ASSOCIATION OF CORPORATE COUNSEL

Corporate Criminal Investigations and Liability in the Sarbanes-Oxley Era
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Sponsored by Saul Ewing LLP

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Moderator: Sarah Starkweather, Director and Counsel, UBS Securities LLC

(Sarah Starkweather): Hello. I'm (Sarah Starkweather), and I'll moderate today's panel. I am the immediate past chair of ACC's corporate and securities law committee, which is the committee sponsor of today's program.

For my day job, I work in the legal department of UBS Investment Bank currently supporting the fixed income businesses. In past positions, I have also worked with UBS and Fanny Mae on addressing Sarbanes-Oxley issues, including some of the issues we will be discussing today.

I want to thank all of you for joining us today. Before we start, I wanted to mention two administrative points: first, if you have a question for the panelists, you type it at any time in the box in the lower left corner of your screen. We will generally hold the questions until the end.

Second, we ask that you fill out the evaluation form that appears on your screen as item one under the links heading on the left of your screen.

Joining me today on the panel is (Jim Becker). (Jim) serves as the co-chair of the White Collar and Government Enforcement Practice Group at the law firm of Saul Ewing. Chambers USA named (Jim) as one America's leading lawyers in white-collar litigation in 2007. Prior to joining Saul Ewing, (Jim) served as an assistant U.S. attorney for the Eastern District of Pennsylvania where he was chief of the major crimes section. He's also a former trial attorney for the Antitrust Division of the U.S. Department of Justice. (Jim) joins us today from Philadelphia. Welcome, (Jim).

(Jim Becker): Thank you, (Sarah). Happy to be here.

(Sarah Starkweather): Also joining the panel today, we have (Chris Hall), one of (Jim)'s partners at Saul Ewing. (Chris) joins Saul Ewing from the U.S. attorney's office a year ago. He assists clients during internal investigations, criminal investigations and civil enforcement actions. (Chris) places particular emphasis on financial services, health care, defense and government contract industries. Welcome, (Chris).

(Chris Hall): Thanks, (Sarah).

(Sarah Starkweather): Finally, we're pleased to have (Dave Resnikoff) with us today. (Dave) is associate general counsel and vice president of compliance and ethics at Baxter International a global pharmaceutical and Devices Company based in Chicago. (Dave) leads Baxter's worldwide compliance and ethics team and helps manage Baxter's response to government investigations. From 2003 to 2006, (Dave) was associate compliance counsel for investigations at Tyco International where he helped build Tyco's new ethics and compliance program and managed the company's internal compliance investigations. Prior to Tyco, (Dave) served as an assistant US attorney in Philadelphia where he prosecuted healthcare fraud and other white collar crimes. A warm welcome (Dave).

(Dave Resnikoff): Thanks, (Sarah).

(Sarah Starkweather): OK. Let's begin today's presentation with a brief overview of the Sarbanes-Oxley provisions and regulations in which govern internal investigations. (Chris)?

(Chris Hall): Thanks, (Sarah). We're going to presume sophisticated audience, but we did want to start with kind of the basic statutory framework for internal investigations as changed by SOX and the pertinent provisions appear in Section 301 in subparagraphs 4, 5 and 6. And I am not going to read the provisions, but essentially section four requires that every audit committee of a publicly created company establish procedure for a communications channel, for complaints and a process by which those complaints will be handled and it has to include an confidential, anonymous communications channel.

Subparagraphs 5 and 6 give teeth to that, in that the audit committee is authorized to engage advisors, to assist it in handling those complaints and to fund the expense of those advisors. So that's the statutory framework, the immediate statutory framework there are other provisions that we are going to get to in the program that govern internal investigation but those, that's kind of the base line of where we start.

(Sarah Starkweather): OK. Thanks, (Chris). (Dave), can you walk us through how these provisions work in practice?

(Dave Resnikoff): Sure. Well, I think the good news is that since the Sarbanes-Oxley Act and the sentencing guidelines enhancements, many, in fact most public companies have enhanced or gone out and installed their hotlines and that's the good news. The bad news is from a workload perspective is that those hotlines are actually working and there is a lot of volume that is coming at the business end of those hotlines. And the questions arises as to how do you handle the hundreds of issues that are coming out of these hotlines if you are a much larger company and how do you handle each of those issues appropriately, make sure your not missing issues that are coming up and you are handling them as both Sarb-Ox and sentencing guidelines and regulators would want you to handle them.

The way we approach that at Baxter and the way I would advise to handle that is to really start with the end in mind that is what are, determine what your goals are and I would suggest that the goals of any investigation of any allegations of misconduct, regulatory or otherwise, are a thorough investigation of the facts, a speedy and objective inquiry, very prompt and accurate legal analysis, with minimal disruption to the business, investigation that protects the identity and the reputation of the accused, something that protects the identity of the whistleblower, actual independence of the investigation and the appearance of

objectivity, prompt, proportionate disciplinary decisions consistent across the business, all maintaining applicable privileges unless there is an affirmative decision to wave.

And finally, the goal of identifying any compliance gaps that exist and designing a remedy that fills them. Those are a lot of goals. Some of which overlap, some of which indeed compete with each other and the rest of the discussion today is going to be spent flushing out, really how to accomplish those goals in the very tricky world of internal investigations.

Let me say that I think the primary thing that any company, any lawyer, any in house compliance person can do in triaging this flood of information coming out of these hotlines is to right from the start make sure that you have the right people at the table, spotting the issues that are raised by any person who is bringing a complaint into any part of the organization whether it's through a hotline, through HR, through finance, through legal, through maybe a vendor or customer and so that whether it's an accounting issue or it's a trust issue or it's a healthcare fraud and abuse issue, or a foreign corrupt practice issue there are people that are skilled in those areas or at least familiar with them to spot the issue and make sure the team that's put together to handle each allegation is appropriate. And indeed weeding out those investigations that are better handled by the human resources group, the finance group or some other entity within the organization.

So, I will also say that it's important to centralize intake and to have a periodic meeting with this multi-disciplinary to evaluate each allegation that comes in and to make sure as investigations progress, that the nature of the issues that are being handled haven't changed so much that you need a new teammate or team member with new skills to help run that investigation. Obviously, the allegations that come in ought to be logged and tracked and the investigation of the process should be pursued through factual resolution analysis, disciplinary decisions, compliance gap analysis, remedies and of course, internal external communication decisions. But again, the important place to start is with triaging matters at the beginning.

We at Baxter actually meet once a week with the vice president of audit and with our director of security and our chief labor and employment lawyer and we go through all of the new matters that have come in over the week and make sure their handled appropriately at the start.

(Sarah Starkweather): Thanks, (Dave). (Jim), so what are (Dave)'s options for how to staff an internal investigation?

(Jim Becker): I guess the main point which follows from what (Dave) has just outlined, range of complaints coming in, there is obviously a triage process that he mentioned and you know, it all falls into different buckets those that perhaps, as he suggested, don't require involvement of lawyers at all and are perhaps left to human resources but significant number of the buckets will inevitably require the involvement of in house counsel directing and providing legal advice with regard to the investigation and the significance of any findings.

In this day in age you read the "Wall Street Journal" and dealing with the literature in this area, you see that there are a wide range of possibilities; one size does not fit all. Some investigations are handled purely by in-house counsel, as (Dave) has described, with this appropriate staff from within the company. Not at all uncommon for inside counsel to call

on outside counsel to come in and either conduct the investigation or assist in house counsel in conduction it. The general counsel these days will go to outside counsel, but for specific deliberate reasons refrain from going to their regular outside counsel but bring in special investigative counsel.

Perhaps this doesn't have a historical track record of representing the company on other matters and with the responsibilities of the audit committee of the publicly traded company in the ((inaudible)) world, the audit committee by statute has to have it with total authority to hire accountants and other experts including outside counsel to come in and conduct investigation, so that might be regular counsel or outside counsel, so I want to having said that one size doesn't fit all. I want to throw it back to (Chris) and (Dave) to get their thoughts on some of the factors that shape that decision of which direction does the company go in terms of which counsel would be the appropriate one to be involved in with the investigation. (Chris), does that have anything to do with, for example, with who the complainant is and where they are coming from and what their credibility might be?

(Chris Hall): And that's somewhat of a proxy for that decision that you say you are making out that you've outlined above (Jim). Depending on the source of the complaint, they give you insight as to the credibility of the complainant. There's a wide range of, and I'd love to hear (Dave)'s thoughts on this, on wide range of possible complaints that might come into your hotline or other confidential communication channel, and I'd love to hear how (Dave) makes those assessments as to credibility, but obviously a subpoena, especially a grand jury subpoena, in of itself has a certain amount of gravitas and credibility.

The government does not issue a grand jury subpoena without some basis and ratching it up even further in this post ((inaudible)) world a complaint by your outside auditor merits special attention and may certainly may inform you as to how you want to stop that investigation. Those are just a couple of the factors I'm going to turn in back now to (Dave) and (Jim) for some others.

(Dave Resnikoff): I guess what I would say is that you need to know that from the start your investigation may be looked at in hindsight by either the board of directors or your own management or federal regulators or prosecutors or state prosecutors, and so it is important to handle these things right from the start.

So the first question to ask yourself, do you have the expertise to even begin evaluating the credibility of the whistle blower or the substance and meritorious nature of the complaint. But assuming you have that in house expertise, and even if you don't, I think the first step is to really scope the issue that's been raised and to evaluate, you know, the credibility of the whistleblower in the sense of rather or not they are a) operating with a full deck; b) do they have an ulterior motive here which undermines the credibility; and c) have they brought forth sufficient details that will make you believe that you may have an issue of further inquiry; or d) even results in liability for the company. So as you continue down the spectrum of credibility, the more credible, the more substantive the whistleblower's out ((inaudible)) issues are, the more you may want to think about bringing people to the table who have real expertise to handle the issue going forward.

(Jim Becker): This is (Jim). I think in all of that I agree with apart from just evaluating the credibility of the source. I think the content of the allegation and the level of seriousness and

how high within the company this is reaching, at least in terms of an allegation, his senior management conduct, you know, involved or an issue, is that going to be the subject of the investigation or is this something that however bad it might be, you know, at least on the surface appear to be limited to one, you know, outpost of the company but the higher the level and the more serious the allegation, I think that from a standpoint of which counsel is the appropriate counsel to be involved and tell me if you disagree with this.

But I think in house counsel has to be asking himself or herself, can we, will we be perceived as having conducted an objective investigation and a fair thorough investigation if we, you know, in house counsel are charged with the task of investigating misconduct of our own management or is that a situation because of the seriousness of the allegation we've got to go outside and if going outside, do we have to be concerned about whether we're going to our familiar counsel who might have all of the expertise and might have the best resources to break the barrier but can they fairly conduct an investigation where they might be called upon to pass judgments about the conduct of his conduct of senior management with whom they may have close personal relationships.

(Dave Resnikoff): I absolutely agree, and I think it's a question that in house counsel and outside counsel as continuously ask themselves as the investigation unfolds because that perception of objectivity, of independence, of credibility is so important in so many ways whether you're dealing specifically with management and the board in terms of making disciplinary decisions or business decisions or talking to the government about resolving a possible violations of law, so that, in deed the ((inaudible)) in house counsel, may need management who is under investigation. Perhaps the less in house counsel ought to be deeply involved and the more reliance they place on outside counsel. I think that's exactly the way it should play out.

(Chris Hall): (Jim), can you talk for just about minute about how allegations of this statement and the financial statement might affect the design of an internal investigation team?

(Jim Becker): Well, I think where possible financial statement are involved, I think you have to have a heightened concern sooner, rather than later, that this may ultimately lead to a judgment about management's handling of the situation as an accounting manner, whether that's the CFO and perhaps even the CEO in terms of signing off on the statements they are required to under ((inaudible)), so on the one hand you might have an allegation of some wrongdoing in the first instance has nothing to do with them but if it, you know, looks like it's potentially material enough and significant enough to have financial disclosure implication then automatically you're into sort of second guessing and examining and putting under the microscope the conduct of at least the CFO and perhaps the CEO, and so I think you enter into that world of do we need to go out of our way to try and make sure we set this up in a way that when it's put under the microscope by somebody else from an outside party perhaps, you know, will it have the necessary initiative of having been subjected to thorough ((inaudible)) called upon to look at high level management's financial reporting decisions.

Male: And, (Dave), can you talk to us a little bit about the (Higginbotham) decision?

(Dave Resnikoff): Sure. (Higginbotham) is a very important decision with respect to the issue of ((inaudible)) investigation in public disclosure, not governmental disclosure but public disclosure, of allegations of wrongdoing. There's always been a very good question of, you

know, what do you need to publicly disclose the fact that there's an allegation of wrong doing and that you are looking at it and I don't report to an expert of public disclosure, but (Higginbotham) does (stance) the proposition that a company has a reasonable amount of time to determine whether an allegation of misconduct is meritorious or is not meritorious and that it need not to disclose the ((inaudible)) of unsubstantiated allegations. So the good news is we have a reasonable amount of time to look at these matters prior to facing that disclosure decision.

(Jim Becker): Just one quick follow up on that, and this is (Jim Becker) speaking. At the same time, there may be real publicly traded company disclosure reporting obligations you may, you know, be you're doing quarterly reports, you know, every 90 days you're dealing with the outside auditors on what disclosures have to be made in connection with those quarterly FCC filings, and so you may be under some tight time deadline to make difficult judgments about whether you have a disclosable reportable event or not in light of the appropriate accounting standards, such as ((inaudible)) whether, you know, whether there's a reasonable possibility of a claim that could result in a negative outcome for the company being asserted. You may have to make quick judgments on that.

(Chris Hall): And just moving ahead with additional factors that may inform you are to the design of your internal investigation team, I think we talked about the ((inaudible)) argument already as (Jim) talked about the importance of the appearance of the ((inaudible)). But, (Dave), could you speak about some of these other factors?

(Dave Resnikoff): Sure, again focusing on the choice of whether or not you handle an investigation internally or you turn to outside counsel, I think there's some real issues that play out depending on which choice you make and that you should think of up front. One is if you handle an investigation internally. Generally, I have found that it's faster, it's a little more efficient, and certainly a lot less scary for employees and a lot less chilling on the general business environment, and there is a lot less disruption of the business going forward.

Conversely, when you do bring in outside counsel, there is a lag time in the selection of outside counsel, the education of outside counsel, the competing demands of outside counsels. Schedule tends to be a factor and it is extrinsically a little more scary to employees who tend to be very, very jumpy when complete strangers who are also lawyers begin questioning them about their conduct. And that is not to say that you should not use outside counsel but it is a factor, it is a dynamic that exists so to the extent that you can not handle something internally or better point is that you expect to bring in outside counsel just be very aware of that dynamic and try to mitigate those known side affects.

(Chris Hall): (Dave), let's talk now for a minute about the personalities of senior management and the board and how that might factor into the decision as to how you staff an internal investigation.

(Dave Resnikoff): Sure. Ultimately there is a real practical matter staffing needs to be geared towards the appetite of management and the board. At least that should be a factor because they are going to be the in the first instance primary audience for the results of any internal investigation. So the choice of, whether it is an audit-committee lead investigation or management investigation, is to be driven in large part by that dynamic and the personalities in each of those groups.

The choice of which outside counsel is used will depend really on the appetite for the audit committee or conversely the management to control the pace and scope of an internal investigation. And I think it is worth saying that there is a lot of potential here for tension and some real communication skills to be brought to bear from the management of a significant investigation as it relates to the management's relationship with the audit committee and vice versa. There is a lot of room for tension.

(Chris Hall): In the interest of time I think we will advance over the next two slides fairly quickly. I think in terms of the challenges that face outside counsel or regular outside counsel, (Jim) touched on this before, where it may be very difficult for regular outside counsel to assist in an internal investigation of senior management with whom it has a very close and long-standing relationship and we saw that also affects the perception after the fact depending on your ultimate audience of the independence of the investigation, we saw that as part of the Enron fall-out. So those are additional challenges and I think—

(Jim Becker): (Chris), just on that quickly. Apart from just the close personal relationship you can also have a situation and this comes up more and more frequently this in day and age where regular outside counsel's advice is at issue in the underlying investigation.

That is, for example, I think it was in Missouri a few years ago, a health care fraud case both outside counsel and in-house counsel were named in an indictment as coconspirators with the business managers who entered into a business transaction that the government later accused as being a felony violation of the anti kick-back statue. And so the outside counsel's business advice was at the core of the investigation. Obviously something like that needs to be flagged day one because you do not want to go down the road of having a so-called thorough investigation done by the counsel whose advice ultimately ends up under the microscope.

(Chris Hall): That is a great point. (Dave), do want to talk about some of these additional challenges for conducting an independent investigation.

(Dave Resnikoff): Sure. As I said before, it is very important to have a real and apparent objective in independent investigation and government regulators and prosecutors will repeatedly say that. But it is possible to take that concept to an extreme though, where we really throw the baby out with the bath water, I do not think that independence has to mean that outside counsel has virtual inspector general authority to conduct an investigation without the participation of the legal department or business control unless that is what the board wants of course. Because I think there is a real cost to not partnering and functioning well with the legal department and the matter of substance is the matter of getting what everyone wants which is to the bottom of the bath and having a good legal analysis and understanding what the problems are.

If outside counsel is as independent as can be and operate with complete independence, I think that they lose access to a lot of context and a lot of historical context especially that is very helpful in understanding what may or may not have gone wrong with the company and in fashioning an appropriate report. I also think that without partnering with inside counsel they lose the persuasive impact in interview of in-house counsel who can really take the edge off an interview and really help get to the bottom of the matter. I also think if outside

counsel operated completely independently there is no institutional memory that is left behind at the client once they disappear beyond perhaps a report, if at all.

And finally, there is a cost issue. Which is that cost can escalate very, very quickly beyond anybody's expectations. And that can create a lot of friction between the finance department and, say, the legal department in the course of the investigation. So a bunch of land mines to look for. And I guess I would say at the end of the day it is important for outside counsel to be very sensitive to these matters and to partner well with inside counsel moving forward.

(Jim Becker): This is (Jim). Just one quick comment on that. I agree with everything (Dave) just said and that said though, there are circumstances with increasing frequency in this day and age post ((inaudible)) as we have discussed previously where it may be the audit committee that is driving the train and management, senior management may be somewhat resistant to that just given the natural tension that exists when someone like the audit committee comes in to Monday morning quarterback, perhaps you know judgment and decisions and actions or inactions on the part of senior management.

So in those situations there may have to be some trade off and accepting, you know, less in the way of those obvious efficiencies that (Dave) is emphasizing, are very important for getting to the bottom line for the sake of the audit committee sort of maintaining it's, you know, independent and responsible role it has. It may have to tolerate certain inefficiencies, you know, to be able to claim at the end of the day that it has fulfilled its statutory and fiduciary responsibilities to the company. Sure.

(Sarah Starkweather): OK. Thanks. Well we have now thought through how to structure the right team and now it is time to get down to brass tacks, the employee interview. What should we be thinking about here?

(Chris Hall): Well, again, we are presuming a sophisticated audience, we are confident that everyone is well familiar with the Up John opinion, very, very briefly the Supreme Court in that case did away with the control group test and the good news is that it established that outside counsel can establish an attorney/client relationship with essentially any employee with whom it needs to interview for the purpose of discovering the facts that it needs to advise the senior management as to the appropriate course of action to provide legal counsel.

The bad news is that, that creates a question in the mind of the employee as to whether that attorney/client relationship extends to them as individuals. And I am sure (Dave) can talk to us more about this, but it would be quite a natural sentiment for an employee to believe that an attorney representing a company might also represent them. So what we would like to do is direct our audience to the key provisions to the code of professional responsibility that guides attorneys that are involved in internal investigations. And the first one is found at Rule of Professional Conduct 1.13, that guides lawyers who represent an organization as their client and lawyers should focus on subparagraph D that requires that attorneys as a part, as an ethical matter are required to make clear to an employee during the course of an interview and best practices require that it be at the inception of an interview that they represent the company and that they may have interests that are different from the employee.

The second rule of Professional Conduct that guides practitioners in this area is Rule 4.3, which guides attorneys that are dealing with unrepresented persons. And again, that requires

lawyer's where there is a possibility of confusion to let unrepresented parties now that the lawyers represent the organization and that their interests might diverge and especially in the post ((inaudible)) world, and we are going to get to this later in the program where there is a probability, certainly a very reasonable possibility that later on the company is going to want to disclose the findings of this investigation to an outside regulator to that the employee understands that the confidentiality of their communications with the in house lawyer conducting that investigation, that it not something that the employee controls, that that's the organizations privilege and the organization may well decide, in its best interest, to disclose that to the government or some other regulator in the future.

So that is the very important second to take away on this is, with respect to the so call corporate Miranda warnings, that they be very clear and that they be given at the outset of an investigation. Because almost by definition when you decide to undertake the effort to expend the resources to interview a particular employee about an alleged wrong doing, almost by definition they are someone that's like or very possibly or reasonably going to have interests that diverge from those of the company. (Jim) do you want to …

(Jim Becker): Just on this point of employee interviews, everything (Chris) just said in terms of Upjohn is absolutely right and it is advise that is critical to give and at the same time in the real world practical application of it, you want to deliver it in a way that hopefully you are not going to chill your own employees from talking to you, if you ultimately want to get information. And sometimes, you know lawyers will ask themselves, whether they are in house lawyers or outside counsel, well what if the employee starts to incriminate himself or herself in wrong doing, possibly criminal wrong doing, is there some obligation out of ethical or otherwise to bring a halt to the interview and sort of advise the employee further about where they are in the process and the risk they are facing and this is an issue people can differ about.

I think it is more a question of labor relations and employee fairness than it is a matter of ethics in my own personal view as company counsel, is that in that situation I am charged with trying to get to the bottom of some allegation of misconduct, wrong doing, you know whatever. I can only do my job on advising the company on how to deal with that by getting the facts as best I can. So you know, if an employee starts down that road I want to get to the end of it and complete the interview and get every last detail because it might be my last opportunity to talk to that employee on reflection that they decide or if after the interview we have a discussion of about where they stand and they then go seek counsel, you know I may no longer have as direct and ready access to that employee.

So my rule of thumb, I realize that there may be exceptions to this, my rule of thumb is just press on and get to the bottom of it because that is ultimately in the interests of the client or corporation who I made clear at the outset of this employee that's my only obligation and that's who I represent.

(Chris Hall): (Dave), I think you have some real insights to the relationship to the human resources considerations.

(Dave Resnikoff): Sure, and I agree with (Jim) completely. Especially if you think lose or win and this is and this is the last chance you have access to them and then maybe they are going to be suspended or terminated or they are going to just leave on their own accord, you've got to

press on. You have an ethical duty to get the information while you can, assuming they have been given the proper corporate Miranda warnings.

However, I think in the majority of cases where it is not clear what happened and the facts are still in play, that if you feel that the witness, in a lot of cases the witnesses will, number one be very grateful for it and feel that you created a lot of good will by getting them counsel who can help them perhaps prepare for an interview with a lot of documents, a lot of e-mail that is going to give you at the end of the day a better statement and a better understanding of the facts than if you had just pressed ahead with an interview and gotten maybe 30 to 40 percent of what is out there so that I have had very good luck getting employees independent counsel who really helped with the prep and who then are able to stick with us for a second, third interview to understand what the issues are and that has worked well.

(Chris Hall): (Dave), tell us a little bit about, you worked for an international company, tell us how that plays a role.

(Dave Resnikoff): You know if you've got an investigation, which is carrying you abroad or maybe it is solely located abroad, particularly in Europe. A couple of issues to keep in mind, one, in most European Countries there is no attorney/client privilege which is poor communications with in house counsel, it only exists with outside counsel because in house counsel are presumed to be to close to management for there to be a true attorney/client relationship and a recent decision by the European Court ((inaudible)) in September verified that and it may be on appeal to the Commission at this point, but I think for the time being that is going to be the rule.

Second issue is that especially in Europe there are Unions known as Works Counsels, which employees will want to have at the table during interviews and Works Counsels will angle to be there. So very tricky, thorny issue to get through and it suffices to say that it is impossible to just say no, it takes a lot of negotiation to figure out who is going to be at the table in an interview and who is not and what the ground rules for the interview are.

(Sarah Starkweather): OK. Thanks, (Dave).

Let's talk about what happens next. You have completed you fact gathering and analysis, then what?

Male: Go ahead, (Dave).

(Dave Resnikoff): Sure, you know, as a general matter you have to make a decision about whether you are going to memorialize you factual findings and your legal analysis and who you are going to report to internally. Is it going to be to general counsel, a broader selection of senior managers, you have to ask yourself how you are going to do that because of privilege, consideration and then possibly the Board.

I think, (Jim), you have some thoughts on that?

(Jim Becker): I think the point to emphasize here, it is really a simple and obvious one, but prior to ((inaudible)) I don't think it home as frequently as it does not and that is these are all possible audiences going into this before you really know that you have. I mean prior to

((inaudible)) I think it was more common for in house counsel or outside counsel to think well lets investigate, find out what we have, make a determination of how serious it is, then we will decide what to do with it.

I think now you really have to go in knowing that the audience may not just be just general counsel and management, here is what we found. You may know that from day one regardless of what we find, however serious, however non-serious, that we are going to have to report to the audit committee if they don't already know about it. That in turn may require disclosures to outside auditors who may not be willing to sign off on financials until they get a certain comfort level about the thoroughness and completeness of the investigation. If they are unwilling to sign off on financials then you are late in filing and now the regulators, the exchange in which you trade or the FCC may now start looking at why the late filing or the non-filing.

The government may be looking at the very same issue that you are looking at and may be conducting an investigation because of some allegation brought to them by a whistle blower and in this day and age they are, with increasing frequency, pressing for companies to waive the attorney/client privilege in order to be able to maintain the position that they cooperated fully with the government and therefore deserves lenient treatment. So I think the point here is to recognize from day one before you even know what you are dealing with that these are all possible audiences.

And I guess this raises in my mind, (Chris), what does that say to you as the lawyer working on something like this, what form does your work product take? Are you reducing everything to writing if at the end of the day there may be full and complete waivers? How do you deal with that issue?

(Chris Hall): Well, I think that McNaulty, again we presume that this audience is well versed in the DOJ Memorandum provides only superficial comfort, that although on the surface there appears to be another layer of scrutiny by may justice as to whether the Government is ever going to ask for full disclosure as part of its consideration when it determines whether a Corporation has fully cooperated with the Government in terms of deciding on how to dispose of matter. Well, in theory there is another level of review, in practice we have seen kind of informal requests by line Assistant US Attorney's who in effect say to us, geese you are not going to make me go to Washington on this.

So in terms of thinking that the Government now, post McNaulty, is less likely to ask for a waiver of the attorney/client privilege and to ask for access to an internal report of an investigation, all bets are off. I think you have to assume that whether it is informally or formally that that is a very real possibility. And then I think you have to consider that whether it is informally or formally that that is a very real possibility. And then I think you have to consider the culture of your client.

There are some clients who have a long standing practice that they are not going to waive under any circumstances and that might inform you as to how to how detailed your written report to your internal audience would be. There are other companies that exist and operate in a highly regulated environment, such as the financial services industry, where there is a culture of cooperation consistently, historical. And for those clients you may want to

consider a kind of less detailed written product that focuses on oral reports supported by a selection of T documents.

(Jim), do you have some more thoughts on this?

(Jim Becker): Just kind of something I always thought of as a little bit ironic, as I have practiced in this post ((inaudible)) world recognizing the possibility of these disclosures that almost counter intuitive. But normally you think of attorney work product and if you are doing a report of an interview of somebody you do, you typically will cloak a memorandum in work product, i.e. attorney mental impression, all kinds of subjective comments and notes to yourself about the content of what the witness is saying, their credibility, whether it makes sense, how does it square with what someone else has said and that is the kind of documentation of an internal report of interview that an attorney does that blends to the argument that this is work product and not be the subject of any type discovery request, formal or informal.

On the other hand, if you are recognizing from day one that I might end up putting all of this on the table that is the last thing you want in something like a report of interview. You want to retreat to just the brutally, you know kind of objective, here is what this witness said as a factual matter, you know just the facts ma'am and non of the mental impression that gives it the work product. So it is a very weird world in which recognizing that you may not serve privilege, you might be writing certain things up in a way that isn't maximizing their protection under the privilege of the work product document.

(Sarah Starkweather): OK. Thanks, (Jim). That covers reporting. What about reporting out?

(Chris Hall): There are a number of factors. We now not only live in a post ((inaudible)) world, but we live in a false claims act world. Many clients do business with the Government, submit claims for reimbursement to the government and not only do we have a Federal False Claims Act, but now we have, I think, approximately 20 State False Claims Acts and so not only does the Plaintiffs Bar know about it, but employment counsel know about it and employees know about it.

So if you are a highly regulated industry that does business with the Government, you cannot ignore the fact that the Government may well already know or if it doesn't already know, it may likely soon know about an allegation of wrong doing. So the question is obviously, do we lower the boom, lower the boom gently on ourselves as opposed as to waiting to become a subject of it, of an investigation. And then, there is also under ((inaudible)) the auditor obligations.

There is a new process, and the citation is here and it is a fairly detailed regulatory scheme and process. But your outside auditors have a independent obligation to report wrong doing to the Board and if not satisfy with the Boards response to withdraw from the representation, so there is that additional element of lack of control and the question is the sooner the Board and its Counsel take control of the situation and provide a appropriate response the better.

There are some other factors. (Jim)?

(Jim Becker): I just wanted address briefly the issue of disclosing some possible wrongdoing; for example, in the context of a government regulated industry say health care. Should we disclose wrongdoing to the authorities, Health and Human Services, Department of Justice in a situation where they are not already on to it or we don't think they are already on to it? It is a difficult call to make and that is probably an under statement, but eventually you are advising the corporate client on the risks and benefits of disclosure versus non-disclosure and you know that gets to be very a tricky area to give advice. You need to be informed about what's the voluntary disclosure track record with individual agencies like the Department of Defense, the Department of Justice, Health and Human Services that do have some track records with expectation of once you make a disclosure, what's the likely outcome versus a scenario which still comes up you know in the health care field and over billing situations in Medicare program by a health care provider.

We caught the problem, it is some financial harm to the Government, we have stopped it, we corrected it, we can quietly make a repayment to the Medicare intermediary and life will go on and maybe the Government won't find out about it. That is the kind of analysis you are going but you are always looking at what is the likelihood of detection if we don't disclose and where will be in terms of explaining to the Government why we did not disclose.

(Chris Hall): I think we have talked. I have already mentioned the State AG's, we have found and we hear from clients that it used to be very easy and orderly to deal with just the Department of Justice but they find the world not quite complex where they are not only dealing with 20 Attorney Generals, the Department of Justice but there is also the Plaintiffs Tort Bar which is supporting the various State AG's through political contributions. So there is this private network out there that is working to uncover allegations of wrong doing and it is essential that corporations, as (Dave) has pointed out, take prompt action and be in a position to self disclose if public disclosure is otherwise inevitable and likely with greater consequences.

And finally, there is just one more kind of ((inaudible)) overlay that informs attorney's practicing in this area and that is the regulation cited here on this slide that concerns the obligation of an attorney to report within a company. The provision here, ((inaudible)) section 307, it applies to all attorneys that are practicing before the FCC and what is important there an incredibly broad definition of who is an attorney that is practicing before the FCC and these regulations and statute define that so broadly as to include any attorney that is tasked with responsibility of conducting an internal investigation concerning allegations of misconduct in connection with financial reporting. Any attorney, even if they are not an FCC practitioner, even if they are just simply an in house attorney with a special expertise and white collar investigations, they are deemed by these regulations to be practicing before the FCC and they have obligations to report up and if not satisfied to keep reporting up and up and up until they get to the Board of Directors. So that is just another factor that impacts a companies decision as to whether it is going to self disclose.

Sarah?

(Sarah Starkweather): OK. Thanks, (Chris). Just to wrap up, I will just ask each panelist to share one final thought with our audience. Shall we start with (Chris)?

(Chris Hall): Well, I think that (Dave) alluded to it quite well in the very beginning, not only do we have these ((inaudible)) provisions that provide for the anonymous complaint process and empower the Board of Directors, the Audit Committee to fund outside advisors and to resolve internal matters but we also have the overlay of the Federal Sentencing Guidelines Section 8B2.1 which takes to ((inaudible)) principles and apply them across the board, so it is essential that companies have a play book in place that will guide them in the heat of battle if and when allegations arrive. I guess that would be my thoughts.

(Sarah Starkweather): Thanks, (Chris).

(Dave), can you share a final thought?

(Dave Resnikoff): Sure, just speaking particularly to in house counsel, my information is that every company is wrestling with the question, how do we do this right? So for those of you who don't have a program that is up and running or is under construction, I think take some comfort in the fact, everybody's program is under construction at this point or at least is being refined and there is a lot of good best practice sharing that is going around out there and but it is not that hard to get it right.

(Sarah Starkweather): OK. Thanks, (Dave). And (Jim)?

(Jim Becker): I guess my final thought is that because the pressure is from so many different directions for a public ally traded company are on disclosure of whatever it is finding in conducting an internal investigation whether it is in house counsel or outside counsel, start from the premise that in the end your work will be disclosed and that come Monday morning your work will become Monday morning quarterbacking. So while you are racing to get the facts are, also step back and be mindful of the steps that I am not taking. What could I be doing? What leads am I not following up on and that I am making judgments every step of the way, and be prepared to defend, not just your findings, but all of the actions that you might have taken and didn't? Because this is an exercise in your work product becoming on display and you'll be under the microscope just like the conduct that you're investigating.

(Sarah Starkweather): That's certainly true. Thanks, (Jim). We have a few minutes left for questions from the audience, and a few people have sent them in. Again, if you haven't already done so, you can type a question into the box in the lower left corner of your screen.

Why don't we start with—somebody asked a follow-up question to (Dave)'s closing comments about having a playbook ready. So what do you mean by "having a playbook ready in advance?" (Dave)?

(Dave Resnikoff): Sure, I think it's important to have an investigation policy that addresses the issue, in the first instance, of triage. I guess the first part of that playbook is to make sure that everybody in your company knows that if there's an allegation of misconduct that it goes to a centralized place – either the compliance group or the legal department or a team of audit legal compliance – for triage, and if there's a determined, decided way of handling those issues. Who makes the decision about who investigates, whether you need outside counsel or you don't need outside counsel, and so on, throughout the investigation's process.

So that, you know, when an issue comes in you can pull it off the shelf and there's an agreed-upon process that you follow.

(Sarah Starkweather): OK. Thanks.

Male: I would just add that you almost need at least two playbooks. One for in-house counsel, but I think the audit committee itself will want a playbook. The audit committee is ultimately, under SOX, tasked with reviewing the results of a significant internal investigation, and it is important for the audit committee to have its own playbook. These are not the sorts of decisions that an audit committee has to undertake everyday. It's not necessarily intuitive, and for that reason, I think an audit committee would benefit from having its own playbook.

(Sarah Starkweather): OK. Thanks. And there's a follow-up question to that from the audience. "Is there a sample playbook out there that we can utilize to start? Is anyone aware of any of that?"

(Dave Resnikoff): You know, there is some literature out there on corporate internal investigations. I know (Dan Webb) did a very large treatise on it. There are some shorter pamphlets out there. There's an author, Mayer Brown, who wrote "The First 72 Hours of an Investigation." And I think the compliance and ethics leadership group and the corporate executive board have sort of sample investigation policies that are out there.

(Sarah Starkweather): OK. Thanks, (Dave).

Another question that had come in earlier: "If you think that your audit committee is not sufficiently engaged, what do you do? If you think that they should become more engaged, how do you handle that?"

(Jim Becker): This is (Jim). I'll take a quick stab at that, and that obviously raises a dicey, tricky issue. I think management and in-house counsel who are looking to engage an audit committee more than they seem to be engaged… It's like taking the animal right up to the trough trying to get them to drink. I think, you know, you need to be mindful of educating the audit committee and other board members of their responsibilities in this area. It's not just good corporate practice. These are affirmative Sarbanes-Oxley legal obligations.

You can look to some frightening decisions around the country being reported where, for example, you know, board members and audit committee members are held individually liable because of their failure to see red flags and to respond to red flags. You know, that's one approach – to try and educate them that this isn't a choice about wanting to be involved or not wanting to be involved. These are legal obligations that come with the territory of serving on the board, and particularly on the audit committee.

(Chris Hall): Excuse me. This is (Chris). And I would just add that the shtick to induce an audit committee to get involved lies with the outside auditor. I mean, if an outside auditor is not sufficiently satisfied with the response of an audit committee to an allegation of wrongdoing, ultimately that auditor for Sarbanes-Oxley has the obligation to resign from the account and give notice to the SEC. So there is every motive for an audit committee to be sufficiently engaged.

(Dave Resnikoff): This is (Dave). Let me just add that the seminal case on this is Caremark, out of the Chancery Court in Delaware, which provides for personal liability on behalf of each director in the event that they are not familiar with, and taking a real leadership role in, making sure the company has an effective compliance program. It's worth a read. It's worth copying and giving to each of your directors. Obviously, how you communicate this is a more political issue, but you've got good authority to stand on.

(Sarah Starkweather): OK. Thanks. I'm wondering if there's any difference on the advice you would give on really any point during this presentation if you have a company that's on the Wiltshire 5000 instead of the Fortune 100, let's say, so, a smaller company.

(Chris Hall): Well, this is (Chris). I'll take a stab at that. Obviously, I think all of the regulations that we've talked about accommodate resources so that it may well be that you have a compliance officer and a general counsel who wear the same hat. It may well be that in terms of a compliance committee that it's a committee of one person. So that I think all of the SOX regulations accommodate the rationing of resources so long as the process is the same, so long as there is reporting-up to the highest level, to the Board of Directors, if an attorney is not satisfied that senior management is taking responsible action. So I think the fair answer is that you cannot be fairly second-guessed for a reasonable rationing of resources as a small company so long as you engage in the process.

Male: And, on the other hand, I think this is one of the criticisms of Sarbanes-Oxley, that the costs that it imposes on all companies – whether Fortune 100 or Wiltshire 5000 – are significant, and the smaller companies are at a disadvantage trying to meet all of their obligations under it. Whether that will lead to relaxation of some of the requirements, or not, that battle is sort of being played out with the SEC and with Congress. But, you know, for the time being it is a very difficult situation for the relatively small company with limited resources to meet all of these obligations.

(Sarah Starkweather): Thank you. I think we've used up our time.

In closing, thanks again to (Dave Resnikoff) for sharing his time and insights with us today, and also to (Jim Becker) and (Chris Hall) for organizing the web cast, and to their firm, Saul Ewing, for sponsoring it. Replays and sides of this presentation will be available on the ACC Web site in case you want to go back and review either of those. And please don't forget to fill out the evaluation form that's available on the left side of your screen.

Thanks for joining us today. You may now disconnect.

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