By William McDonald, Michael Williams, and Megan Evans

Protecting the Corporation's Interests

There was a time when a corporate internal investigation was a relatively straightforward affair. When faced with an allegation of misconduct, a corporation would follow a well-worn path. First the corporation defined the investigation's purpose. Then it appointed an investigation team. The team then collected relevant information, conducted interviews, and made a report. With results in hand, the corporation might punish culpable individuals or change its policies to avoid a similar problem in the future. But once it took these remedial actions, the company could usually move on, content that it had achieved its objective and brought the truth to light.

Though the basics of investigations remain much the same, the simple times have gone. Since the Enron scandal, corporate investigations can no longer operate quietly behind the scenes. Instead, government regulators—operating at the local, state, federal, and even international level—anxiously await the investigations' results. Those regulators often seek not only the facts discovered, but also the work product and privileged materials developed during an internal investigation. Meanwhile, the media stands ready to reveal investigation results to huge numbers of consumers, investors, and other plaintiffs-to-be. And an investigation's results don't just threaten the company's reputation, regulatory standing, or balance sheet—they can also lead to significant criminal penalties.

In this new environment, two external pressures make the matter of internal investigations—and the privileges that sometimes apply—especially difficult. For one, the Department of Justice ("DOJ") effectively threatens a company with greater penalties for an inadequate investigation into criminal allegations. That threat might encourage corporations to waive privileges, either in an effort to prove the sufficiency of its efforts to investigate, or in an effort to turn over useful (but privileged) information to the DOJ. At the same time, private plaintiffs often try to obtain the results of internal investigations for their own purposes. When they are successful in doing so, the internal investigation becomes less of a support tool for the cor-

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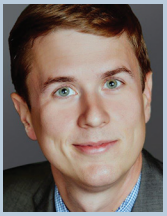


poration and more of a discovery weapon used against it.

Investigations can still reveal critical facts that enable companies to seek better legal advice. They can prove that a company is acting in good faith and prevent accusations against innocent actors. And they can prevent future violations by deterring bad actors and establishing a culture of compliance. Even with the complications presented by DOJ involvement and watchful plaintiffs, a few best practices can allow a corporation to conduct appropriate investigations while still preserving privileges. This article considers some of those practices.

The DOJ and Internal Investigations: A Complicated Relationship

The DOJ has expected companies to take investigatory action in response to alleged wrongdoing for some time now. In particular, investigatory action might earn the corporation "cooperation credit," the key mitigation tool for a company facing a criminal investigation. If a company sufficiently investigates and earns such credit, it might receive a smaller fine or avoid prosecution altogether. But the DOJ's policies on cooperation, and its related position on corporate privileges, have changed over time.

1999: The Holder Memo

The Department first spoke about internal investigations in a 1999 memorandum from then Deputy Attorney General Eric Holder. This "Holder Memo" listed nine discretionary factors that the DOJ would consider in determining whether and how to charge corporations. "Cooperation and voluntary disclosure" came near the top of the list, and the DOJ stressed that companies should "conduct internal investigations and disclose their findings to appropriate authorities" to exhibit such cooperation. The "completeness" of the disclosure, "including, if necessary, a waiver of the attorney-client and work product protections… with respect to its internal investigation" would help establish cooperation, too. Prosecutors were further expected to evaluate "whether the corporation appear[ed] to be protecting its culpable employees and agents."

2003: The Thompson Memo

Although the Holder Memo made cooperation a discretionary consideration, that changed in a 2003 memorandum from Deputy Attorney General Larry Thompson. In the wake of the Enron and Worldcom scandals, the Thompson Memo took a harder approach, changing the nine discretionary considerations from the Holder Memo into nine *mandatory* considerations for prosecutors pursuing corporations. Once more, the corporation's cooperation appeared on the list along with other slight changes. Among other things, the Thompson Memo also invited prosecutors to probe the "authenticity of a corporation's cooperation," a rather unusual requirement that often left corporations wondering how much cooperation was enough. Beyond that, a company facing DOJ scrutiny was expected "to disclose the complete results of its internal investigation" and waive any privileges that might obstruct that disclosure. Investigations also became relevant to other mandatory considerations, such as "the corporation's remedial actions."

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2006: The McNulty Memo

Following significant criticism of the Thompson Memo's apparent expectation of waiver, the DOJ began moderating its stance. In an initial step, Deputy Attorney General Paul McNulty issued a 2006 memorandum adopting a more nuanced view of waiver requests relevant to internal investigations. In particular, the McNulty Memo distinguished between "purely factual" attorney work product and other forms of protected information. The former category was fair game for prosecutors whenever there was a "legitimate need" for it. Except in "rare circumstances," prosecutors were instructed not to formally ask for the latter category of information. That category included "attorney notes, memoranda or reports… containing counsel's mental impressions and conclusions, legal determinations reached as the result of an internal investigation, or legal advice given to the corporations."

Many suggested that the McNulty Memo did not go far enough. Prosecutors, taking advantage of the McNulty Memo's focus on "formal" requests, continued making "informal" requests for privileged materials created during internal investigations. Furthermore, prosecutors operating under the McNulty Memo could still "favorably consider a corporation's acquiescence to the government's waiver request." That concession often led corporations to waive, so as to gain "favor." Consequently, some experts complained that the Thompson and McNulty Memos only served to "deputize" corporate counsel at the expense of an effective investigation. Even Congress took note of these practices, as the Senate considered a bill that would have prohibited the DOJ from considering matters such as privilege waiver in assigning cooperation credit.

2008: The Filip Memo

In response to these continuing criticisms, the DOJ tried to reform its practices again in 2008. Deputy Attorney General Mark Filip that year issued the Filip Memo, which was later incorporated into the U.S. Attorneys' Manual. The Filip Memo included a frank concession: the DOJ's prior policies on privilege waiver had garnered the criticism "from a broad array of voices." These voices, Filip conceded, contended that "the Department's position… has promoted an environment in which those protections are being unfairly eroded to the detriment of all." Accordingly, Filip directed prosecutors not to condition cooperation credit on privilege waivers. Instead, the Filip Memo called for corporations to disclose "the relevant facts."

The Filip Memo's relaxed approach, however, came with a catch: the DOJ would still specifically require corporations to reveal any number of facts revealed during inter-

nal investigations. For example, though the Filip Memo stressed that a corporation did not need to produce "notes or memoranda generated by the lawyers' interviews" in internal investigations, it directed that prosecutors could seek "relevant factual information acquired through those interviews[.]" And the problem of implicitly coerced waivers remained, as the DOJ continued to offer an "enhanced" credit if corporations voluntarily disclosed attorney notes and memoranda.

2015: The Yates Memo

Issued on September 9, 2015 by Deputy Attorney General Sally Yates, the Yates Memo is now the latest iteration of the DOJ's ever-evolving approach. It shifts the DOJ's attention in assigning cooperation credit, now focusing on disclosure of individual misconduct. More generally, it changes how the results of internal investigations may be used in DOJ actions.

The Yates Memo lists certain "traditional" factors that are considered in assigning cooperation credit. Among these factors is the "speed of the internal investigation." Certainly, DOJ attorneys had criticized "foot-dragging" in informal speeches. And prior statements, such as the Filip Memo, referred to "timely" disclosure (perhaps within the relevant statute of limitations). But accuracy and truthfulness—rather than speed—had been the traditional focus in official policy statements. Speed presents a difficult issue for a corporation undertaking an investigation, as a long investigation meant to fully assess potential wrongdoing might be misperceived as an obstructionist effort to slow the DOJ down and delay resolution. A rushed investigation also might not permit the corporation sufficient time to evaluate questions pertaining to privilege and disclosure.

Speed notwithstanding, the most important element in the Yates Memo comes in its focus on individuals. Although the DOJ has pursued individuals for some time, the Yates Memo memorializes the DOJ's belief that *all* information on individuals must be turned over. No longer can corporations "pick and choose" which facts to disclose. Instead, in all civil and criminal matters, "the company must identify all individuals involved in or responsible for the misconduct at issue[.]" If a corporation fails to completely disclose the individual malfeasants, then it will not be eligible for *any* amount of cooperation credit. Yates has separately called this "new" requirement an "all or nothing" proposition.

This "all or nothing" position could directly affect how a corporation approaches its own privileges. The Yates Memo references the Filip Memo's treatment of privileges, as incorporated into the U.S. Attorney's Manual, and it concedes that corporations have an obligation to disclose only "within the bounds of the law and legal privileges." But if the slightest degree of perceived non-cooperation is enough to defeat *any* right to cooperation credit, then a company might nevertheless be inclined to waive. With such high stakes, corporations must make careful decisions in their application of the attorney-client privilege protection.

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Most interestingly, a corporation can even miss out on cooperation credit if it has no knowledge of which individuals were at fault, but "declines to learn of such facts." Yates has said that corporations cannot "plead ignorance. If they don't know who is responsible, they will need to find out … [by] investigat[ing] and identify[ing] the responsible parties, then provid[ing] all non-privileged evidence implicating those individuals." Thus, the choice to launch an internal investigation to identify individuals is no longer so discretionary, at least if a corporation hopes to obtain cooperation credit. So, corporations are essentially compelled to generate *more* privileged information than they might otherwise, only to have regulators and plaintiffs attempt to force disclosure of and build a case around that very information.

Despite the privilege-related considerations inherent in conducting an investigation in connection with DOJ charges, an internal investigation remains the best approach in many cases. A responsibly run investigation could convince the DOJ to offer the corporation a more favorable resolution, including a deferred-prosecution agreement or non-prosecution altogether. Lacking sufficient cooperation, a corporate defendant might instead face a guilty plea—or worse. In obtaining an almost $9 billion penalty and guilty plea against BNP Parbias SA, for example, the DOJ stressed that the company's lack of cooperation was a "crucial factor" in its decision to require a guilty plea. In contrast, Morgan Stanley received a declination from the DOJ in a foreign bribery case, as the company maintained adequate internal controls, disclosed the matter to the DOJ early, and fully investigated individuals at fault.

Protecting Privilege in Private Litigation

Where private civil litigation is expected, a corporate investigation often serves as a basis for the corporate defense. If a corporation learns of a potential problem and does nothing, plaintiffs will look to paint that company as a bad actor, and the company will be impeded in its efforts to show due diligence in identifying and resolving the alleged concerns. As two contrasting cases show, where litigation is anticipated, the structure and controls of an investigation are critical.

In re Kellogg Brown & Root: Upholding the Privilege

The D.C. Circuit issued two mandamus orders respecting a defense contractor's privilege claims over documents related to an investigation into alleged kickbacks on military contracts. *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014). In the first manda-

mus order, the D.C. Circuit addressed the pre-conditions to an assertion of privilege. The court held that the privilege applies not only to investigations conducted by outside counsel, but also by in-house counsel or by non-attorneys serving as agents of counsel. The court also held that the privilege applies even if an investigation is mandated, and even if the investigation serves multiple purposes, as long as a significant purpose is to obtain legal advice. In the second mandamus order, the court found those privileges had not been waived. Although a company witness had reviewed privileged documents in preparing for his deposition, the witness asserted the privilege during the deposition and did not disclose privileged information. And although the company had described some of its investigation process in a footnote to a motion for summary judgment, the footnote neither reflected an unconditional disclosure, nor relied on the privileged documents. In short, the *KBR* decisions appear to embrace a broad conception of privileges operating within an internal investigation.

Wultz v. Bank of China Limited: Denying the Privilege

On the other hand, the Southern District of New York rejected claims of privilege over documents related to an internal investigation into customer wire transfers allegedly related to terrorist activity. *Wultz v. Bank of China Limited*, 304 F.R.D. 384 (S.D.N.Y. 2015). In contrast to *Kellogg*, the investigation was conducted by non-attorneys, at the direction of non-attorneys, for the purpose of assessing the wire-transfer allegations. The court found the investigation was conducted for regulatory or public relations purposes, and outside counsel was engaged only *after* the investigation to advise on its results. The court ruled that even though information from the investigation may have been critical in outside counsel's legal analysis, the "attorney-client privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client." In contrast to *KBR*, *Wultz* takes a narrow view of privileges applicable to internal investigations, demonstrating that attorneys should be intimately and immediately involved in the investigation for any privilege to be claimed.

Best Practices: Making Investigations Work Under the Watchful Eyes of the DOJ and Would-Be Plaintiffs

If a corporation chooses to pursue an investigation, it can take several steps to help mitigate the costs and burdens that grow from such investigations, while preserving privileges along the way.

> Attorney involvement can better maintain the privileged status of attorney-client communications and work product during an investigation. Attorneys also offer substantive expertise on the subjects under investigation.

- **Establish rigorous ethics and compliance programs.** An old saying suggests that an ounce of prevention is worth a pound of cure. But here, the saying is more than a truism. DOJ guidance, including portions of the Filip Memo incorporated into the U.S. Attorneys' Manual, dictates that the DOJ will consider "the existence and effectiveness of the corporation's pre-existing compliance program." If the company has "established corporate governance mechanisms that can effectively detect and prevent misconduct," then charges are less likely. Effective compliance should involve fully informed, independent directors, independent auditing procedures, and effective reporting processes. Furthermore, given the government's emphasis on speedy cooperation, it is now even more important for companies to have pre-established investigation protocols and crisis management procedures. A company should not be left scrambling to develop such procedures on the fly when it receives its first notice from the DOJ. Compliance programs can also help companies avoid liability from other government agencies. For instance, the Securities and Exchange Commission relied in part on Goodyear Tire & Rubber Co.'s improved compliance programs in offering that company a favorable settlement of recent violations.
- **Take immediate action to appoint investigation managers when faced with accusations of wrongdoing.** A fast response signals to the DOJ and future jurors that the corporation takes the matter under investigation seriously. Appointing a manager and naming an investigation team are two of the easiest steps to take quickly. The appropriate manager depends on the scope of the alleged misconduct, but investigations drawing the attention of the DOJ should most often be managed at a high level (such as the board of directors). Likewise, an investigation team should come from outside the company. Outside counsel may bring more expense than in-house attorneys, but they also bring additional expertise in corporate investigations, extra resources, and an impartial view on key decisions. But, outside counsel should be carefully selected, as counsel who have represented the company before might appear beholden to the company's interests.
- **Carefully define the scope of the investigation.** Once the team is set, the scope of the investigation should be defined. The DOJ suggests that the investigation should be "tailored to the scope of the wrongdoing." Here, the corporation faces a delicate balancing act of widening the investigation enough to obtain all relevant answers and keeping the investigation narrow enough to remain manageable and cost-effective. Yates has suggested an answer to the dilemma, inferring that counsel should "pick up the phone and discuss it with the prosecutor" if "there's a question about the scope of what's required." Other DOJ officials have agreed that "[i]

t is reasonable to take resources—time and money—into account," so a savvy company will work with the DOJ to create limits saving those resources. Assistant Attorney General Leslie Caldwell has described what some limits might look like:

> [I]f a company discovers a[] … violation in one country, and has no basis to suspect that violations are occurring elsewhere, we would not necessarily expect it to extend its investigation beyond the conduct in that country. On the other hand, if the same people involved in the violation also operated in other countries, we likely would expect the investigation to be broader.… To the extent a company decides to conduct a broader survey of its operations, that decision, and any attendant delay and cost, are the result of the company's choices, not the department's requirement.

Limits are important to prevent costs from spiraling out of control. A global investigation involving Siemens provides one example of how that can happen, as the company spent $950 million investigating—millions more than the fine it eventually paid to the DOJ.

- **Take aggressive steps to obtain relevant information.** Especially if the alleged misconduct involves acts of deception or dishonesty, the company should take all available steps to identify and preserve relevant evidence. Such steps will avoid any later suggestion that the company destroyed evidence after-the-fact. Information holds are a good first step. The investigation team should then be given full access to all areas of the company where relevant documents might be found. The company might also consider making available to the team certain employees—such as those in the general counsel's office, human resources, information technology, and accounting—that have special knowledge of corporate structures. If the team plans to conduct key word searches of electronic documents or the like, and DOJ cooperation credit is at issue, then the team might consider submitting its search terms, custodians, or processes to the relevant DOJ prosecutor for approval. And in cases where the company is especially concerned about document destruction, it might consider hiring a third-party document collection vendor to secure existing documents or a computer forensics expert to recover deleted information.
- **Use attorneys to conduct employee interviews.** The cautious company should use lawyers to conduct witness interviews, to prevent the situation described in *Wultz*. Attorney involvement can better maintain the privileged status of attorney-client communications and work product during an investigation. Attorneys also offer substantive expertise on the subjects under investigation. But note that the "privilege advantage" might be defeated if the lawyers conducting the interviews choose to produce verbatim records. Such records, which arguably lack the attorney's mental impressions and analyses, are much closer to "purely factual" information. And that type of information is in turn more amenable to discovery—and of great interest to the DOJ and plaintiffs' counsel. If an attorney is not going to be used at all, then investigation protocols should make clear that (1) the interviews are conducted at the direction of counsel; and (2) the primary purpose of the interviews is to assist counsel in rendering legal advice for the corporation.
- **Recognize and address the conflicts inherent in witness interviews.** Because the DOJ requests that the company also turn over information relevant to individuals, the company's interests and an individual's interests may not be entirely aligned. Investigators should be candid with witnesses about that reality. As an initial step, the interviewing attorney should issue so-called *Upjohn* warnings, named for the seminal Supreme Court decision explaining attorney-client privilege in the corporate context. These warnings should identify the attorney's role as lawyer for the corporation (not the employee), describe the purpose of the investigation, explain that any privileges belong to the corporation alone, and ask the interviewee to keep the matter confidential. Failing to offer such disclaimers could make it more difficult for the DOJ to use employee statements in later proceedings, which could then lead to negative consequences for the company. Although the decision was later reversed, one district court even suppressed statements given in an internal investigation without the warnings. *See United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009). In a post-Yates Memo world, companies should consider whether warnings that are even more extensive are appropriate. Such warnings might caution the employee that their statements could be turned over to federal investigators who could then use the information in determining whether to pursue criminal or civil action. Employees might also be reminded of their Fifth Amendment rights and advised of their option to obtain personal counsel. Admittedly, disclosures like these could produce a chilling effect, as employees might become fearful of incriminating themselves. They might also have a negative effect on company morale. But candor seems the wiser course in this context, as the company (or even the attorney conducting the interview) could otherwise face claims of ethical misconduct.
- **Document your processes.** Sometimes, even the best investigation will fail to bear fruit. For those instances, the company must be able to show exactly what steps were taken and what information was obtained. As one Assistant Attorney General has explained, "[w]hen a company is truly unable to identify culpable individuals, even after an appropriately tailored, careful, thorough investigation, but [it] still provides the government with all the relevant facts, and otherwise assists us in obtaining the relevant evidence, the company will still be eligible for cooperation credit[.]" Frequent communication with the DOJ, well-documented procedures and protocols, and careful recordkeeping concerning the information that *is* obtained should all help show the DOJ that the investigation was "appropriate" and careful. Meanwhile, clear documentation will demonstrate to future jurors that any investigation was more than a public relations effort.

- **Be cautious in deciding how to make a final report.** Recent court decisions have reconfirmed that the attorney-client privilege and work-product protections apply in the context of internal investigations. But that general notion will be of little comfort to a corporation who then waives its own privileges by making an overly broad report to investigators. Very few courts have adopted the notion of selective waiver, which permits a disclosure to government regulators without otherwise waiving any applicable privileges as to all. So, reports to the DOJ and other regulators should be carefully composed to include only the factual information that is of real interest to the relevant authority. Reports should not include attorney analyses or in-depth discussions concerning how these facts were determined. A company might even consider making an oral report of the crucial findings of its investigation. If authorities request privileged documents of particular concern to the company, then corporate officials might raise those concerns directly with those authorities. For instance, the more recent DOJ policy memoranda that disfavor waiver should help in persuading DOJ officials to take the concerns seriously.

Conclusion

Internal investigations will never again be as simple as they once were, but they need not impose an insurmountable burden. With a few best practices in place, a responsible company should be able to identify the information it needs, obtain cooperation credit for that information (if necessary), protect the company's privileges, and successfully put the matter behind it.