committee is not the end of the story, however. The committee and its counsel must still take care not to share privileged investigative information or results with third parties or at least third parties that do not share a common interest.

If a board of directors has delegated its authority to a special litigation committee, the board is still likely to have legitimate reasons for wanting to be briefed on the investigation and its conclusions. Assuming those legitimate reasons exist, when the special litigation committee and its counsel address the board of directors, only those directors who are there in a purely fiduciary capacity for the corporation and do not have a personal adverse interest may be in attendance or the privilege will be waived. Rightly or wrongly, the presence of personal lawyers for directors at the board meeting will be a negative factor, suggesting that the directors have dual, inconsistent interests and that the privilege has been breached. The use by personal lawyers of information provided at the board meeting to exculpate individual directors, poses an even greater threat to the privilege under *Ryan*. Given the difficulties of separating an individual's fiduciary from his independent capacity, this can mean that materials will not be shared with a director (in any capacity) if he has any meaningful individual exposure.

The same thoughtful consideration that goes into deciding whether to brief the whole board of directors or just a subpart must be given to the decision to share any written report or other material that is believed to be covered by the privilege. Again, the information, in the hands of any third party, will breach the privilege.

Similarly, if the committee believes it would be beneficial to share information from the investigation with management or employees, care should be taken to ensure there is a commonality of interest with those receiving the information so that a joint defense agreement will withstand scrutiny.

5. Retaining Outside Counsel

There are two important reasons why it is important for the corporation or the special litigation committee to retain outside counsel. First, general counsel may play a business as well as a legal counsel role in the corporation or otherwise lack the independence to provide unconflicted representation of the corporation. Second, if the corporation is considering cooperating with the government in order to avoid charges, investigative conclusions produced by plainly independent outside counsel are more likely to produce the desired result. Outside

counsel should not be the firm's regular outside counsel or otherwise have a relationship with the corporation, director or officers such that counsel's independence can be called into question.

D. Conducting the Investigation: Who Represents Whom

Assume that a special litigation committee with the help of outside counsel is conducting the investigation. It is important to keep in mind that the committee is an entity separate and distinct not only from the corporation but from its officers, other management and employees. More often than not, outside counsel for the committee will not represent these individuals. A corporation can only commit wrongdoing through individuals. It is in the interest of the corporation, through its surrogate conducting the investigation, to ferret out wrongdoing. Any wrongdoers and those who had supervisory responsibility over them up the corporate hierarchy are potentially adverse to the corporation/its special committee and cannot be represented by the same counsel because of the need for unconflicted counsel.

Additionally, especially with DOJ's McNulty Memo (*see* § XII.B) still in effect, the corporation may have a bias toward full cooperation with the government that particular officers or employees do not share. It may be the corporation's desire to satisfy McNulty factors by encouraging officers and employees to provide information to the government under pain of not receiving attorney's fees, termination or other sanctions. This may not be in the best interest of an individual officer or employee. If there is a question whether the corporation's and an officer's or employee's interests are aligned, separate counsel is advisable.

1. Officers

Typically, officers have their own counsel. Because of their position in the corporate hierarchy, the CEO, CFO and other executives, depending on the nature of the perceived misconduct, are often named in a shareholders derivative suit because of their fiduciary duty and may be of interest in a regulatory or criminal investigation. They thus have a potential conflict of interest with the corporation and merit separate counsel.

Any adversity between the corporation and its officers may be purely theoretical, with a shared interest in identifying misconduct, correcting it and making policy and procedural changes that will minimize the likelihood of the problem reoccurring. This is a situation where a joint defense agreement may be appropriate. Counsel must take care, however, to ascertain whether there is a strong argument as to a commonality of interest or whether circumstances make it advisable not to share information for fear of jeopardizing the privilege.

2. Employees

Whether it is advisable for an employee to be represented in an investigation depends in large part on whether he is purely a witness or may have some level of involvement. An employee with personal exposure should have counsel. It is often advisable even for an employee who does not have personal exposure to be represented by counsel, because it may both increase the comfort level of the employee and ease the progress of the investigation not only for the government but for the corporation. When employees do not have personal

exposure or interests adverse to each other, they may be represented by pool counsel, *i.e.*, one attorney for a number of employees.

3. Investigative Warnings

As indicated, outside counsel will conduct interviews as part of a corporation's internal investigation. At the outset of an interview, counsel must advise the individual that the attorney-client privilege belongs to the corporation, not to the individual, and that if the corporation chooses to cooperate, the information the individual provides may be shared with the government. As indicated, an officer will likely already be represented by independent counsel, ensuring that the officer truly understands the advice and reaches an informed decision whether to proceed with the interview and whether to do so under a joint defense agreement. In some cases, an employee may not be represented by counsel and, therefore, special care should be taken to ensure that the warning is understood. *See generally, Upjohn v. United States*, 449 U.S. 383 (1981).

E. Sharing Investigative Results with Outside Entities

Because of DOJ's Thompson and McNulty Memos, discussed in more detail in § XII.B below it has become increasingly common for corporate counsel to share investigative results with law enforcement or regulatory agencies in order to garner credit for cooperation and avoid indictment of the corporation. Whether to share these results may once again become a more deliberative decision depending on the outcome of the dispute between the DOJ and the Judiciary Committee.

It is important that the corporation and counsel understand in making the decision regarding turning over investigative results that it will in all likelihood be viewed as a waiver of privilege. As a general rule, when a company chooses to do a voluntary disclosure to a governmental entity in order to avoid a federal enforcement proceeding, that disclosure constitutes a waiver of any privilege in subsequent civil litigation. *See In re Steinhardt Partners, C.P.*, 9 F.3d 230 (2d Cir. 1993); *Westinghouse Elec. Corp v. Republic of Phillippines*, 951 F.2d 1414, 1425 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989); *Permian Corp. v. United States*, 665 F.2d 1214, 1219-20 (D.C. Cir. 1981). One circuit has held that the disclosure is a waiver with regard to that governmental entity alone. In *Diversified Industries Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc), the Court held that a corporation's prior disclosure of privileged materials to the SEC constituted a waiver of the privilege only to the SEC. Accordingly, a subsequent discovery demand by a civil litigant for the information was denied. The majority rule, and the assumption under which the disclosing party should operate, is that the disclosure constitutes a subject matter waiver of any applicable privilege in any other proceeding.

Contrary authority appears limited. *See In re: Cardinal Health Securities Litigation*, 2007 WL 495150 (S.D.N.Y. Jan. 26, 2007) (upholding selective waiver of the work product privilege). In *Ross v. Abercrombie & Fitch Co.,* No. 2:05-CV-0819, 2008 U.S. Dist. LEXIS 33018 (S.D. Ohio April 22, 2008), however, a district court extended the doctrine of selective waiver to preserve attorney-client privilege and work product protection in a Special Litigation Committee Report even though defendant Abercrombie had previously used the report as

evidence in its efforts to dismiss a separate shareholder derivative suit. The facts are not unusual in these situations. Abercrombie had faced two distinct but related lawsuits: one involving shareholder derivative claims and one involving private securities claims. In the derivative action, Abercrombie obtained a dismissal because the corporate board had investigated and had concluded that the suit was not in the best interest of shareholders. The key evidence in support of its motion was a report by the Board's Special Litigation Committee. The Report – itself work product and containing privileged attorney-client communications – was filed with the court under seal and served on counsel for plaintiffs in the derivative suit. The plaintiffs in the securities case moved to compel production of the Report, asserting its disclosure in the derivative action, albeit under seal, waived any privilege.

The court disagreed. Although the plaintiffs characterized the actions as "selective waiver" the court stated that in the particular context of the other case, "the disclosure of the report under those unique circumstances is essentially involuntary[.]" *Id*. at *12. The court therefore denied the motion to compel, holding that the sealed filing in the derivative action did not waive the applicable privileges.[15]

XI. Parallel Proceedings

A. Overview

1. Introduction

There are several definitions of "parallel proceedings."[16] The most common definition relates to situations when both criminal and civil investigations/cases are in progress at the same time. An example would be when a trustee is conducting an adversary proceeding to recover property in a Chapter 7 case, while, at the same time, there is a criminal investigation of the debtor for bankruptcy fraud involving concealment of the same asset. Similarly, it is not uncommon for the SEC to be engaging in a civil investigation while the Department of Justice is conducting a criminal inquiry. The second involves two actions, again arising out of the same facts or transactions, and again concurrent or successive, one of which is brought by the government as a criminal prosecution while the other is brought as a civil action. For purposes of this presentation, only the former will be considered.

There is no longer any question that the government has the power to engage in parallel proceedings. The Supreme Court supplied the answer to this question in *United States v. Kordel*,

[15] Abercrombie's victory could turn out to be temporary. Circuit precedent required the court, in managing the related derivative action, to hold a hearing on whether to make public the contents of the Special Litigation Committee Report. If made public, the Report would lose any claim to privilege or work product protection.

[16] Parallel proceedings should be distinguished from joint investigations. In the latter, two or more agencies from one government or several governments collaborate on one investigation.

379 U.S. 1 (1970), in which it stated that "[I]t would stultify enforcement of federal law to require a government agency invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial."

While virtually any action can become a concurrent criminal/civil matter, a number of federal statutes expressly provide for such a dual track. These statutes include: the Sherman Act, 15 U.S.C. §§ 1-3, 15, 15(a) (1988) (antitrust); the Securities Act of 1933, 15 U.S.C. § 77t (1988); the Internal Revenue Code, 26 U.S.C. § 7201 (1988), and; the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq*.

2. Agency Policies

Government agencies have been continuously moving toward parallel proceedings. As far back as 1997, the Justice Department issued a memorandum to all federal attorneys instructing them to increase the efficiency and reach of the government's enforcement efforts by developing "greater cooperation, communication and teamwork between the criminal and civil prosecutors who are often conducting parallel investigations of the same offenders and matters."[17]

The SEC was a leader of independent agencies in emphasizing parallel proceedings. Harvey Pitt, while chairman of the SEC, also encouraged cooperation between the SEC and the Department of Justice. In a 2002 speech to the DOJ's corporate-fraud conference, he said the DOJ's prosecutorial powers had been a "critical adjunct" to the SEC's "increased focus on the pursuit and prosecution of securities fraud" and that he was "proud of the cooperative spirit" the two agencies had "shared and continue[d] to share." Pitt concluded his speech by inviting all U.S. attorneys in attendance "to continue to take advantage of the [SEC's] expertise" and by expressing the SEC's willingness to assist them "in any way possible."

Other agencies have moved in the same direction. The IRS has a policy of pursuing civil and criminal actions simultaneously. The IRS has increased the number of cases it has referred to DOJ for criminal prosecution and, rather than delay its civil proceedings pending the conclusion of criminal prosecutions, it has shifted to a policy of pursuing civil and criminal remedies simultaneously. Similarly, in September, 2007, EPA issued a memorandum articulating r a new parallel proceedings policy aimed at strengthening coordination between the civil and criminal enforcement programs.

The way that EPA has explained its policy is instructive. In determining whether to proceed both criminally and civilly, the EPA has made clear that it will consider legal and practical issues. Factors the EPA will consider in going forward with a parallel criminal case include:

[17] Memorandum from the Attorney General to Federal Attorneys (July 28, 1997).

- the deterrent and punitive effects of criminal sanctions
- the ability to use a criminal conviction as collateral estoppel in a subsequent civil case
- the possibility that civil penalties might undermine the severity of the criminal sentence
- preservation of the secrecy and process of a criminal investigation

Key factors the EPA will consider in going forward with a parallel civil action are:

- a threat to human health or the environment that should be expeditiously addressed
- a threat of dissipation of the defendant's assets, statute of limitations or a bankruptcy deadline
- the relationship between the civil and criminal actions
- whether the civil case is integral to a national priority and whether postponing or discontinuing the case would substantially and adversely affect implementation of the national effort

The Chief Prosecutor for the Environmental Crimes Section of DOJ recently explained that the primary issue DOJ will look at with criminal prosecution is the offender's culpable conduct, specifically lying, cheating, and stealing.

3. Reasons for Parallel Proceedings

In addition to enjoying the benefits of a joint investigation – access to the combined resources and expertise of criminal investigators and subject-specific regulators – parallel proceedings enable to government to make the most of it evidence by bringing suits to address the full panoply of wrongs perceived to have been committed and to secure the full range of penalties. Further, the availability of parallel proceedings potentially offers the government some distinct tactical advantages over defendants. For example, if a regulatory agency forces the defendant to the witness stand in a civil case and the defendant chooses to assert his Fifth Amendment privilege against self-incrimination, it is lawful for the jury to draw an adverse inference. And if the defendant instead chooses to testify, he risks providing the prosecution fertile ground for cross-examination at the criminal trial, divulging his defense strategy, being accused of perjury or incriminating himself. A parallel civil proceeding may offer prosecutors the benefit of more expansive discovery rules and an opportunity to manipulate the differences in the scope and timing of civil and criminal discovery. For example, in a criminal action, prosecutors are entitled to the evidence the defendant plans to use during his case-in-chief only when the defendant has previously made a reciprocal request. In a civil action, on the other hand, both parties are entitled to all relevant, non-privileged material "reasonably calculated to lead to the discovery of admissible evidence."

It is for these reasons that the courts have historically granted applications made either by the government or the defendants to stay the civil proceedings pending resolution of the related criminal cases. *See, e.g., Trustees of the Plumbers and Pipefitters National Pension Fund v. Transworld Mechanical, Inc.*, 886 F.Supp. 1134 (S.D.N.Y. 1995). On occasion, however, the courts have told the government that since it decided to take advantage of the strategic and public relations benefits of parallel proceedings, it must live with the consequences.

The courts have, however, been conflicted about the precise rules for parallel cases. In *Securities Exchange Commission v. Saad*, 229 F.R.D. 90 (S.D.N.Y. 2005), Judge Rakoff denied the government's request for a stay of discovery in an SEC enforcement action which had been filed in tandem with a parallel criminal case. The prosecution had argued that the civil process would permit the defendants to gain a "special advantage" because of the broader discovery of the government's case provided by Rule 26 of the Federal Rules of Civil Procedure. Judge Rakoff noted that the government could not always use the judicial process exclusively to its own advantage. Instead, he held that the government's position was difficult to credit when "the U.S. Attorney's Office, having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant, should then wish to be relieved of the consequences that will flow if the two actions proceed simultaneously."[18]

4. What Level of Cooperation is Appropriate?

The courts have considered what level of cooperation is appropriate for civil and criminal aspects of the government. In *SEC v. HealthSouth Corp*., 261 F. Supp.2d (N.D. Ala. 2003), the government sought to freeze the assets of Richard Scrushy, Chairman and CEO of HealthSouth Corporation. The SEC supported its application by introducing (i) testimony of an FBI agent involved in the criminal investigation that later led to the indictment against Scrushy, (ii) tape recorded conversations between Scrushy and a former HealthSouth officer who had been outfitted with a recording device and instructed by the prosecution to obtain incriminating statements from Scrushy; and (iii) guilty plea colloquies of former HealthSouth officers who had negotiated plea agreements with the U.S. Attorney's Office but who were not subject to cross-examination by Scrushy's counsel due to their assertion of their privilege against self-incrimination.

The district court denied the asset freeze application on the ground that the SEC had used evidence at the hearing from the criminal investigation as support for an application civil in nature, the guilty plea colloquies could not be considered because of the lack of cross-examination, and the government had improperly refused to provide Scrushy with a copy of the tape recording - a refusal it sought to justify on the ground that it lacked authority to do so because the tape recording was FBI property.

In contrast, in a widely-noted recent decision, the Ninth Circuit endorsed a much more permissive view. In 2006 a federal district judge in Oregon dismissed securities, wire and mail fraud charges against three corporate officers, finding that the government had violated the defendants' due process rights by effectively conducting a criminal investigation under the guise of a civil SEC inquiry and by concealing the SEC's close cooperation with the FBI and the U.S. Attorney. In the alternative, the district court suppressed all evidence the individual defendants had provided in response to SEC subpoenas. The court also suppressed evidence of a revenue recognition scheme which had been provided to the government by an attorney who represented both the corporation and an individual defendant. In April 2008, the Ninth Circuit reversed the district court in all respects and reinstated the charges against all three defendants.

Having made its findings, the district court concluded that the government had abused its authority to conduct parallel civil and criminal proceedings. The court found that the criminal proceeding had existed in name only and that the prosecutors had elected to gather information through the SEC civil proceeding instead of conducting its own criminal probe. Turning to the government's conduct, the court noted that during one defendant's deposition, defense counsel inquired about the involvement of the USAO, but the SEC attorney merely referred him to SEC Form 1662. This four-page form was sent to all witnesses subpoenaed to testify before the SEC and indicated that the SEC routinely makes its files available to other federal agencies, particularly prosecutors, and warned of the likelihood that information supplied by a deponent would be referred to prosecutors where appropriate. An SEC attorney also instructed court reporters present for those depositions not to mention that a federal prosecutor was assigned to the case. The court found that this conduct constituted trickery and deceit to induce the defendants to participate in the SEC inquiry without asserting their Fifth Amendment rights and without the benefits of criminal discovery rules by keeping them in the dark about the criminal investigation and how it was furthered by the SEC proceeding.

The Ninth Circuit vacated the district court's decision. In *United States v. Stringer*, 2008 WL 901563, 2008 U.S. App. LEXIS 7267 (9th Cir. April 4, 2008), holding that initiation of the SEC proceeding, even just days before the criminal investigation, tended to negate any suggestion that the civil proceeding had been launched in bad faith to obtain evidence for a criminal prosecution. The court ruled that SEC Form 1662 provided sufficient notice to the defendants and their counsel of the possible use of their statements in criminal proceedings and noted that the defendants had been specifically warned at the outset of their depositions that the facts being developed in the SEC investigation might constitute crimes. The court observed that "there was nothing false or misleading" about the SEC attorney's reference to Form 1662 in response to a defense attorney's question about possible USAO involvement or about "the request to court reporters to, in effect, mind their own business…." Accordingly, it ruled that the defendant's Fifth Amendment and due process rights had not been violated and that the government's actions did not constitute an unreasonable search and seizure. The court also ruled that the government's receipt of evidence from an attorney that tended to assist one client (the corporation) but tended to implicate another client (the individual defendant) of the same attorney did not impermissibly interfere with the attorney-client relationship where the individual defendant had been fully apprised of the attorney's potential conflict of interest and had consented to the joint representation.

[18] 229 F.R.D. at 92. *See also United States v. Gieger Transfer Serv.*, 174 F.R.D. 382, 385 (S.D. Miss. 1997).

B. Rule 6(e)

1. General Rules of Secrecy

When parallel proceedings involve grand juries, some special rules apply. Among the most important is Fed. R. Crim. P. 6(e), which, broadly speaking restricts how prosecutors may share information obtained through grand jury proceedings with other government agencies Rule 6(e) of the Federal Rules of Criminal Procedure declares that "matters occurring before the grand jury" are secret and may not be disclosed. Violations of Rule 6(e) may be punishable as contempt or may result in the suppression of evidence in a Commission enforcement action. *See, e.g., United States v. Smith*, 815 F.2d 24 (6th Cir. 1987); *United States v. DiBona*, 601 F. Supp. 1162, 1166 *aff'd on reconsideration*, 610 F. Supp. 449 (E.D. Pa. 1984). As a result, the starting point is that the government may not use grand jury proceedings to augment its efforts in the civil context. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958) (If the prosecution used criminal procedures to elicit evidence in a civil case, "it would be flouting the policy of the law.").

Note that Rule 6(e) allows disclosure to "an attorney for the government for use in the performance of such attorney's duty." Rule 6(e)(3)(A)(i). The term "attorney for the government" includes attorneys for DOJ's Criminal Division, but does not include Civil Division attorneys. *United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983). Rule 6(e)(3)(A)(ii) further allows disclosure of grand jury evidence to governmental personnel whose assistance is necessary to the criminal investigation, but limits the scope of its use to the criminal investigation at hand. The prosecutor must disclosure the names of any such "other government personnel" to the court prior to disclosure.

The Court may also authorize disclosure under certain circumstances. For example, Rule 6(e)(3)(E)(i) provides that the court may authorize disclosure in connection with a judicial proceeding. The court may, however, limit disclosure to uses that relate "fairly directly to some identifiable litigation, pending or anticipated." *United States v. Baggot*, 463 U.S. 476, 489 (1983). An additional criterion required by courts is that the primary purpose of information being sought must be "to assist in preparation or conduct of a judicial proceeding." *Id*. The courts have wide discretion in determining whether to permit disclosure. *United States v. John Doe*, Inc., 481 U.S. 102 (1982). Administrative proceedings have been held not to constitute "judicial proceedings" under Rule 6(e). *United States v. Bates*, 627 F.2d 349, 351 (D.C. Cir. 1980). Courts have continued, after *Baggot*, to struggle with whether an administrative investigation is preliminary to or in connection with a judicial proceeding using the *Baggot* analysis. *In re Barker*, 741 F.2d 250 (9th Cir. 1984) *In re Federal Grand Jury Proceedings*, 760 F.2d 436 (2nd Cir. 1985); *In re Grand Jury Proceedings, (Daewoo)*, 613 F.Supp. 672, 678 (D.Ore. 1985).

In addition to the requirements of Rule 6(e), the Supreme Court has held that to obtain grand jury material requires a showing of "particularized need." *United States v. Sells Engineering, Inc.*, 463 U.S. at 443-4. This requirement applies to government movants as well as private parties. In *Sells*, the Court held that a movant seeking disclosure under the particularized need standard must show: 1) the material is needed to avoid a possible injustice in another

judicial proceeding; 2) the need for disclosure is greater than the need for continued secrecy; and 3) the request is structured to cover only material that is needed. *Id*. at 443; *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979), *see also United States v. John Doe, Inc.*, 481 U.S. 102 (1987) (disclosure to Civil Division by Antitrust Division lawyers and United States Attorney permitted where criminal investigation previously closed and Civil Division showed particularized need). Determination of what adequately constitutes a "particularized need" requires a balancing of the need for secrecy under Rule 6(e) and the need for disclosure in certain circumstances. *See, e.g., In re The May 18, 1981 Grand Jury*, 602 F.Supp. 772, 776 (E.D.N.Y. 1985) (consideration of narrowness of request); *United States v. Proctor & Gamble Co.*, 356 U.S. at 682. (considering degree of need for disclosure); *SEC v. Everest Management Corp*, 87 F.R.D. 100, 105 (consideration of cost and delay in using other means to obtain information).

It is important to keep in mind that Rule 6(e) restricts only "matters occurring before the grand jury." Fed. R. Crim. P. 6(e)(2). Thus, for example, if the prosecutor gets a witness interview by threatening, but not issuing, a grand jury subpoena, there is a strong argument that the interview does not occur before the grand jury. Further, there is still some dispute whether materials prepared independently of the grand jury process, but which have been subpoenaed by or submitted to the grand jury, can be disclosed. Where documents discovered are sought for their own sake and not to discover what took place before the grand jury, some courts have allowed their discovery. *See, e.g., United States v. Standford*, 589 F.2d 285, 291 (7th Cir. 1978) cert. denied, 440 U.S. 983 (1979); *In re Grand Jury Proceedings*, 505 F.Supp. 978, 981 (D.Me. 1981). A number of courts have held otherwise – that all documents submitted to the grand jury are restricted from disclosure. *See, e.g. In re Grand Jury Proceedings*, 851 F.2d 860 (6th Cir. 1988) (confidential business records, obtained by grand jury through coercion are "matters occurring before the grand jury" just as much as testimony); *In re Sealed Case*, 801 F.2d 1379 (D.C. Cir. 1986); *United Stated v. Penrod*, 609 F.2d 1092, 1095 (4th Cir. 1979); In Re Electronic Surveillance, 596 F.Supp. 991, 996 (E.D. Mich 1984).

In a recent case, *In re Grand Jury Matter*, __ F. Supp.2d __, 2008 WL 2058491 (D. Mass. January 29, 2008), the court denied the government's *ex parte* application for an order permitting federal prosecutors to share with their counterparts in the Justice Department's Civil Division copies of business records subpoenaed by a grand jury in the context of the federal False Claims Act ("FCA"). Consistent with the requirements of that statute, two *qui tam* actions were filed in 2003 and 2006, alleging FCA and other federal violations by a company identified in the decision only as "ABC Corp." In 2005, the government commenced a criminal investigation of ABC Corp. and, in 2008 anticipated receiving business records and computer information from the company in response to a grand jury subpoena. The criminal prosecutors sought leave to share these subpoenaed materials with attorneys in DOJ's Civil Division on the grounds that the latter needed them to evaluate the *qui tam* complaints against the company.

The district court denied the government's application and delineated what the government must show in any renewed application. The court directed that any such application be accompanied by a sworn affidavit containing a "strong showing of particularized need" by the Civil Division for the materials covered by the grand jury subpoena. The court also required that any future application and affidavit address several issues, including "whether the grand jury investigation was undertaken in good faith, and not as a pretext to collect information for use in a

civil investigation" and whether any materials disclosed to the Civil Division attorneys would be shared with private parties to the *qui tam* actions. The court also cautioned that, if the government renewed its petition, the court reserved the right to decide whether to consider the petition in an *ex parte* proceeding or, in the alternative, to give ABC Corp. notice and an opportunity to be heard, in which event it might order the government to move to unseal the *qui tam* actions pending before another judge in the same district.

C. Fifth Amendment Issues

An individual may assert the Fifth Amendment privilege against self incrimination. A corporation has no protection under the Fifth Amendment privilege. *See Curcio v. United States*, 354 U.S. 118, 122 (1957); *United States v. White*, 322 U.S. 694 (1944).

D. Rule 408

Prior to the amendment to Fed. R. Evid. 408, relating to settlement discussions, a defendant facing parallel proceedings had the ability to negotiate settlement of the civil suit without fear that any incriminating statements made during settlement talks would later re-surface in the criminal case. Under the old version, all statements made during settlement talks between opposing parties were excluded from any other proceeding. The amendment, however, singles out defendants facing parallel proceedings by stating that the government may use any incriminating statements made during settlement talks as proof of guilt in the criminal case. This change departs significantly from prior practice, and must be taken into account even when the only apparent litigation is civil in form.

E. Civil as Stalking Horse

The following are common procedures or hearings that create potential concerns about parallel criminal investigations or cases, wherein the defendant/target has to decide whether 1) to provide testimony/statements and/or records, or 2) to assert the Fifth Amendment privilege on behalf of individuals against self-incrimination:

1. *Request for voluntary production* – target has to decide whether or not to provide testimony and records and thus cooperate in the hope that he/she will not only get concessions on the SEC suit, but also that he/she will not be prosecuted as well.

2. *Administrative "testimony"* – target is subpoenaed to provide statements under oath in direct response to questions pertaining to the subject matter of the investigation.

3. *Administrative subpoena for records* – target is subpoenaed to provide records pertaining to the transactions or area of investigation.

4. *Temporary restraining order hearings* – defendant/target is sued by the SEC and soon thereafter a restraining order hearing is held regarding bank accounts and other assets of which the defendant or his entity have or had control.

5. "*Wells" submission* – A target is given the opportunity to present information or evidence as to why the SEC should not sue him/her after an investigation is underway. This submission involves presenting copies of records or other information, a narrative of events, and possibly affidavits.

6. *Receivership hearings* – Hearings regarding the use of funds or other assets that a court-appointed receiver would attempt to either place into the receivership, repatriate the assets, and/or inquire into the nature of transactions and source of assets.

7. *Depositions* – During the litigation of the suit and on the record.

8. *Administrative hearings* – Administrative actions are often used for lower level violations or actions to bar an officer or director of a publicly traded company from functioning ever again as such. Administrative actions are also used for attempts to bar a person from participating in the industry (*e.g.*, broker-dealer bar).

XII. Privilege Issues

A. Compliance with Upjohn

In *Upjohn Company v. United States*, 449 U.S. 383, 386-396 (1981), the Supreme Court promulgated the rule that the attorney-client privilege is maintained between counsel and client-company when counsel for the company communicates with various employees of such company. *Upjohn* thus established the principle that, despite the normal rule that communications with third parties constitute waivers of the attorney-client privilege, the privilege can be maintained between company and counsel even though communications have occurred between inside counsel and lower level (*i.e.*, non-control group) employees.

Under this case, provided a lower level employee knows that he or she is not the client, the privilege clearly belongs to the company alone. *See In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 339-40 (4th Cir. 2005). If the employee reasonably believes that he or she is being represented by the attorney as well, courts will often hold that the privilege applies to both the company and the individual employee. *See id*. at 339-41. As a result, the disclaimer generally given to such employees before being interviewed by company counsel, either inside or outside, are often called "*Upjohn* Warnings."

Because the privilege belongs to the company, it is up to the company to decide to waive that privilege. The company may choose to do so because it has discovered the real person(s) who have engaged in wrong-doing, because it wants to demonstrate that the individual is a rogue employee, or because it wants to demonstrate that it is cooperating with the government in order to gain better treatment.

Over the course if time, the latter rationale moved from being purely voluntary to one that became the result of pressure imposed by the prosecution. This was formalized in a document called the "Thompson Memorandum" and its successors discussed in the next section.

B. McNulty Memorandum

1. History

From January 2003 to December 2006, the United States Department of Justice had in place a policy – embodied in the Thompson Memorandum – which required prosecutors to consider a company's willingness to turn over materials from internal investigations, waive the attorney-client privilege, and refuse to advance legal fees for individuals targeted by the investigation in determining whether and to what extent the company should be prosecuted. In June and July 2006, in the KPMG case in the Southern District of New York, Judge Lewis Kaplan found that the predecessor to the McNulty Memo – the Thompson Memo – alone and in combination with the actions of Assistant U.S. Attorneys violated Fifth Amendment substantive due process rights and the Sixth Amendment right to counsel of KPMG employees; he specifically addressed the coercive effect of the threat of cutting off attorneys' fees to employees. *See U.S. v. Stein*, 435 F.Supp.2d 330, 341 (S.D.N.Y. 2006); *U.S. v. Stein*, 435 F.Supp.2d 330, 341 (S.D.N.Y. 2006). In September 2006, Senator Arlen Specter introduced the Attorney Client Privilege Protection Act, seeking to prohibit federal prosecutors from deciding whether a corporation had cooperated based on the corporation's valid assertion of the attorney-client privilege, payment of attorney's fees of employees or failure to terminate or otherwise sanction an employee who exercised his constitutional rights or other legal protections in response to a government request. S.30, 109th Cong. (2006) (reproduced in Appendix C). In December 2007, the government countered with the McNulty Memo, imposing consultation and approval requirements before a federal prosecutor may seek waiver of the attorney-client privilege. Senator Specter was not satisfied and reintroduced his legislation in the 110th Congress. S.186, 110th Cong. (2007) and S. 3217, 110th Cong. 2d Sess. (2008).

1. Current status[19]

DOJ and Congress have still not had a meeting of the minds, with DOJ stating its intent to further revise the McNulty Memo and Senator Specter responding that he continues to prefer a legislative fix. *See* Deputy Attorney General Mark Fillip letter dated July 9, 2008 and Senator Specter letter dated July 10, 2008. *See* Appendix D. Broadly speaking, the Justice Department proposes to revise its guidelines to address such concerns. According to Judge Filip's letter, the revised guidelines will ensure that:

- Cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence and not by the waiver of privileges

[19] This is an extremely fluid situation. Accordingly, although the materials are current as of August, 2008, there may have been significant changes since that date.

- Federal prosecutors will not demand the disclosure of non-factual attorney work product and core attorney-client privileged communications ("Category II" information) as a condition for cooperation credit
- In evaluating cooperation, federal prosecutors will not consider whether the corporation has advanced attorneys' fees to its employees, entered into a joint defense agreement, or retained or sanctioned employees

After receiving Judge Filip's letter, Senator Specter issued a response on July 10 that criticized Filip's proposals as "unsatisfactorily vague" and again urged prompt legislative action. While Judge Filip's letter indicated that cooperation would now be measured by the disclosure of "facts and evidence" and not the waiver of privilege, Senator Specter expressed concern that such facts and evidence could be obtained from individuals who expected such facts to be kept confidential and privileged. Specter also voiced concern that Judge Filip's description of "Category II" information "leaves a large undefined area where factual and non-factual attorney work product may overlap." The senator also noted that unlike a permanent legislative solution, Filip's proposal to revise the McNulty Memo would be a temporary and limited solution that would not be binding on other government agencies (including the SEC) and could be revisited by future Attorneys General. Noting that his legislation was first introduced in December 2006, Specter stated that "it is too much to ask for the legislative process to await a written revision of McNulty and then await a review of the implementation of a new memorandum for a 'reasonable amount of time' which could be very long."

While the Filip letter suggests that DOJ policy is headed for significant changes, the scope of those changes is still uncertain. Accordingly, this is an area that corporate counsel should track with some level of frequency

2. Delaware law

Any company conducting an internal investigation should also pay close attention to a decision recently handed down by Delaware's Court of Chancery. In *Ryan v. Gifford*, No. 2213-CC (Del. Ch. Nov. 30, 2007), a case about alleged stock option backdating by a company and some of its officers and directors, the chancellor held not only that the plaintiff's need for information vitiated the defendants' attorney client privilege, but also that the privilege had been waived when counsel to the Special Committee of the board reported its investigative findings to the full board. Using fairly sweeping language, the court treated the full board as it would a third party outside the Special Committee's privilege umbrella, and ruled that the oral presentation of the Special Committee's report to the complete board waived privilege with respect to the *entire* investigation because some members of the board who heard the report were "subjects" of the investigation and defendants in the lawsuit. As a result, the court held that the plaintiff was entitled to all communications between and among the company, the Special Committee and its outside counsel related to the investigation and counsel's final report. Ryan did have some particularly compelling facts. Nonetheless, only time will tell whether it will be limited or expanded.

XIII. Checklists and Forms

A. Corporate Upjohn Warning Form (sample)

1. Sample 1

I am/we are lawyers for Corporation A. I/we represent only Corporation A and I/we do not represent you. If you want an attorney, you must hire your own. Your communications with me/us are protected by the attorney-client privilege. The attorney-client privilege belongs solely to Corporation A. Accordingly, Corporation A may elect to waive that privilege and reveal your communications with me/us to third parties, including the government, at its sole discretion.

[If applicable] According to the personnel policies applicable to all employees of Corporation A, failure to cooperate with an investigation conducted by Corporation A is grounds for censure and/or dismissal.

[Optional] If you understand that I/we are not your attorney[s] and that you have the option of hiring your own attorney, sign and date below.

_____
[Signature] [Date]
Printed Name:

_____
[Witness] [Date]
Printed Name:

Notes for in house counsel:

Consider in advance whether you wish to address the issue of reimbursement for the employee's legal expenses if they should wish to hire their own attorney. It may be necessary or advisable for the corporation to retain counsel for certain employees before attempting to interview them. If the corporation chooses to do so it should make clear to these employees that it is doing so for the employee's own protection, and not because the corporation believes that the employee has done something inappropriate.

2. Sample 2

A somewhat less formal version follows:

As you know, [your management] has asked you to meet with us as part of our inquiry into these matters. The purpose of our meeting is simply to gather the information we need, as

counsel, to develop the legal advice that the company has sought to prepare for possible litigation.

I am a lawyer and I represent the company. I do not represent you or any other employee personally. This factual review is being undertaken pursuant to the company's attorney-client privilege, but the company may decide to waive the privilege at some point in the future. You cannot waive the attorney/client privilege as applied to this interview or review. If the company does decide to waive its attorney/client privilege, it can do so without your consent or consultation. To allow the company to maintain the privileged protection of the information we gather, it is important that you not discuss the substance of this interview with anyone.

[If counsel desires, the employee can be informed that he has the right to consult with counsel or have counsel present.]

Do you have any questions?

(Adapted from B. Brian, B. McNeil, Internal Corporate Investigations (2003)).

B. Emergency Notification Procedures for Receptionists and Guards (sample)

If a government agent enters a corporate office to execute a search warrant, serve a subpoena, or interview a corporate employee, you must follow the procedure listed below.

1. You must immediately make the notifications listed below.
2. If the agents are serving a search warrant, you are to politely request that they wait while you contact a company official who can accompany them. If the agents refuse to wait, you are not to interfere, but you do not have to do anything further to assist them other than providing information that will facilitate the search and is immediately within your control: such as the location of specific offices, etc.
3. You are not required to conduct the search for them.
4. If none of the emergency contacts are available before the agents conclude their search, you are to ensure that the agents log the documents or equipment they remove from the office so that it can later be tracked.
5. If the agents are there to serve a subpoena, you are to accept service and make the notifications listed below.
6. If the agents request to interview an employee, you are to politely request that they wait while you contact a company official who will assist them. Then proceed to make the notifications listed below. If the agents do not

have a search warrant, you do not have to provide them with additional information, such as the requested employee's office location.

7. Do *not* attempt to impede, physically or otherwise, the person(s) serving and executing the warrant.

NOTIFICATION LIST

1. Notify General Counsel.
   The in house counsel's phone numbers are:
   a) ___-____ (office)
   b) ___-____ (home)
   c) ___-____ (cell)

If not reached by phone, notify in house counsel via email at _____.com.

2. [If corporation has a litigation chief] Notify chief counsel for litigation.
   The litigation chief's phone numbers are:
   a) ___-____ (office)
   b) ___-____ (home)
   c) ___-____ (cell)

If not reached by phone, notify the litigation chief via email at _____.com.

3. If neither General Counsel nor the litigation chief is available, notify the Chief Executive Officer.
   The Chief Executive Officer's phone numbers are:
   a) ___-____ (office)
   b) ___-____ (home)
   c) ___-____ (cell)

If not reached by phone, notify the Chief Executive Officer via email at _____.com.

C. Search Warrant Procedures for Plant Manager in Absence of General Counsel

If a government agent enters the company facility to execute a search warrant and legal counsel is not immediately available, you must follow the procedure listed below.

1. *Immediately contact [name], [title]* or *[name], [title]*. It is *critical* that you notify these individuals *as soon as possible*.
2. Ask to see the government investigators' identification and/or business cards. You should take down in writing the names and positions of the government investigators conducting the search.
3. Ask for a copy of the search warrant for you to keep.

4. Observe the search and take notes concerning the specific file cabinets, offices and records being searched. Also record any comments or statements made by the government agents.
5. Keep a separate inventory of property seized, and ask for a copy of the agent's inventory.
6. If the agents seek to turn off and seize any computer equipment, explain that this equipment is essential to run the manufacturing. Advise the agents that you must back up data before the computers may be removed.
7. Ask to make copies of any documents that are seized in the search before they are removed.
8. Ask for a written inventory listing all property or records seized in the search. This written inventory should be signed by the government investigator, who also should provide the time, date and his or her full name, title, address and telephone number.
9. Do *not* "agree" that the search can be expanded beyond the specific limits or objects described in the search warrant.
10. Neither you nor any employees are required to answer any questions of a substantive nature, such as "tell us about your activities," "what operations are carried on at this site," etc. You may politely decline to answer these questions; search warrants seek documents, not answers to questions.
11. All non-essential employees should be sent home on paid leave.
12. Do *not* attempt to impede, physically or otherwise, the person(s) serving and executing the warrant.
13. If you get press inquiries, refer them to _____.

D. Checklist of IT Preparation Information

Company's Computer Hardware and Systems

- types of computers (e.g., mainframe, workstations, laptops)
- types and versions of all operating systems (*e.g.*, Windows, Linux, UNIX), including dates of major changes or operating grades
- number/types of servers (*e.g.*, Exchange servers) and the location of servers (e.g., physical locations and addresses)
- employees' use of laptops to conduct business, and how the laptops are connected to the network servers (*e.g.*, remote access programs, synchronization procedures)
- employees' use of their home computers to conduct business, and how those computers are connected to the company's network (*e.g.*, remote access, Web access)
- employees' use of handheld devices (*e.g.*, BlackBerrys, Treo smartphones, Palm Pilots) to conduct business

- all data storage locations outside of the United States containing data created by the company in the United States

Company's Application Software Programs

- e-mail programs used by the Company (*e.g.*, Microsoft Outlook) when the current e-mail system was implemented, if the company has any policy on where employees are to store their e-mails (*e.g.*, on a network server or their local drives), whether employees can access their e-mails remotely from outside the office, whether employees' e-mail folders are automatically archived on the network server, whether any " janitorial" programs are run or periodically purge old mails ,if any other policy limits are enforced on employees' e-mail accounts, and which company personnel are responsible for administering the company's e-mail system
- electronic calendaring software programs
- word processing and spreadsheet software programs
- voice-mail programs, and the period for which voice-mail messages are retained by the company
- internal company instant messaging ("IM") programs, and the period for which IM text messages are retained by the company
- any financial and accounting programs
- document management programs
- customized software programs subpoena

Company's Backup Procedures

- the types of backups that the company performs (e.g., full backups, incremental backups)
- the types of data backed up by the company (e.g., e-mails, word processing documents)
- the company's backup schedule (e.g., each business day, weekly, and monthly)
- what backup media, such as tapes, are recycled for refuse (and thus overwritten)
- what backup media containing potentially responsive data were in existence at the time the subpoena was issued to the company
- whether backup media are indexed and/or logged by backup software
- the type of media on which the backup data is stored
- whether the company has restored backup tapes within the last two years for any purpose, including for other litigation or to retrieve data inadvertently deleted from the company's computer systems

E. Delegation of Computer Technician to Office of General Counsel (sample)

Effective [month/date/year], you are designated to work under the direction and control of the Office of General Counsel in order to provide assistance to the Office of General Counsel in addressing legal issues relating to [subpoena or matter]. You are directed to address to the Office of General Counsel all issues relating to subpoena compliance. Because your assistance in these endeavors is on behalf of the Office of General Counsel and for the purpose of legal advice, your work and communications are protected by the attorney-client and work-product privileges. All work product and communications resulting from this designation remain confidential.

During the course of your assistance to the Office of General Counsel, it may be necessary for you to prepare memoranda or other written documents that memorialize your work product. Please place at the beginning of any such document the following legend: "PRIVILEGED AND CONFIDENTIAL – PREPARED FOR CORPORATION A, OFFICE OF GENERAL COUNSEL – _____[subpoena or matter]." Please do not discuss, display, or disseminate any of the work product resulting from your activities, or any information obtained as a result of your assistance to the Office of General Counsel, to any persons other than the attorneys in the Office of General Counsel, other persons authorized by the Office of General Counsel, or, to the extent necessary and appropriate, employees from whom information is sought or obtained in relation to your assistance to the Office of General Counsel.

To the extent it is necessary and appropriate for you to maintain, during the course of your assistance to the Office of General Counsel in this matter, any files relating to such assistance, those files should remain separate from any regular corporation files and should be plainly labeled "PRIVILEGED AND CONFIDENTIAL – ASSISTANCE TO CORPORATION A, OFFICE OF GENERAL COUNSEL – _____[case name]."

Thank you for your assistance to the Office of General Counsel and compliance with this mandate.

F. Checklist for Search Warrant

1. Identify who is leader of group

2. Get/read copy of warrant

3. Call criminal defense counsel

   - Fact of warrant
   - Time of service

   - Agencies involved
   - Areas to be searched

- Types of evidence to be gathered

4. Inform lead agent of intent to send employees home and do so

5. Organize observation of search

6. Track all items taken

7. Get detailed receipt for all items taken

G. Guide Sheet for Assisting Employees

INSTRUCTIONS FOR EMPLOYEES ASSISTING WITH SEARCH

You have been asked to assist [Company] in responding to a search warrant. Please follow these rules:

- Regardless of what happens, **NEVER** touch or interfere with any agent. If there is an issue, bring it to the attention of the General Counsel.
- You are not to answer **ANY** questions or have **ANY** discussions with any agent during this activity. Even if they ask for the location of the restroom, you must send for the General Counsel. This direction applies only during the time you are assisting with the search; on other occasions follow the general rules applying to all employees during the search
- Keep detailed notes of all events (write legibly), including
  - Name of agent you are accompanying
  - Locations agents searches
  - Types and locations of files or items reviewed
  - Types of files or items taken
  - All questions asked
  - Any discussions with any employee
  - Any unusual event
- Provide your notes to General Counsel at the end of the search
- If requested, please take the appropriate pictures or videos
- Give the cameras to General Counsel at the end of the search
- Do **NOT** talk to any other employee about this search
- Do **NOT** talk to any member of the media

H. Notice to Employees

NOTICE TO EMPLOYEES

The company has been served with a subpoena from the (identify investigating agency) which seeks certain company records relating to (state general scope and status such as accuracy of certain claims of reimbursement). At this point, there is an investigation only; no charges have been filed and no litigation initiated.

The legal staff for the company is providing you this letter to advise you that you may be contacted by investigators seeking to interview you regarding any knowledge you may have about this matter. You should be aware of the following:

(1) Investigators have the right to contact you and to request an interview.

(2) You have the right to speak with investigators. You also have the right to request a time and place for this interview which is convenient to you.

(3) You also have the right to decline to be interviewed.

(4) You have the right to consult with legal counsel prior to deciding whether to submit to an interview. Counsel for the company is available to meet with you.

(5) You also have the right to retain your own attorney.

If you do consent to an interview:

(1) You have the right to have an attorney present during the interview, to confer with an attorney in advance, and to terminate the interview at any time.

(2) Statements made to investigators may constitute legal admissions which may later be used as evidence against you, the company or both, in legal proceedings.

(3) Remember that if you choose to speak to the government, you should TELL THE TRUTH, and should state only matters you know to be a fact. A false statement to an investigator may constitute a criminal offense.

I. Litigation Hold Example

MEMORANDUM

To:
From:
Re:
Date:

ATTORNEY-CLIENT PRIVILEGED & CONFIDENTIAL:
DO NOT COPY, FORWARD OR DISTRIBUTE

[Company Name] has received a # relating to #. When litigation is commenced or threatened, [Company Name], and every employee, has a legal duty to preserve all records regarding the specifics of the litigation or threatened litigation. Therefore, each of you must retain all records and information in your (or [Company Name]'s) possession or control that may relate to # lawsuit until further notice.

Each of you and any assistants, secretaries or record-keepers need to retain **all information, no matter how or where it is stored** relating to # (this includes but is not limited to documents; electronically stored data such as documents and information stored on computers, Blackberries, voice mail, etc.; emails; retains, samples and materials; spreadsheets; databases; calendars; and telephone logs). Please note that back-up or storage tapes may contain relevant information and should not be overwritten unless it has been verified either that the tape contains no relevant information or that the information has been appropriately preserved.

The following summarizes the essential claims and will help you determine what records and information relate to the lawsuit:

•

Below is a list of the types of records and information you will need to retain in this case:

1. Anything mentioning or relating to _____.
2. Anything relating to _____ that either concerns _____ or the products sold to_____.
3. Anything that could be used by either side to show how the products performed, including:
   a. Retains, samples, or remaining stock (that is part of any batch sent to _____ between _____ and _____);
   b. Formulas;
   c. Testing results, reports, panels, etc.; and
   d. Claims and investigations (including those involving other customers for the same product and time frame).
4. Any literature or documentation relating to the products sold to _____ during the _____to _____ time frame, including MSDS, TDS, product literature, letters, advertisements, brochures, etc.
5. All electronic records relating to this matter.

Please note that this list may not be a complete list. All information regarding the above referenced matter needs to be retained. If you have any questions, please contact me directly at [Phone Number] **before** disposing of any information or documentation that might possibly relate to this matter.

This Hold Order takes precedence over all other guidelines or policy statements that would otherwise authorize or require the destruction of records described below. If you are unsure whether to preserve a particular record, first check with me.

Thank you for your cooperation.

Please review the list of recipients of this memo. In the event that I have missed someone that would have knowledge and/or have documents regarding this matter, please let me know immediately. I will then forward them a copy of this memo for their records.

J. OSHA Inspection Documents

1. OSHA Checklist and Report

Company representatives must complete this form during each OSHA inspection. Additional pages, photographs, and other documents should be attached when needed to complete any question.

1. Company representative: _____ Name
2. Date of inspection: _____
3. OSHA inspector _____ Name and Title
4. OSHA Area Director: _____
   Telephone Number (OSHA _____
   OSHA Address: _____
5. Reason for inspection: _____
   _____

A. If the inspection is the result of an employee complaint:

Describe the nature of the complaint (*e.g.*, identify the machine, equipment, or condition which forms the basis of the complaint):

_____

_____

_____

Date OSHA received the complaint: _____

Was the complaint verified? When? _____

Did OSHA verify that the complainant was in fact an employee? How? When?

_____

_____

Assuming that the condition described in the complaint exists, what regulation does the OSHA inspector maintain has been violated?

_____

_____

Set forth any errors or inaccuracies in the complaint.

_____

_____

B. If the inspection is the result of a workplace fatality or accident:

Describe in detail the circumstances surrounding the incident, including names of witnesses.

_____

_____

Attach a copy of the communication sent to OSHA within 8 hours of the fatality.

C. If the inspection is a follow-up inspection:

Identify the previous citation, proposed penalty, and abatement requirement, if any:

_____

_____

_____

_____

Attach a copy of the earlier citation and the OSHA inspector's worksheets relating to the citation, if available.

D. If the inspection is a general scheduled inspection pursuant to a neutral administrative or legislative plan:

Describe the inspection program and the criteria used to select this particular facility for inspection:

_____

_____

_____

Were the company injury and illness logs checked prior to the inspection?

_____

Was the company's lost-time injury rate below the national average for manufacturing?

_____

6. Is this an inspection of a multi-employer worksite? _____

If so, list the names of all other employers and the number of workers employed by each employer who are present on the worksite, with a brief description of the nature of the work being performed.

_____

_____

_____

_____

7. If no search warrant was presented, did you consent to a limited inspection?

A. If so, did you read a statement of limited consent to the OSHA inspector and provide him with a copy of the letter?

_____

Time and date statement read: _____

Was a confirmation letter sent to the OSHA Area Director?

_____

B. Describe the specific machine, equipment, or condition you permitted the OSHA inspector to inspect.

_____

_____

Attach a copy of the letter of limited consent mailed to the Area Director.

C. Did the OSHA inspector attempt to broaden the scope of the inspection after being admitted for the purpose of making a limited inspection?

_____

If so, describe the machines, equipment or conditions which you refused to allow the OSHA inspector to inspect:

_____

_____

8. If no search warrant was presented, was the OSHA inspector refused entry?_____

A. If so, was the statement read (and a copy of the statement given) to the OSHA inspector explaining the company's position?

_____

Time and date statement read: _____

B. Was a confirmation letter sent to the OSHA Area Director explaining the company's position?

_____

Time and date of letter: _____

9. Did the OSHA inspector present a search warrant upon arrival?

_____

A. If so, describe the contents of the search warrant and the specific machine, equipment, or condition to be inspected:

_____

_____

_____

_____

Attach a copy of the search warrant.

B. If the inspector was permitted to inspect pursuant to the warrant, was a copy of a letter of protest addressed to the Area Director handed to the OSHA compliance officer?

_____

Time and date letter was given to compliance officer:

_____

Was a certified copy mailed to the Area Director, return receipt requested?

_____

Attach a copy of the letter of protest mailed to the Area Director.

10. List any records, documents, or notices reviewed by the OSHA inspector:

_____

_____

_____

_____

11. Describe in detail any remarks made during the opening conference, including any statements made to the OSHA inspector regarding the scope of the inspection, trade secrets, or any other matter of significance:

_____

_____

_____

12. List all machines, equipment, or conditions inspected and their exact location:

_____

_____

_____

13. State the names and titles of the Company representatives who accompanied the OSHA inspector during the inspection tour:

_____

_____

_____

_____

14. State the names and titles of employee (union) representatives who accompanied the OSHA inspector during the inspection tour:

_____

_____

_____

15. Describe the route taken by the OSHA inspector during the inspection tour:

_____

_____

_____

16. Describe in detail any relevant remarks made during the inspection by both the OSHA inspector and any employees, identifying the speaker:

_____

_____

_____

17. Describe in detail any objections made during the inspection:

_____

_____

_____

18. Identify any photographs taken by the OSHA inspector, including location, time of day, date, and the names of any employees in the photograph:

_____

_____

_____

Did you request copies of the photographs taken by the OSHA inspector? _____

19. Identify any photographs taken by a management representative, including photographer, location, time of day, date, and the names of any employees in the photograph:

_____

_____

_____

_____

20. Describe any monitoring conducted by the OSHA inspector, including the equipment used, monitoring procedure, time of day, date, and the results of such monitoring, if known:

_____

_____

_____

_____

21. List the names of any employees interviewed by the OSHA inspector and state whether a management representative was present during the interview. If a management representative was present, state the name of the employee interviewed and a summary of the interview:

_____

_____

_____

_____

_____

_____

22. Describe any area identified as containing or possibly revealing a trade secret:

_____

_____

_____

A. State the time and date when you made the compliance officer aware of areas containing trade secrets:

_____

B. Did you hand a copy of the letter identifying trade secrets addressed to the Area Director of OSHA to the OSHA inspector?

_____

Time and date letter given to compliance officer: _____

Did you send the letter identifying trade secrets to the Area Director? _____

Attach a copy of the letter identifying trade secrets mailed to the Area Director.

C. List any materials that were labeled "confidential trade secret":

_____

_____

_____

23. Describe in detail any remarks made during the closing conference and identify the speaker. (Include the reason why the inspector will recommend a citation and what abatement method he recommends):

_____

_____

_____

_____

_____

2. LETTER #1

Area Director
Occupational Safety and Health Administration
U.S. Department of Labor

Dear Area Director,

It is the policy of (Company) to cooperate with any government agency enforcing federal, state or local laws or regulations. It is also important to (COMPANY) that these laws and regulations are enforced in accordance with the safeguards of the United States Constitution. We have been

advised by our legal counsel that inspections of a company's facilities, without the employer's consent, are unconstitutional in the absence of a valid search warrant. Because we do not desire to waive our Fourth Amendment rights under the United States Constitution, we are refusing to admit you to our plant. Should you deem it necessary to obtain an administrative search warrant for the purpose of conducting an inspection, please notify me so that the Company may be present when application for the warrant is made.

A copy of this letter was read to the Compliance Safety and Health Officer under your supervision.

Very truly yours,

3. LETTER #2

Area Director
Occupational Safety and Health Administration
U.S. Department of Labor

Dear Area Director,

A Compliance Officer under your supervision has asked to inspect (specific area referred to in the employee complaint, accident report, or area previously cited) on date . The (Company) has complied with this request. The inspection, however, is with the consent of (Company) only as to the (specific areas identified above). Should the scope of the inspection exceed our consent, reserves its right to challenge the validity of the inspection, to seek the exclusion of any evidence obtained as a result of the inspection, and to seek the dismissal of any citations issued as a result of the inspection. A copy of this letter was hand-delivered to the Compliance Officer before he began the inspection.

Very truly yours,

4. LETTER #3

Area Director
Occupational Safety and Health Administration
U.S. Department of Labor

Dear Area Director,

A Compliance Officer under your supervision presented a search warrant and requested to inspect this Company's premises on (Date) . The Company has complied with the request. The inspection, however, is totally without the consent of this Company and it is permitting the Compliance Officer to enter its premises under protest. We reserve our right to

challenge the validity of the inspection, to seek the exclusion of any evidence obtained as a result of the inspection, and to seek the dismissal of any citations issued as a result of the inspection.

A copy of this letter was hand-delivered to the Compliance Officer before he began the inspection.

Very truly yours,

---

5. LETTER #4

Area Director
Occupational Safety and Health Administration
U.S. Department of Labor

Dear Area Director:

A Compliance Safety and Health Officer under your supervision has requested to inspect (specific areas which contain or might reveal a trade secret) of (Company) on (date). Since the described areas contain or might reveal a trade secret, we are requesting that any information obtained by the Compliance Safety and Health Officer in such areas, including all photographs and samples, be labeled "confidential - trade secret," and we insist that OSHA treat them confidentially pursuant to OSHA rules and regulations. In the event we have overlooked a confidential product or process during the present inspection, we reserve the right to bring these to OSHA's attention at a later date with the expectation that OSHA will treat them with confidentiality.

A copy of this letter was hand-delivered to the Compliance Officer before he began inspecting areas which contain or might reveal a trade secret.

Very truly yours,

K. ICE Audit Checklist

- Insist on 3 days notice before allowing the inspection.
- Notify the home office or supervisory personnel as soon as possible.
- **Do Not** consent to a search.
- **Do Not** destroy the I-9s.
- Determine whether ICE or the DOL will be conducting the inspection.
- Evaluate the status of the Company's compliance as soon as possible.

- Evaluate the Company's desire and ability to resist any subpoena as soon as possible.
- Organize and, if any are missing, complete replacement I-9s (**without** back dating them) and begin to evaluate other documents to be presented at inspection.
- Designate one individual responsible for liaison with the auditor.
- Determine whether auditor will remove I-9 forms from Company premises. **(Not recommended.)**
- Determine whether photocopies of forms and/or supporting documents will be made available to auditor.
- Select location for the on-site audit, preferably a conference or meeting room where there will be no interruptions and limited access to employees.
- Take careful note of any alleged violations mentioned by the auditor.
- Ask auditor for assistance in understanding any alleged problems.

L. ECPA Checklist

	Voluntary Disclosure Allowed?		**Mechanisms to Compel Disclosure**	
	Public Provider	Non-Public Provider	Public Provider	Non-Public Provider
Basic subscriber, session, and billing information	Not to government, unless § 2702(c) exception applies [§ 2702(a)(3)]	Yes [§ 2702(a)(3)]	Subpoena; 2703(d) order; or search warrant [§ 2703(c)(2)]	Subpoena; 2703(d) order; or search warrant [§ 2703(c)(2)]
Other transactional and account records	Not to government, unless § 2702(c) exception applies [§ 2702(a)(3)]	Yes [§ 2702(a)(3)]	2703(d) order or search warrant [§ 2703(c)(1)]	2703(d) order or search warrant [§ 2703(c)(1)]
Accessed communications (opened e-mail and voice mail) left with provider and other stored files	No, unless § 2702(b) exception applies [§ 2702(a)(2)]	Yes [§ 2702(a)(2)]	Subpoena with notice; 2703(d) order with notice; or search warrant [§ 2703(b)]	Subpoena; ECPA doesn't apply [§ 2711(2)]
Unretrieved communication, -- e-mail and voice mail (in electronic storage more than 180 days)	No, unless § 2702(b) exception applies [§ 2702(a)(1)]	Yes [§ 2702(a)(1)]	Subpoena with notice; 2703(d) order with notice; or search warrant [§ 2703(a,b)]	Subpoena with notice; 2703(d) order with notice; or search warrant [§ 2703(a,b)]
Unretrieved communication -- e-mail and voice mail (in electronic storage 180 days or less)	No, unless § 2702(b) exception applies	Yes [§ 2702(a)(1)]	Search warrant [§ 2703(a)]	Search warrant [§ 2703(a)]

APPENDIX A – Course Description

603 The Government Investigator is Knocking: Now What?

Tuesday, October 21, 2008

2:30 PM - 4:00 PM

Who is at the door? It could be the EEOC, OSHA, Customs, NRC, the SEC or a myriad of other possibilities. First, a deep breath. But then what do I do? This session will provide you with a road map for those first 24 hours and beyond. It will allow you to plan ahead for this scenario, implement guidelines and train your people in advance for when a government investigator comes calling. Once the investigators are at the door, understand what these agencies can and cannot do during an inspection or investigation. Know what your first response and first steps should be.

APPENDIX B – Author Biographies

Bridget Rohde Biography

Bridget Rohde is a member in Mintz Levin's New York office and practices in the Litigation Section. She is in the White Collar & Corporate Investigative Practice, focusing on white collar criminal defense and internal corporate investigations.

Before joining Mintz Levin, Ms. Rohde was Chief of the Criminal Division of the United States Attorney's Office for the Eastern District of New York, supervising approximately 100 Assistant U.S. Attorneys prosecuting cases involving business and securities fraud, public integrity, organized crime and racketeering, violent crimes and terrorism, narcotics, money laundering, tax offenses and numerous other crimes.

From her sixteen years as an Assistant United States Attorney, Ms. Rohde has extensive experience in federal court, where she won numerous jury trials. Ms. Rohde also has extensive experience conducting complex criminal investigations. She has also briefed and argued numerous matters before the United States Court of Appeals for the Second Circuit.

Ms. Rohde's trial record includes the conviction of a reputed powerful Russian mobster following a several week extortion trial in federal court in Brooklyn. A month-long immigration fraud trial of this same defendant similarly resulted in conviction. Other significant litigation involved the racketeering prosecution of a reputed Gambino family soldier and his associates for illegal domination of the scrap metal industry and the labor racketeering prosecution of Colombo family members and associates as well as labor union officials for mail fraud and related offenses. These cases derived from multi-agency investigations conducted under Ms. Rohde's leadership and involved extensive witness interviews, document review and pre-trial litigation.

Ms. Rohde has frequently been recognized for her outstanding trial and investigative skills. She received the prestigious Director's Award for Superior Performance as an Assistant U.S. Attorney from the United States Attorney General. She also received the Federal Prosecutor of the Year Award from the Federal Law Enforcement Foundation. Additionally, Ms. Rohde has lectured and taught courses at the U.S. Department of Justice, the U.S. Department of Labor, the Association of the Bar of the City of New York, the New York County Lawyer's Association and elsewhere on criminal law, trial advocacy, ethical issues, racketeering and other topics.

Ms. Rohde is a Magna Cum Laude graduate of the College of Notre Dame of Maryland, where she received her Bachelor of Arts degree in 1983. She received her Juris Doctor degree, with honors, from the University of Maryland School of Law in 1986. Ms. Rohde thereafter clerked for the Honorable Frederic N. Smalkin of the United States District Court, District of Maryland.

Ms. Rohde may be reached at (212) 692-6883 and bmrohde@mintz.com.

Evan Slavitt Biography

Evan Slavitt is the Vice President of Business and Legal Affairs for AVX Corporation, a NYSE-listed global manufacturer of electronic components and connectors. In that capacity, he is the General Counsel and Chief Legal Officer for the company and its subsidiaries.

Mr. Slavitt began his legal career in the United States Department of Justice, first in the Antitrust Division and then as an Assistant United States Attorney for the District of Massachusetts. In private practice, Mr. Slavitt worked in several large partnerships before becoming a founding member of Bodoff & Slavitt, LLP. In private practice, Mr. Slavitt concentrated on complex commercial litigation, white collar criminal defense, and corporate investigation.

Mr. Slavitt has been an active member of a variety of bar associations, including helping to establish and acting as the first co-chair of the Bankruptcy Litigation Committee for the American Bankruptcy Institute, Chair of the Environmental Crimes Committee of the ABA's Section on Environmental Law, and participated in the educational committees of the Boston Bar Association and the Massachusetts Continuing Legal Education Foundation. He is a frequent lecturer on legal topics and has written or co-authored numerous articles and books. Currently, Mr. Slavitt chairs the Publications Committee for the ACC's Compliance and Ethics Committee. Mr. Slavitt also was the General Counsel for the Massachusetts Republican Party and its 2004 candidate for Attorney General.

Mr. Slavitt has a B.A. and M.A. from Yale University and a J.D. from Harvard Law School where he was an editor of the Harvard Law Review.

Mr. Slavitt may be reached at 843/946-0624 and eslavitt@avxus.com.

APPENDIX C – Attorney-Client Privilege Protection Act

O:\BEN\BEN38685.xml S.L.C.

110TH CONGRESS
2D SESSION

S. _____

To provide appropriate protection to attorney-client privileged communications and attorney work product.

IN THE SENATE OF THE UNITED STATES

Mr. SPECTER (for himself, Mr. BIDEN, Mr. GRAHAM, Mr. KERRY, Mr. CORNYN, Mr. PRYOR, Mrs. DOLE, Ms. LANDRIEU, Mr. COCHRAN, Mr. CARPER, Mrs. MCCASKILL,
)

introduced the following bill; which was read twice and referred to the Committee on

---

A BILL

To provide appropriate protection to attorney-client privileged communications and attorney work product.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Attorney-Client Privilege Protection Act of 2008".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—Congress finds the following:

(1) Justice is served when all parties to litigation are represented by experienced diligent counsel.

(2) Protecting attorney-client privileged communications from compelled disclosure fosters voluntary compliance with the law.

(3) To serve the purpose of the attorney-client privilege, attorneys and clients must have a degree of confidence that they will not be required to disclose privileged communications.

(4) The ability of an organization to have effective compliance programs and to conduct comprehensive internal investigations is enhanced when there is clarity and consistency regarding the attorney-client privilege.

(5) Prosecutors, investigators, enforcement officials, and other officers or employees of Government agencies have been able to, and can continue to, conduct their work while respecting attorney-client and work product protections and the rights of individuals, including seeking and discovering facts crucial to the investigation and prosecution of organizations.

(6) Congress recognized that law enforcement can effectively investigate without attorney-client privileged information when it banned demands by the Attorney General for privileged materials in the

Racketeer Influenced and Corrupt Organizations Act. See section 1968(c)(2) of title 18, United States Code.

(7) Despite the existence of numerous investigative tools that do not impact the attorney-client relationship, the Department of Justice and other agencies have increasingly created and implemented policies that tend to undermine the adversarial system of justice, such as encouraging organizations to waive attorney-client privilege and work product protections to avoid indictment or other sanctions.

(8) An indictment can have devastating consequences on an organization, potentially eliminating the ability of the organization to survive post-indictment or to dispute the charges against it at trial.

(9) Waiver demands and related policies of Government agencies are encroaching on the constitutional rights and other legal protections of employees.

(10) As recognized throughout the common law, and specifically in the crime-fraud exception, the attorney-client privilege, work product doctrine, and payment of counsel fees cannot and shall not be used as devices to conceal wrongdoing or to cloak advice on evading the law.

(b) PURPOSE.—It is the purpose of this Act to place on each agency clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization.

SEC. 3. DISCLOSURE OF ATTORNEY-CLIENT PRIVILEGE OR ADVANCEMENT OF COUNSEL FEES AS ELEMENTS OF COOPERATION.

(a) IN GENERAL.—Chapter 201 of title 18, United States Code, is amended by inserting after section 3013 the following:

"§ 3014. Preservation of fundamental legal protections and rights in the context of investigations and enforcement matters regarding organizations

"(a) DEFINITIONS.—In this section:

"(1) ATTORNEY-CLIENT PRIVILEGE.—The term 'attorney-client privilege' means the attorney-client privilege as governed by the principles of the common law, as they may be interpreted by the courts of the United States in the light of reason and experience, and the principles of article V of the Federal Rules of Evidence.

"(2) ATTORNEY WORK PRODUCT.—The term 'attorney work product' means materials prepared by or at the direction of an attorney in anticipation of litigation, particularly any such materials that contain a mental impression, conclusion, opinion, or legal theory of that attorney.

"(3) ORGANIZATION.—The term 'organization' does not include—

"(A) a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

"(B) any group of individuals whose primary purpose is to obtain money through illegal acts; or

"(C) any terrorist organization, as defined in section 2339B.

"(b) ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT.—

"(1) IN GENERAL.—In any Federal investigation or criminal or civil enforcement matter, including any form of administrative proceeding or adjudication, an agent or attorney of the United States shall not—

"(A) demand or request that an organization, or a current or former employee or agent

of such organization, waive the protections of the attorney-client privilege or the attorney work product doctrine;

"(B) offer to reward or actually reward an organization, or current or former employee or agent of such organization, for waiving the protections of the attorney-client privilege or the attorney work product doctrine; or

"(C) threaten adverse treatment or penalize an organization, or current or former employee or agent of such organization, for declining to waive the protections of the attorney-client privilege or the attorney work product doctrine.

"(2) CHARGING DECISIONS.—

"(A) IN GENERAL.—In any Federal investigation or criminal or civil enforcement matter, including any form of administrative proceeding or adjudication, an agent or attorney of the United States shall not consider any conduct described in subparagraph (B) in—

"(i) making a civil or criminal charging or enforcement decision relating to an organization, or a current or former employee or agent of such organization; or

"(ii) determining whether an organization, or a current or former employee or agent of such organization, is cooperating with the Government.

"(B) CONDUCT.—The conduct described in this subparagraph is—

"(i) the valid assertion of the protection of the attorney-client privilege or attorney work product doctrine;

"(ii) the provision of counsel to, or contribution to the legal defense fees or expenses of, a current or former employee or agent of an organization;

"(iii) the entry into, or existence of, a valid joint defense, information sharing, or common interest agreement between an organization and a current or former employee or agent of such organization, or among its current or former employees;

"(iv) except as provided in subsection (f), the sharing of relevant information in anticipation of or in response to an investigation or enforcement matter between an organization and a current or former em-

ployee or agent of such organization, or among its current or former employees; or

"(v) the failure to terminate the employment or affiliation of or otherwise sanction any employee or agent of that organization because of the decision by that employee or agent to exercise personal constitutional rights or other legal protections in response to a Government request.

"(3) DEMANDS AND REQUESTS.—In any Federal investigation or criminal or civil enforcement matter, including any form of administrative proceeding or adjudication, an agent or attorney of the United States shall not demand or request an organization, or a current or former employee or agent of such organization, to refrain from the conduct described in paragraph (2)(B).

"(c) INAPPLICABILITY.—Nothing in this section shall be construed to prohibit an agent or attorney of the United States from requesting or seeking any communication or material that—

"(1) an agent or attorney of ordinary sense and understanding would not know is subject to a claim of attorney-client privilege or attorney work product;

"(2) an agent or attorney of ordinary sense and understanding would reasonably believe is not entitled to protection under the attorney-client privilege or attorney work product doctrine; or

"(3) would not be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation.

"(d) VOLUNTARY DISCLOSURES.—

"(1) IN GENERAL.—Nothing in this section may be construed to prohibit an organization from making, or an agent or attorney of the United States from accepting, a voluntary and unsolicited offer to waive the protections of the attorney-client privilege or attorney work product doctrine.

"(2) CONSIDERATION IN CHARGING DECISIONS.—An agent or attorney of the United States shall not consider the fact that material provided as described in paragraph (1), or any material redacted therefrom, had been subject to a nonfrivolous claim of attorney-client privilege or work-product protection in—

"(A) making a civil or criminal charging or enforcement decision relating to an organiza-

tion, or a current or former employee or agent of such organization; or

"(B) determining whether an organization, or a current or former employee or agent of such organization, is cooperating with the Government.

"(3) OTHER CONSIDERATION.—Subject to the limitations under subsection (b), an agent or attorney of the United States may consider a voluntary disclosure described in paragraph (1) for any other purpose that is otherwise lawful.

"(e) NOT TO AFFECT EXAMINATION OR INSPECTION ACCESS OTHERWISE PERMITTED.—This section does not affect any other Federal statute that authorizes, in the course of an examination or inspection, an agent or attorney of the United States to require or compel the production of attorney-client privileged material or attorney work product.

"(f) CHARGING DECISIONS NOT TO INCLUDE DECISIONS TO CHARGE UNDER INDEPENDENT PROHIBITIONS.—Subsection (b)(2) shall not be construed to prohibit charging an organization, or a current or former employee or agent of such organization, for conduct described in clause (ii), (iii), or (iv) of subparagraph (B) of that

subsection under a Federal law which makes that conduct in itself an offense.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 201 of title 18, United States Code, is amended by adding at the end the following:

"3014. Preservation of fundamental legal protections and rights in the context of investigations and enforcement matters regarding organizations.".

APPENDIX D –Filip/ Spector Correspondence

Office of the Deputy Attorney General
Washington, D.C. 20530

July 9, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Senator Specter:

At your request during my confirmation proceedings last year, I committed to review the Department of Justice's Principles of Federal Prosecution of Business Organizations ("Principles"), the internal policy that governs how all federal prosecutors investigate, charge, and prosecute corporate crimes. I write to update you on my review, and to provide you with a summary of certain changes to the Principles that the Department intends to make in the coming weeks to address issues you have raised and that were echoed during my review. I respectfully ask that you give us an opportunity to implement these changes and then review their operation after a reasonable amount of time before pursuing legislation in this area.

As you are aware, some have raised concerns about the effect of the Principles on the preservation of the attorney-client privilege and work product protection. Specifically and most notably, some have argued that the Department has used the threat of criminal indictment and prosecution (or the threat of withholding cooperation credit) to coerce corporations to waive privilege or work product protection against their will and to provide information to the government that otherwise would be subject to these protections. Others have argued that the perceived widespread use of privilege waivers has inhibited candid communications between corporate employees and legal counsel whose advice has been sought. Additionally, some have expressed concern that the Principles improperly permit the government to limit or refuse cooperation credit to a corporation if the corporation has advanced attorneys' fees to its employees, failed to sanction or fire allegedly culpable employees, or entered into joint defense agreements.

In response to these and other concerns, senior attorneys in the Department and I met internally and with several organizations and former government officials who expressed an interest in this issue, including representatives of the corporate community, criminal defense attorneys, in-house counsel, and civil liberties advocates. During those meetings, we discussed the matters noted above, as well as the Department's belief that we have been judicious in our limited requests for waivers. We pointed out that in the eighteen months since the Principles were last amended, the Department has approved no requests by prosecutors to obtain from corporations core attorney-client communications or non-factual attorney work product.

Despite the obvious difference of opinion between the Department and these groups in some key areas, our meetings were extremely productive and we did find common ground, particularly in the areas of joint defense agreements, attorneys' fees, and employee sanctions. I also came away impressed by the need for the Department to address any lingering perceptions that our conduct in corporate criminal investigations is anything other than fair and respectful of the attorney-client privilege. To that end, I have carefully reviewed the Principles and expect that the Department will make the following revisions to them in the next few weeks:

- Cooperation will be measured by the extent to which a corporation discloses relevant facts and evidence, not its waiver of privileges. The government's key measure of cooperation will be the same for a corporation as for an individual: to what extent has the corporation timely disclosed the relevant facts about the misconduct? That will be the operative question – *not* whether the corporation waived attorney-client privilege or work product protection in making its disclosures.

- Federal prosecutors will not demand the disclosure of "Category II" information as a condition for cooperation credit. To be eligible for cooperation credit, a corporation need not disclose, and the government may not demand, what the McNulty Memo defines as "Category II information" – namely, non-factual attorney work product and core attorney-client privileged communications. (Of course, attorney-client communications that were made in furtherance of a crime or fraud, or that relate to an advice-of-counsel defense, are excluded from the protection of the privilege by well-settled case law and will therefore continue to fall outside these principles.)

- Federal prosecutors will not consider whether the corporation has advanced attorneys' fees to its employees in evaluating cooperation. The advancement of attorneys' fees or provision of counsel by a corporation to its employees will not be taken into account for the purpose of evaluating cooperation.

- Federal prosecutors will not consider whether the corporation has entered into a joint defense agreement in evaluating cooperation. The mere participation in a joint defense, common interest, or similar agreement by a corporation will not be taken into account for the purpose of evaluating cooperation. The government may, of course, request that a corporation refrain from disclosing to others sensitive information about the investigation that the government provides in confidence to the corporation, and may consider whether the corporation has abided by that request.

- Federal prosecutors will not consider whether the corporation has retained or sanctioned employees in evaluating cooperation. How and whether a corporation disciplines culpable employees may bear on the quality of its remedial measures or its compliance program; it will not be taken into account for the purpose of evaluating cooperation.

During my tenure as Deputy Attorney General, I have appreciated the courtesy you have extended to me and to the Department, particularly your patience during my review of this important issue. I have come to the conclusion that the above changes to the Principles are preferable to any legislation, however well intentioned and diligently drafted, that would seek to address the same core set of issues. I think we all very much share an appreciation for the foundational role that the attorney-client privilege plays in our legal system, including our system of criminal justice. The interest that you both have shown in this matter, including your vigilance in protecting the attorney-client privilege, certainly has motivated the Department to pursue the changes I have outlined above.

I remain available to discuss this matter with you further at your convenience. Thank you again for considering our views.

Sincerely,

Mark Filip
Deputy Attorney General

July 10, 2008

The Honorable Mark Filip
Deputy Attorney General
Department of Justice
Washington, DC 20530

Dear Judge Filip:

Thank you for your letter of July 9, 2008, addressed to Chairman Leahy and me concerning the issue of Attorney-Client Privilege.

I begin my consideration of this issue in the context of two fundamental legal principles:

> 1. The constitutional right to an attorney indispensably includes the attorney-client privilege; and
>
> 2. The Government has the burden of proof to produce non-privileged evidence in order to convict.

The importance of the attorney-client privilege was stated by Justice Rehnquist in *Upjohn* when he wrote that the privilege's:

> "purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyers being fully informed by the client."

I am concerned about the delay in enacting legislation while the Department of Justice is continuing to act under the McNulty Memorandum with individuals incurring enormous attorneys' fees including appellate litigation. The Committee's first hearing on this issue was held on September 12, 2006 and my legislation, now S.3217, was introduced on December 8, 2006. Thereafter, there was a revision of the Thompson memorandum with the McNulty memorandum on December 12, 2006 and another hearing was held on September 18, 2007.

Then on October 17, 2007, this issue was raised at the confirmation hearings of Attorney General Mukasey. As you note in the opening line of your letter, last year you committed to review the issue during your confirmation hearings which were held on December 19, 2007. When you and I discussed this matter on June 26, 2008, I pressed as to when we would have something in writing and you responded that you expected it sometime later this summer.

I note illustratively the high legal fees which have been incurred by individuals as cited in the opinion of Judge Kaplan, in *United States v. Stein*, 495 F.Supp.2d 390 (SDNY 2007), who said that the litigation costs among the individual defendants had already averaged $1.7 million. One defendant was cited as being "insolvent." The costs cited by Judge Kaplan were all before trial

and appellate costs, which will be much higher. The Department of Justice conceded to Judge Kaplan that $3.3 million would be "a very conservative estimate" of the average defense costs going forward, and the defendants' lawyers cited an average expected cost of $13 million. This squares with the New York Law Journal's report last year, which said, "[r]ecent court decisions have revealed the cost of an individual's defense can reach as high as $20 million to $40 million." I would be interested to know what is happening in the other cases, besides KPMG, which involve this issue and what kind of expenditures have been required of individuals who have been subjected to the implementation of the Thompson/ McNulty memoranda.

In the context of these lengthy delays and the potential prejudice which is involved in these matters, I think it is too much to ask for the legislative process to await a written revision of McNulty and then await a review of the implementation of a new memorandum for a "reasonable amount of time" which could be very long.

While I understand that the revised memorandum you are preparing will be more explicit, the revisions set forth in your letter are unsatisfactorily vague. When you comment that cooperation will be measured by the disclosure of facts and evidence, not the waiver of privilege, such facts and evidence may have been obtained from an individual who expected the confidentiality of his disclosures of facts and evidence would be protected under the attorney-client privilege. I cite the example of the employees in the case, *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333 (4th Cir. 2005), who were confused about confidentiality because the company's counsel told them, "We can represent you as long as no conflict appears."

When you refer to "Category II" information and exclude "non-factual attorney work product," that leaves a large undefined area where factual and non-factual attorney work product may overlap.

In your statement that federal prosecutors will not consider the advance of attorneys' fees, would that standard lead the Department of Justice to abandon its appeal in the case of United States v. Stein? Beyond that specific case, what other cases and what cost to defendants is the Department of Justice pursuing under Thompson/McNulty because the corporation is paying defendants' attorneys fee?

On the question of federal prosecutors not considering whether the corporation has entered into a joint defense agreement, I am interested to know what relevance that factor has ever had and how often the Department of Justice opposed such joint defense agreements in the past.

Similarly, as to federal prosecutors not considering sanctions against employees, I would be interested to know what relevance that ever had and what the Department of Justice has done on that matter in past cases.

Beyond these specific issues, there are other concerns. A Department of Justice statement of Principles would not bind any other federal agencies such as the SEC and IRS. Similarly, any Department of Justice statement of Principles would be subject to modification by subsequent Attorneys-General unlike legislation. It is worth noting that former Attorneys-General Edwin

Meese and Dick Thornburgh testified in strong opposition to what the Department of Justice was doing with the Thompson and McNulty memoranda.

I am making this prompt response to your letter in an effort to move this matter along. These are my initial reactions to the outline of your new proposal which I may supplement as we get more input from other interested parties.

Shortly before the July 4th recess, Chairman Leahy commented that he may schedule Judiciary Committee action on the pending legislation. My recommendation to Chairman Leahy is that we move ahead in the Judiciary Committee to either come to some accommodation with the Administration on legislation or have Congress move ahead on its own. In the interim, I would appreciate it if you would complete a more explicit statement on a "Filip memorandum" to supplement Thompson/McNulty so that we may be in a position to move ahead as promptly as possible. I would further appreciate your informing the Committee on the specific cases which are pending under Thompson/McNulty including the costs incurred by companies and individuals.

Sincerely,

Arlen Specter

APPENDIX E – IRS Voluntary Consent Form

Voluntary Consent to a Search of Person, Premises, or Conveyance

Statement of Rights

Before we search your premises (or person or conveyance) you should be aware of your rights under the Fourth Amendment to the Constitution.

You have the right to refuse to permit us to enter your premises (or to search your person or conveyance).

If you voluntarily permit us to enter and search your premises (or to search your person or conveyance) any incriminating evidence that we find may be used against you in court, or other proceedings.

Prior to permitting us to search, you have the right to require us to secure a search warrant.

Waiver

I have read the above statement of my rights and, fully understanding these rights, I waive them freely and voluntarily, without threat or intimidation and without any promise of reward or immunity.

Person, premises or conveyance to be searched:

Location of search:

Date:

Time:

Witness:

Name

Name

Name

Special Agent

Title

Form 6884 (5-82) Department of the Treasury - Internal Revenue Service