THE ROLE OF INTERNAL INVESTIGATIONS

IN DEFENDING AGAINST

CHARGES OF CORPORATE MISCONDUCT

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1. SUMMARY AND INTRODUCTION.

Internal investigations are an integral part of the successful defense of corporations threatened with charges of criminal misconduct. They are also essential to the assessment of any improper practices which have not yet become the subject of government scrutiny. For government contractors and companies operating in highly regulated industries, responsible corrective actions in such situations are critical to minimizing the risk of adverse administrative and civil consequences, including suspension and debarment.

This article examines when and how internal investigations should be conducted in order to best protect the interests of the corporation on the criminal, civil and administrative fronts. It considers first the purposes to be served by internal investigations, and the circumstances in which such investigations are warranted. It next considers certain threshold questions which arise in such circumstances, including who should conduct the investigation, and how corporate employees and former employees should be apprised of their rights and obligations in the event they are contacted by government investigators.

This article then provides some basic guidelines for the manner in which an internal investigation should be conducted, and how current or former employees should be prepared for government interviews or grand jury appearances. Of particular concern to the corporation is the need to minimize the risk that the

government will view the conduct of the company in conducting the internal investigation as part of an effort to obstruct the government's own inquiry or to influence improperly the testimony of individuals it may regard as witnesses in the matter. Attention is also given to the issue of whether employees and former employees should be represented by separate counsel, and if so, when and how the company should indemnify employees and former employees against the costs of such representation.

This article deals as well with the question of reporting the findings of an internal investigation to corporate management. A major concern of government contractors in particular is whether voluntary disclosure of such findings to the government is necessary or desirable. This issue is discussed in detail, especially in light of the implementation of the Department of Defense ("DoD") Voluntary Disclosure Program, the Federal Sentencing Guidelines for Organizations, and the provisions of the False Claims Act, 31 U.S.C. § 3729 et seq., which encourage individuals with knowledge of wrong-doing to file qui tam ("in the name of the King") lawsuits acting as private attorneys general.

Finally, this article treats the subject of written submissions to the government, presenting arguments against criminal prosecution. While there may be tactical disadvantages associated with "showing the company's hand" in this fashion,

the potential benefit of averting indictment and prosecution may justify disclosure to the government of the company's likely defenses were the case to go to trial.

2. DISCUSSION.

1. The Purposes Served by Conducting an Internal Investigation.

Internal investigations are called for in a variety of situations frequently encountered by corporate management and counsel. Whenever the company learns that it may be implicated in some form of wrongdoing through the conduct of one or more of its officers or employees, it is essential to determine the nature of the activities involved in order to develop the appropriate response. Failure to act promptly to ascertain the facts and chart a proper course could subject the company to increased exposure to criminal prosecution, civil suits and administrative sanctions by relevant government agencies.

The internal investigation must of course be calibrated to the nature of the problem at hand, in order to determine (i) what happened, (ii) who was involved, and (iii) why it occurred. Understanding why the individual identified acted as he did is, in many ways, the most subtle and important goal of the internal investigation. It amounts to a "search for intent," which is the key element in most criminal cases involving corporate misconduct.

It is critical to the successful defense of a criminal investigation that the company promptly ascertain the facts and circumstances of the conduct which is

being called into question. Only then will the company be able to anticipate and respond effectively to the government's investigation. The development of persuasive arguments against prosecution must be tailored to the facts. Failure to understand the facts can result in misguided arguments which, even if not perceived as deliberately misleading, can seriously undermine the credibility of the defense. In addition, the defense can suffer considerable damage if it is "blind sided" by the government with facts of which it was unaware.

Internal investigations play a vital role in a company's effort to avoid suspension and debarment. Where questionable conduct on the part of the company has occurred, the internal investigation may itself serve as an indication of corporate good citizenship or "present responsibility" – the controlling consideration in a decision whether the company should be suspended or debarred. As part of its Voluntary Disclosure Program, the DoD has publicly announced that disclosure to the government of problems identified by the contractor will be viewed as a factor in favor of the contractor in the suspension/debarment equation. As of July 1, 1996, the DoD had accepted 321 disclosures. Only two of these volunteers have been suspended or debarred. Other government agencies with suspension/debarment authority over the contractor may likewise give favorable consideration to contractors which are forthcoming in disclosing and correcting deficiencies. Self-examination is a

predicate to whatever corrective actions may be necessary to correct any past errors, whether or not of a criminal nature.

Further, voluntary disclosure of misconduct can significantly reduce the time that may be imposed upon a corporation under the Federal Sentencing Guidelines for Organizations. When combined with an effective corporate compliance program, voluntary disclosure can reduce a company's fine by 95 percent.

In short, whenever a company has reason to believe that a problem may have occurred, it should investigate internally to find out exactly what took place and why. Although the company may pause to ask whether it really wants to know what happened, the answer is that it cannot afford not to know. Such knowledge is essential to determining whether disclosure to the government is called for, and whether any corrective action is required. This may be necessary to establish the company's integrity, to limit the Company's exposure to civil liability in qui tam and other actions, to avoid suspension and debarment even if no government investigation is pending, and to reduce the potential fine that may be imposed for the conduct.

2. The Circumstances in Which an Internal Investigation Is Warranted.

As a general matter, as soon as a company has reason to believe a problem may exist, an internal investigation should be initiated. The effective defense of a criminal case or civil or administrative action depends upon an early warning system which enables the company to act in response to the problem, rather than to

react to a government investigation or other proceeding. Time is of the essence in this regard.

Problems that call for internal investigation may come to the attention of corporate management in any number of ways. The following list includes several of the more typical circumstances in which a company would be well-advised to initiate an internal investigation:

(i) company hotline tips;

(ii) employee complaints to supervisors, ombudsmen or other company officials;

(iii) third party complaints (subcontractors, vendors, etc.);

(iv) informal statements by contracting officers, contracting agency auditors, or other government representatives questioning the propriety of the company's conduct;

(v) reports of government auditors or inspectors containing findings of questionable practices;

(vi) internal audit findings of questionable practices;

(vii) outside auditor findings of questionable practices;

(viii) informal requests for information or documents by government investigative authorities;

(ix) subpoenas issued by grand jury, Inspector General, or other government agencies with subpoena power;

(x) civil suits or complaints by disgruntled former employees for wrongful termination, especially by those claiming retaliation for whistle blowing, or raising other allegations of impropriety;

(xi) press inquiries or reports about questionable practices or other improprieties; and

(xii) credible information from any source regarding questionable practices or other legal improprieties.

While it may not in all cases be possible to identify potential problems before the government does, a prompt response by the company to these "red flags" is vital to an effective defense against any allegations of misconduct which may arise.

3. Determining Who Should Conduct an Internal Investigation.

The question is often raised whether an internal investigation should be conducted by counsel, and if so, whether by in-house or outside counsel. Although the answer to these questions will depend upon the circumstances of the case, and the nature and scope of the investigation to be conducted, as a general rule counsel should conduct or supervise the investigation. Sensitive legal questions invariably are raised in the course of such investigations, including the ultimate question of whether the conduct at issue constitutes a violation of law. Counsel must therefore be in a

position both to identify and resolve these issues based upon an analysis of the facts uncovered in the course of the investigation. Moreover, the attorney-client privilege will be available to protect communications essential to the investigation, and the work product doctrine will likewise pertain to materials generated thereby, only if the investigation is conducted by, or at the direction of, attorneys for the company. Upjohn Co. v. United States, 449 U.S. 383 (1981).

Whether in-house or outside counsel should be responsible for conducting the investigation is also subject to a number of general considerations. In-house counsel are typically better acquainted with the company's history, structure, contracts, procedures and operations than are outside counsel. In-house counsel are also known to the company's employees, and may be received more openly by employees who are the subject of company requests for interviews, information and documents in the course of an internal investigation.

On the other hand, precisely because they are less familiar with the company's programs and personnel, outside counsel may be somewhat more objective in assessing questioned practices. The judgment of outside counsel experienced in defending criminal cases involving similar practices may also be a valuable asset to a company faced with allegations of criminal wrongdoing which may lead to indictment, prosecution and conviction on the one hand, and civil and administrative penalties on the other.

Outside counsel may also have certain advantages in dealing with government investigators and prosecutors. While the perception may be unfair, in-house counsel are likely to be viewed by the government as part of the corporate management structure, and therefore lacking independence. This can be a particular problem where the government perceives a conflict between the interests of management and those of its employees. The government is especially sensitive to the influence that management exercises over employees through control of their livelihoods, and this also tends to color the government's view of the conduct of in-house counsel during the course of an internal investigation.

While the government's concerns in this regard may be based upon undue skepticism, as a practical matter, in-house counsel may have greater difficulty in establishing credibility with the prosecutor and investigative agents than would outside counsel. Even if the government has no grounds for charges of obstruction, a perception that in-house counsel is attempting to influence witnesses in order to protect colleagues in management could undermine the company's ability to persuade the prosecutor that criminal charges are not warranted.

The risk of waiver of attorney-client privilege is also a consideration in determining who should conduct an internal investigation. Where there is a pending government investigation, and the internal inquiry is being conducted as part of a

litigation defense, establishing and preserving attorney-client privilege and attorney work product claims are important objectives.

Communications between corporate counsel and the company's employees for the purpose of obtaining information relevant to legal matters as to which counsel must advise the company are subject to the company's attorney-client privilege. Upjohn Co. v. United States, 449 U.S. 383 (1981). This principle applies to former as well as current employees of the company. In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig., 658 F.2d 1355 (9th Cir. 1981). Communications between employees and in-house counsel stand on the same legal footing as those between employees and outside counsel. In re LTV Sec. Litig., 89 F.R.D. 595, 601 (N.D. Tex. 1981).

As a practical matter, however, because in-house counsel are frequently called upon to provide business as well as legal advice with respect to matters under investigation, it may be more difficult for in-house counsel to establish and maintain the privilege. This problem is exacerbated when information obtained in the internal investigation is shared by in-house counsel with auditors, accountants, underwriters and corporate officials not involved in the defense of the case. Waiver of the privilege is likely in these situations. See, e.g., In Re John Doe Corp., 675 F.2d 482 (2d Cir. 1982); In re Subpoena Duces Tecum Served on Wilkie, Farr & Gallagher, No. M8-85 (JSM), 1997 U.S. Dist. LEXIS (S.D.N.Y. Mar. 14, 1997).

Moreover, where in-house counsel is handling the internal investigation, the government is both more alert to the potential for waiver and more disposed to press the issue. This point is underscored by the following statement of the Director of the Division of Enforcement of the Securities and Exchange Commission at the time of the 1982 Annual Meeting of the ABA Section of Corporation, Banking and Business Law:

> The Commission staff will be inquisitive when examining whether the privilege or the work product protections have been correctly established and maintained by the house counsel. This curiosity does not reflect disrespect for the important role of house counsel; rather it is a recognition of the practical difficulties that are inherent in their attempts to establish and to preserve privileged communications and work product materials.

Where a waiver has occurred, counsel could well be sought by the government as a witness in the case. Notes, memoranda and other attorney work product would be subject to production in such circumstances. Moreover, any waiver would extend to potential civil litigation as well, including shareholder actions. In re Subpoena Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984) (disclosure of internal investigation report and underlying documents to SEC waived privilege with respect to shareholders'

derivative action); Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414 (3d Cir. 1991).

In light of the foregoing considerations, it is often most effective for an internal investigation to be conducted by outside counsel, in close coordination with in-house counsel. This enables the company to take advantage of both the greater familiarity of in-house counsel with the workings of the company, and the greater experience of outside counsel with the workings of the criminal process. It also allows the company to obtain the maximum credibility with the prosecutor and investigative agents; and the maximum insulation against charges of stonewalling, as well as against any waiver of attorney-client privilege and work product protections. Experienced outside criminal defense counsel are generally better acquainted with the subtle problems which often arise in the course of internal investigations, and better positioned to defend against unfounded allegations of witness interference and obstruction of justice.

4. The Need to Apprise Employees of Their Rights and Obligations When Faced with the Possibility of Government Requests for Information.

The red flags which alert a company to the need for an internal investigation, identified in Section B above, often also indicate the need to apprise employees that they may be contacted by government investigators with respect to the conduct in question. It is commonplace in criminal investigations of corporations

that government investigators will contact employees and seek to interview them with respect to the matters at issue. These contacts will often occur at the employee's home, in the evening, when the employee is relaxed and away from what the government perceives to be the inhibiting environment of the workplace. The government investigators will in these situations often suggest to employees that they do not need to seek counsel or consult with company representatives prior to being interviewed.

While employees are of course free to talk to government agents in these circumstances, they may not know that they have no obligation to do so. Employees may also be unaware that they have a right to consult with counsel prior to agreeing to any interview, and that the company may be able and willing to indemnify them for the cost of such representation. Proper legal advice may in fact be critical to protecting the rights of employees who themselves may ultimately be subject to criminal charges as a result of incriminating statements they make to investigators in these situations.

It is a maxim of the law in this area that a witness is the property of neither the government nor the company. Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966). However, this principle has little practical meaning if employees are unaware of their options when confronted on the doorsteps of their homes by trained government investigators. It is therefore important, and also

entirely appropriate, for the company to apprise its employees of their rights and obligations should they be contacted by government agents and asked to submit to an interview.

Disciplinary Rule 7-104(A)(1) of the American Bar Association ("ABA") Model Code of Professional Responsibility and Rule 4.2 of the Model Rules of Professional Responsibility prohibit opposing counsel from contacting represented parties without the consent of their counsel, unless authorized by law to make such contacts. Under the Bush Administration, the Department of Justice adopted the position that federal prosecutors are not bound by the state codes of professional conduct and therefore need not obtain counsel's consent before speaking to a party represented by counsel.

In 1994, the Department of Justice promulgated rules governing contacts with represented parties, and authorizing prosecutors to make such contacts in certain circumstances. 28 C.F.R. § 77 et. seq. (1997). The Department of Justice has taken the position that these regulations forbid, pursuant to the Supremacy Clause, application of state bar codes to federal prosecutors. That position has been roundly criticized by the American Bar Association, and recently was rejected by the United States Court of Appeals for the Eighth Circuit. In United States ex rel. O'Keefe v. McDonnell-Douglas Corp., 132 F.2d 1252, 1257 (8th Cir. 1998), the Court held the regulations to be invalid because there is no statutory basis that

"expressly or impliedly gives the Attorney General the authority to exempt lawyers representing the United States from the local rules of ethics which bind all other lawyers appearing in that court of the United States." See also United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993)(no federal statute authorizes exempting prosecutors from state bar rules). This controversy underscores the importance of providing a thorough explanation of rights at the earliest possible stage of the investigation to all employees who may be contacted by the government.

The manner in which employees are apprised of their rights will necessarily vary depending on the circumstances of the case, including the number of employees involved, their physical locations, and the likelihood that the government may contact them before they can be interviewed by counsel for the company. Thus, where a large number of employees at multiple locations may be subject to interview, the company may want to distribute a memorandum to them, containing the following information:

(i) that the government is conducting an investigation of certain matters;

(ii) that government investigators may wish to interview a number of employees in connection with the investigation;

(iii) that the company has retained outside counsel to represent it in connection with the investigation;

(iv) that the company has also arranged for an attorney to be available to provide advice to those employees who wish to consult with counsel;[1]

(v) that the role of separate counsel would be to advise employees as to the nature of the investigation, the purpose of the government interview, the employee's rights and obligations in connection with such an interview, whether it is in the employee's interest to be interviewed, and the appropriate conditions for any such interview;

(vi) that inasmuch as the matters at issue occurred during the employee's tenure as an employee, the company has agreed to be responsible for advancing fees and related expenses for the employee's legal representation in connection with the investigation;

(vii) that while the company recommends that the employee consult with counsel prior to any interview, it is the employee's sole decision whether or not to do so;

(viii) that it is the employee's right to deal directly with government investigators without counsel, or to confer with counsel prior to doing so; and

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[1] See Section F below for a discussion of the issue of whether employees should be represented by separate counsel in these circumstances.

(ix) that under any circumstances, it is essential that the employee be truthful in responding to questions at any interview.

Use of such a memorandum has a number of advantages over more informal methods of communication. It documents the propriety of the advice given to employees, minimizes confusion on their part, and preserves the advice so that they may refresh their recollection as needed.

The same information may also be communicated to employees orally, either in person or over the telephone, pursuant to a carefully drafted script. Also, depending on the situation, the company may wish to convey similar information to former employees who it believes may be contacted by the government investigators.

It is extremely important that communications of this type with employees or former employees be conducted in a manner that avoids any suggestion that the company is attempting to tamper with or improperly influence a potential witness, or otherwise obstruct the government's inquiry. The Victim and Witness Protection Act of 1982, 18 U.S.C. § 1512 et seq., contains broad proscriptions against the use of "misleading conduct" with an intent to (i) influence testimony, (ii) induce the withholding of testimony or documents, or (iii) hinder, delay or prevent the communication of information regarding the possible commission of an offense to a federal law enforcement officer. 18 U.S.C. § 1512(b). "Misleading conduct" is defined to include (i) knowingly making a false statement, (ii) intentionally omitting

information from a statement and thereby making it misleading, (iii) knowingly inducing reliance upon false or misleading documents, or (iv) knowingly using any trick, scheme or device with an intent to mislead. 18 U.S.C. § 1515(3). This statute has serious implications for companies and their counsel when advising employees of their rights and obligations in connection with a government investigation. It also applies in other sensitive areas of defending a company against allegations of wrongdoing, such as interviewing employees and other individuals in the course of an internal investigation, and preparing witnesses for government interviews or grand jury testimony, topics which are more fully discussed below.

Each case will of course present its own special circumstances, and will require the judgment of experienced counsel in order to ensure that communications with employees are conducted in an appropriate fashion. As a general proposition, when the company is advising employees of their rights and obligations in connection with a government investigation, employees should not be advised by the company or the company's counsel to refuse to speak with government investigators. While it is appropriate for the company to urge employees to contact management or counsel before being interviewed by government investigators, they should not be ordered to do so. Employees should be told that if they agree to be interviewed with or without counsel, the company expects them to respond to questions truthfully. Again, a carefully worded memorandum or script prepared by

counsel for use in providing to employees will help avoid statements which might be misconstrued by the government as misleading or coercive.

5. Conducting the Investigation: Reviewing Documents and Interviewing Witnesses.

The two principal components of an internal investigation are (i) an analysis of those documents which may be relevant to the matters at issue, and (ii) interviews of those employees who may be able to provide information regarding those matters. Generally, it is preferable to review the relevant documents prior to commencing interviews. First, the documents themselves may provide a fertile source of the identities of the individuals who will need to be interviewed as the internal investigation progresses. Thus, the government frequently identifies the employees it would like to interview based upon the documents it obtains from the company pursuant to subpoena or informal request. It is becoming increasingly common in these situations for the government to subpoena or request addresses, telephone numbers and other data regarding employees thus identified. Second, the documents often raise critical questions which can only be answered through interviews of employees with knowledge of their contents or the matters to which they pertain. Moreover, the documents may help refresh the recollections of the individuals being interviewed, and avoid mistaken responses which may throw the internal investigation off course. It is therefore much more efficient to review most if not all of the relevant

documents before beginning a major series of interviews, which otherwise may need to be repeated as important documents come to light.

On the other hand, it is also preferable to interview employees and others before they are interviewed by the government. Depending upon the pace of the government's investigation, it may become necessary to begin interviews before the document review has advanced as far as might otherwise be desirable. The timing and sequence of internal investigative measures thus become matters of judgment based upon the flow of the case.

Whether or not a subpoena or informal request for documents has been received by the company, it may be useful to disseminate a memorandum from a responsible corporate official directing certain employees to search for and deliver relevant documents to a designated location on or before a specified time. It is also helpful to designate an employee of the company with no involvement in the underlying transactions to serve as a contact point inside the company and a liaison with counsel in coordinating this effort. In addition, where the allegations raise accounting or other technical issues, it may be useful to have in-house or outside experts available to assist counsel in analyzing relevant material and in preparing for witness interviews. Care must be exercised, however, to structure the working relationship between counsel and such support personnel to avoid any waiver of the attorney-client privilege or work product protection.

When interviewing employees as part of an internal investigation, they should be informed of the purpose of the interview. Ordinarily, this would include: the fact that the government is conducting an investigation; the nature of the problem being investigated; the fact that counsel has been retained to provide advice to the company in connection with the matter; and the fact that the interview is necessary in order for counsel to obtain the information needed to provide appropriate advice to the company.

The employee must be advised at the outset of the interview that the interviewer is counsel to the company, and not counsel to the employee. Although witness interviews by company counsel are generally subject to the company's attorney-client privilege, the employee should understand that the privilege is the company's, and not the employee's, either to claim or to waive. This is necessary because it may later be in the interest of the company to make disclosures to the government or take corrective or disciplinary actions based upon the information provided by the witness. Thus, while the employee may be requested not to discuss the conversation with others in order to preserve the company's attorney-client privilege, this does not mean that the employee can prevent disclosure of the substance of the interview either within the company or to the government.

In many circumstances, although it may cause the employee to be less forthcoming, it is prudent to advise the employee affirmatively that the substance of

the interview may be disclosed to company management or the government. This is especially important where the matter under internal investigation is not yet known to the government, and (i) the company has a statutory obligation to disclose the matter which is the subject of the internal inquiry (as, for example, pursuant to the Anti-Kickback Act or reporting requirements in various environmental statutes), or (ii) the company anticipates that it will be making a voluntary disclosure of the matter to the government. It is also important where the matter under internal investigation is already known to the government, and the company is in a posture of cooperation which may entail some form of disclosure to the government based upon the results of the internal inquiry. In order to avoid any misunderstanding or confusion on this or any other point, it is helpful before beginning the interview to ask whether the witness has any questions and to clarify any points that may be subject to misinterpretation.

Where it appears that the interests of the company are or may become adverse to those of the employee being interviewed, clarity as to the nature of the lawyer's role is critical, as set forth in Rule 1.13 of the ABA Model Rules of Professional Conduct and its comment. Rule 1.13(d) provides:

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

The Comment to this rule states in pertinent part:

> Clarifying the Lawyers Role

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.
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> Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

During the course of the interview, it is important to avoid any statements or conduct which might be misconstrued as an attempt to mislead the witness or influence his possible testimony. Characterizations of the company's position on particular issues, or of the testimony of other witnesses, should therefore generally be avoided. Similarly, while it is appropriate to question the witness regarding documents as to which he may have knowledge, counsel should avoid a selective presentation of documents which may create a misleading impression of the underlying facts.

The close of the interview may provide counsel with a convenient occasion to provide or restate advice regarding the employee's rights and obligations in connection with government interviews, as set forth in Section D above. It also

offers a good opportunity to reiterate the importance of answering truthfully any questions posed by government investigators.

As soon after the conclusion of the interview as possible, the substance of the conversation with each witness should be memorialized in detail by counsel. This memorandum should reflect counsel's standard introductory and closing remarks to the employee. It should also contain counsel's mental impressions, in order to preserve the attorney work product essential to a proper analysis and defense of the case. See Upjohn Co., 449 U.S. at 399; United States v. Adlman, No. 96-6095, 1998 WL 74092 (2d Cir. Feb. 13, 1998); In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979).

6. Determining Whether Employees and Former Employees Should be Represented by Separate Counsel.

Because a corporation can act only through its directors, officers and employees, the conduct of such individuals is always at issue in criminal investigations of a company. These individuals generally need legal counsel to advise them of their rights and obligations in connection with an investigation, and often turn to corporate counsel for such advice. This poses an important question, which arises in virtually every corporate criminal case: whether such individuals may or should be represented by counsel for the company, or whether separate counsel is preferable or required. The results of the internal investigation often will dictate the answer to this question.

However, as a practical matter, sufficient facts may not be known at the time a decision about joint or separate representation must be made.

Although it is difficult to generalize about such matters, where the company is the subject or target of an investigation, there is often a serious potential for the existence of a conflict between it and its employees. For example, an employee may have taken a questioned action based upon information or direction received from supervisory personnel. Even if contrary to company policy, the action would in all likelihood be attributable to the company, and the company could be held vicariously liable for it if the individuals involved possessed the requisite knowledge and intent. See United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972). In such a situation, the interests of the company, the supervisory personnel and the employee may vary, and counsel for the company accordingly should refrain from providing legal advice to the individuals involved.[2]

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[2] The potential for conflict between a corporate entity and company employees has been exacerbated by the adoption of the Sentencing Guidelines for Organizations by the United States Sentencing Commission. The Guidelines place a premium on self-reporting and cooperation by the company if illegal conduct by company employees has been discovered. Under the Guidelines, a corporation's "culpability score" may be substantially reduced if the corporation reports the offense to the appropriate governmental authorities and fully cooperates in the government's investigation. United States Sentencing Commission Guidelines, Guidelines Manual, U.S.S.G. § 8C2.5(g) (May 1997). The Commentary to § 8C2.5 emphasizes that a company's cooperation "should include the disclosure of all pertinent information known by the organization." This is defined as information "sufficient for law enforcement personnel to identify the nature and extent of the offense and to

individual(s) responsible for the criminal conduct." U.S.S.G. § 8C2.5, Commentary, n.12. In other words, the Sentencing Guidelines create significant incentives for corporations to cooperate with governmental authorities in the prosecution of individuals within the company responsible for illegal conduct.

Where, on the other hand, it is clear that the employee is regarded as a witness in a matter in which neither he nor the company is suspected of any wrongdoing, joint representation by corporate counsel may be appropriate. It should, however, be remembered that a person's status as a witness, subject or target of a government investigation may change as the investigation progresses. Judgments regarding joint representation may therefore be second-guessed with the benefit of hindsight. Moreover, if joint representation is undertaken and a conflict later emerges, corporate counsel may be disqualified from representing either the corporation or its employees.

Even where there is no evident conflict, the government may have qualms about joint representation of the company and its employees. In practice, this often translates into objections to the presence of corporate counsel at any government interviews of company employees. Yet the government has no basis to object to the presence of separate counsel for an employee at any government interview. Thus, joint representation may force the government to call the witness before the grand jury in order to exclude company counsel, where the government might otherwise be willing to interview the witness informally in the presence of separate counsel.

Even where there is no apparent conflict, there may be tactical advantages to the retention of separate counsel by employees who are likely to be

contacted by the government. Separate counsel may have greater credibility - regarding representations made on behalf of individuals. The government may be more forthcoming to separate counsel than would be the case if the individual was represented by company counsel. Separate counsel may avert excessive reliance by the prosecutor on the grand jury process, which has a tendency to take on a life of its own. Separate counsel can prepare the employee to be interviewed or to testify – or advise the employee not to be interviewed or to assert a privilege not to testify -- with less risk of charges that the company is improperly attempting to influence his testimony. In helping a witness state his testimony, the same advice which would be regarded as good lawyering on the part of separate counsel may be viewed as improper coaching on the part of company counsel. Separate counsel will be present for informal interviews, and can ensure that any statements by the employee which may cause confusion are clarified, and that any favorable information is not overlooked. Where in his client's interest, separate counsel may provide corporate counsel with a briefing regarding any informal interviews pursuant to a confidentiality agreement invoking the joint defense privilege, as described more fully below. Because the witness is not under oath when interviewed informally, the risk of perjury charges is eliminated. If the witness is later called before the grand jury, counsel will know, based upon the previous interview, exactly what areas are of concern to the government.

As set forth in Section D above, employees may be advised by the company to consult with separate counsel if they so desire. It is also appropriate for the company to recommend counsel experienced in the type of matter at hand. Employees often seek such recommendations, and the company usually should offer suggestions. In order to maximize efficiency and minimize expense, a group of employees may be represented by the same attorney if there is no conflict among them. However, the decision to retain counsel must be that of the employees. Although reimbursement of attorneys' fees should not be made contingent upon the employees' retaining attorneys recommended by the company, the employee should not be encouraged to believe that fees will be advanced without regard for the qualifications of the attorney and other reasonable criteria.

Fees for legal representation of employees may be paid by the company where permitted or required under the indemnification provisions of applicable state law and the company's charter and bylaws. However, because an employee's eligibility for indemnification may depend upon facts which cannot be ascertained until the conclusion of the case, it may be advisable to advance the payment of legal fees subject to an undertaking by the employee to repay them if it is later determined the employee is not eligible for indemnification. This will protect management from claims by shareholders that advancement of the fees was

unauthorized, and will blunt any suggestion that advancement of fees constitutes an improper attempt by the company to thwart the government's investigation.

Once employees have retained separate counsel, consideration should be given to entering into a written confidentiality agreement among the attorneys for the company and the individuals involved in order to invoke the joint defense privilege. Such an agreement will facilitate the sharing of information developed in the course of investigation of the case, without prejudice to the attorney-client privileges enjoyed by both the company and the employees with their respective counsel. The confidentiality agreement should recite the understandings among counsel with respect to the common defense of their clients, including that: (i) counsel believe there is a mutuality of interest in a common defense and representation; (ii) counsel wish to pursue the separate but common interests of their clients without any waiver of privileged communications; (iii) any information or materials (e.g., witness interview memoranda) which would otherwise be protected from disclosure to third parties will remain confidential notwithstanding their exchange among counsel; and (iv) counsel consider disclosures among themselves of matters of common concern to be essential to the preparation of an effective defense of their clients, and therefore covered by the "joint defense doctrine" established under, e.g., Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir. 1985); United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir. 1979); Continental Oil Co. v. United

States, 330 F.2d 347 (9th Cir. 1964), and cases cited therein. The agreement should further specify that shared privileged information will not be disclosed to parties outside the agreement without the prior consent of the party which made it available in the first place. Counsel's signature to the agreement should constitute a certification that counsel has explained the agreement to his client and that the client agrees to abide by the understandings reflected therein.

7. Preparation of Witnesses for Government Interviews and Grand Jury Appearances.

Careful preparation of witnesses who agree to be interviewed by the government, or who are called before a grand jury, is a critical adjunct to the internal investigation. A thorough internal investigation will foster the most effective preparation of such witnesses. Where the witness is being prepared by separate counsel, counsel to the company may, under the provisions of a joint defense agreement, be able to provide valuable insights based upon information obtained through its internal investigation.

A witness who has not received general guidance about the government interview or grand jury process may inadvertently make statements which confuse the issue or create the impression of improprieties which do not exist. This is especially so where the witness is being interviewed by agents of a prosecutor who is formulating questions with an eye to confirming suspicions or misconduct, trying to get the witness to say things that fit a preconceived theory of the case, or putting a

negative "spin" on the witnesses' responses. Moreover, an unprepared witness may unintentionally make statements which contain inaccuracies which can later call his credibility into question or subject him to charges of perjury.

In most corporate criminal cases, the decision to indict almost invariably depends upon inferences of knowledge and intent of officers or employees, often with respect to conduct which may have occurred years before in a setting governed by the subtleties of complex regulatory principles. Shadings in a witness' response can have serious implications with respect to intent. It is therefore important that the witness thoroughly review his recollections of the events in question with counsel, and be prepared to articulate these recollections precisely.

Government agents often prefer to interview witnesses before they have had an opportunity to prepare with counsel. By getting to a witness "cold," the agents may be able to channel the dialogue along a course which tends to buttress their theory of the case. Efforts by agents to persuade witnesses to be interviewed without counsel are not uncommon, and may be somewhat coercive in nature. For example, former employees may be harassed at their place of business. Current employees may be contacted at home, and if they say they would like to consult with counsel before being interviewed, they may be asked in the presence of their families or friends whether they believe they have done anything wrong or have something to

hide. It is therefore important that potential witnesses be prepared to deal with such eventualities in the manner outlined in Section D above.

Where a witness advises an agent that he is represented by counsel, or would like to seek counsel prior to consenting to any interview, persistent efforts by the agent to obtain an interview without counsel may be inconsistent with the witness' rights under the Sixth Amendment. Moreover, it is clearly improper for a government agent to tell a witness that he may not discuss matters germane to the investigation with the company or its counsel. It should also be noted that the Victim and Witness Protection Act of 1984, 18 U.S.C. § 1512 et seq., applies equally to agents of the government and the company. Accordingly, if a government agent were to furnish misleading information to a witness in order to influence his testimony, the agent would have violated the Act, and the government's investigation would be tainted.

By the same token, preparation of witnesses by counsel must be free from undue influence or misleading conduct. Whether prepared by counsel for the company or separate counsel, the witness should be advised of the importance of telling the truth. In response to inquiries from a witness about how to handle a particular question, counsel should underscore that the question must be answered truthfully, before discussing with the witness the substance of his response.

In order to avoid confusion, the witness may be advised to listen carefully to each question that is asked, and to answer only that question. One

problem that arises with considerable frequency is that questions regarding the witness' knowledge or understanding may require different responses depending on whether they are directed to the witness' current state of awareness, or to what was known at the time of events in question. Accordingly, it may be helpful to counsel witnesses that when answering such questions, they distinguish between what they knew or understood at the time of the events at issue, and what they have learned since that time.

In a similar vein, the witness may properly be cautioned not to speculate in response to questions about his knowledge of the events at issue, and to avoid volunteering information that is not responsive to the question. Speculative or unresponsive answers promote misconceptions on the part of the government investigator which may never become apparent and which are difficult to clarify later even if they do.

In preparing witnesses, it is often necessary either to refresh or to test their recollections of the events in question, through the use of documents or questions based upon information gathered from other sources. When reviewing documents, care should be exercised to avoid a selective presentation which could suggest an attempt to mislead the witness and improperly influence his testimony. It is also generally advisable for counsel to avoid characterization of the facts or of the recollection of other witnesses. Such statements may either add to or alter the

witnesses' independent recollection of events, rather than refresh or test that recollection. They may also undermine the attorney-client privilege. Especially if such statements were to be viewed by a prosecutor as incomplete or inaccurate, they may give rise to charges of witness tampering. It would therefore be preferable to ask witnesses questions in the form of "do you recall," or "is it possible," in seeking to jog their memories or probe whether they might be mistaken or confused as to certain events.

It is also important to "debrief" employees who have been questioned by government investigators or called before a grand jury. These debriefings will assist counsel in understanding the focus and status of the government's investigation. With such an understanding counsel can formulate a more effective strategy and, if necessary, correct any misunderstanding on the part of the government regarding the facts or issues in question.

8. Reporting Findings and Recommendations to the Company.

After counsel has reviewed relevant documents and interviewed and debriefed employees and others knowledgeable about the matters at issue, it is often helpful to prepare a memorandum which (i) summarizes the facts developed through the internal investigation, (ii) analyzes applicable legal principles, (iii) identifies any weaknesses in the company's practices or procedures, (iv) outlines the arguments against criminal prosecution or administrative sanctions, and (v) recommends any

corrective actions or other measures which would improve operations and enhance the contractor's criminal and administrative defense of the case. Most corporate criminal cases involve highly complex facts, the significance of which can be difficult to grasp unless distilled in a detailed written analysis. A memorandum providing such an analysis can therefore be of enormous benefit to management in determining the appropriate course of action to take, including voluntary disclosures, both to minimize exposure for any past misconduct and to ensure present responsibility in its ongoing operations. It will also be extremely beneficial to counsel in mapping a defense strategy, and in preparing to make oral and/or written submissions to (i) the prosecutor, as to why the contractor should not be indicted, and (ii) the debarring agency, as to why the contractor should not be suspended or debarred. Where the internal investigation is properly conducted for the purpose of providing legal advice to the company, a memorandum report summarizing the findings of the investigation and analyzing the legal implications of those findings is protected by the company's attorney-client privilege and the work product doctrine. In re Subpoena Duces Tecum, 738 F.2d at 1369-1371; In re the Leslie Fay Co. Sec. Litig., 152 F.R.D. 42, 44 (S.D.N.Y. 1993).

9. Voluntary Disclosure of Findings from the Internal Investigation.

Where a company conducts an internal investigation based upon information it receives about possible wrongdoing which is not known to the

government, the question arises whether the findings of the investigation should be disclosed to the government. In conjunction with appropriate corrective actions, such disclosures tend to demonstrate the integrity of the company, and thus to dispel the grounds on which the company might be suspended or debarred from government contracting, or otherwise prohibited from doing business through termination of licenses, permits and other such regulatory actions.

The DoD has implemented a formal Voluntary Disclosure Program. In August 1986, the Deputy Defense Secretary, William Taft IV, sent a letter to 87 defense contractors calling for voluntary disclosure of evidence of fraud or wrongdoing. In return, Taft stated that DoD would look favorably upon such disclosure as evidence of present responsibility in determining what administrative action was warranted. The letter emphasized that "early voluntary disclosure, coupled with full cooperation and complete access to necessary records," were hallmarks of contractor integrity. It noted, however, that for the contractor to receive favorable consideration, the disclosure must not have been prompted by realization that the underlying facts were about to become known to the government. The letter also was careful to point out that there was no guarantee that voluntary disclosure would prevent suspension or debarment of the contractor.

For a satisfactory voluntary disclosure, the contractor is expected to: provide a detailed description of how and when the practice arose and continued;

specify any fraud issues raised by the practice; and identify all divisions involved, contracts affected, and officials and employees who knew of, encouraged or participated in the practice. The contractor is also expected to describe its response to the practice including: details as to how it was identified, investigated, and terminated; the steps taken to prevent its recurrence; and all disciplinary actions taken against officials or employees viewed as culpable. Finally, the contractor is expected to furnish a list and a description of investigative, audit and legal information to be provided to the government including: reports of interviews and audits, and audit work-papers; assurance that the contractor is willing to reimburse the government for any damages suffered; and assurance of contractor cooperation with government investigative efforts, including access to corporate records, premises and personnel.

These provisions obviously are extremely broad in scope. In order to avoid questions of proper compliance once a company has embarked on the course of voluntary disclosure, the company should establish the parameters of its disclosure obligations at the outset of the process, through negotiation and agreement with representatives of the agency to which disclosure is being made. Key issues to resolve would include disclosure of internal memoranda of employee interviews, attorney work papers and other sensitive materials. DoD has in the past been willing to agree that protections afforded by the attorney-client privilege and work product doctrine would not be treated as having been waived by virtue of a voluntary

disclosure. Generally, this has meant that materials such as memoranda of witness interviews conducted by counsel did not need to be provided to the government.

The standard agreement governing voluntary disclosures (the so-called "XYZ Agreement") recognizes that attorney-client privilege and work-product doctrine may protect witness interview memoranda, however, the government reserves the right to challenge their applicability in particular situations, and

> the Government may request supplemental information including information provided by any individual interviewed by the company. . . . Any declination by the contractor to provide such supplemental information may affect the Department of Justice's ability to verify the disclosure and evaluate the contractor's cooperation in accordance with the Department of Justice's Voluntary Disclosure Guidelines.

See Letter from Morris Silverstein, DoD Assistant Inspector General for Criminal Investigations Policy and Oversight to Frank Menaker, Jr., Chairman, Special Committee of American Bar Association on Voluntary Disclosure, May 15, 1989 (enclosing revised XYZ Agreement), reprinted in, 51 Fed. Cont. Rep. 951 (1989). As this suggests, the government has become more aggressive in demanding interview notes and other privileged information from companies which make voluntary disclosures, notwithstanding the inevitable chilling effect this will have on the willingness of witnesses to be forthcoming in an internal investigation.

The Department of Justice ("DOJ") endorsed DoD's voluntary disclosure policy in February 1987. DOJ recognized the need to balance the effect of

deterring misconduct by contractors through prosecution of procurement fraud cases on the one hand, with the need to encourage self-examination and voluntary disclosure by contractors on the other. However, Deputy Attorney General Arnold Burns stated that "voluntary corporate disclosure of wrongdoing is rarely the sole basis for a decision not to prosecute." The Justice Department has identified factors the prosecutor is to consider in seeking indictment in the form of a supplement to the United States Attorney's Manual. Where the law and evidence would otherwise support a prosecution, these factors include: (i) candor and completeness of the disclosure; (ii) quality of the contractor's efforts to prevent misconduct in the first instance through a meaningful compliance program, implemented in fact as well as on paper; (iii) dollar impact upon the taxpayers; (iv) pervasiveness of the illegal conduct; (v) level of employees involved; (vi) quality of the contractor's cooperation during the DOJ investigation; and (vii) nature of the remedial actions taken by the contractor in the wake of discovery of the misconduct.[3]

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[3] As was noted above, as of July 1, 1996, the DoD had accepted 321 voluntary

disclosures as part of its formal disclosure program. The government has recovered $356 million as a result of these disclosures. Only two of these volunteers were debarred and only three were indicted. One of those cases involved a voluntary disclosure followed by efforts, including destruction of documents, by the highest level management of the company to cover up the extent of the misconduct. The DoD program is viewed by the government and contractors as a modest success bringing benefits to both. See Klubes, The Department of Defense Voluntary Disclosure Program, 19-20 Pub. Cont. L.J. 504, 519 (1990).

The DOJ recently recognized that similar considerations are also relevant in prosecutorial decisions involving corporate misconduct outside of the defense contracting arena. On July 1, 1991, DOJ issued a policy statement for prosecution of environmental offenses which recognizes that a company's voluntary disclosure of an environmental violation mitigates against an indictment for that violation. The DOJ announced in the statement that "[i]t is the policy of the Department of Justice to encourage self-auditing, self-policy and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion." As the DOJ did with regard to the DoD Voluntary Disclosure Program, the statement enumerated the factors which should be considered in seeking indictment. Where the law and evidence would otherwise support a prosecution, the factors include: (i) voluntary, timely and complete disclosure; (ii) full and prompt corporation with the government; (iii) existence and scope of any regularized, intensive and comprehensive environmental compliance program adopted in good faith in a timely manner; (iv) pervasiveness of noncompliance; (v) existence of effective system of discipline for employees who violate environmental compliance policies; and (vii) extent of any efforts to remedy any ongoing noncompliance.

Even in the absence of a federal agency's stated voluntary disclosure policy, disclosure may in certain cases be the best course for a company to follow. Voluntary disclosure coupled with appropriate corrective actions enable a company to argue that as a responsible corporate citizen it should not be prosecuted, suspended, or debarred. One effective format for an argument based upon these and other equitable and policy considerations is described in Section J below.[4]

The Federal Sentencing Guidelines for Organizations create further incentives for a corporation to voluntarily disclose criminal conduct. Under the Guidelines, a corporation receives a benefit if it has in place an effective compliance program to prevent and detect violations of law. See U.S.S.G. § 8C2.5(f). However, the benefit of a compliance program is lost under the Guidelines if the organization "unreasonably" delays reporting an offense to appropriate governmental authorities after becoming aware of criminal conduct. In addition, as previously noted, a

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[4] It should also be noted that the Anti-Kickback Enforcement Act of 1986, 41 U.S.C. § 51 et. seq., requires contractors to report in writing to the Inspector General of the contracting agency or other designated officials when they have reason to believe a kickback may have occurred between upper and lower tier contractors in connection with a government contract. Implementing regulations appear at 48 C.F.R. § 52.203-7 (1997).

corporation may obtain additional reductions in its "culpability score" if it voluntarily discloses illegal conduct to governmental authorities and fully cooperates in the government's investigation. Such voluntary disclosure must be prior to an imminent threat of disclosure; it also must be "timely and thorough." See U.S.S.G. § 8C2.5(g) and Commentary, n. 12 (emphasis added). Thus, the Sentencing Guidelines create new incentives for voluntary self-reporting by corporations.

Full blown disclosure of the type discussed above has both potential benefits and liabilities. Since the government may be the contractor's primary or only customer, there is a natural desire on the part of the contractor to avoid an adversarial relationship with the government. Cooperation with the government through voluntary disclosure of possible wrongdoing is generally consistent with this objective. Yet while such a posture should result in favorable consideration by both debarring officials and prosecutors, it may also subject the contractor, as well as its officers and employees, to the risk of criminal prosecution, suspension and debarment.

In weighing the advantages and disadvantages of disclosure, a company must also consider that there is a possibility that attorney-client privilege and attorney work product protection may be waived with respect to otherwise privileged and protected communications and materials generated in the course of an internal investigation. Even if a waiver has not occurred as a legal matter, the government may consider the invocation of these protections as a lack of full

cooperation with their investigative efforts, and refuse favorable consideration if the protections are invoked. In other words, there may be no half measures once a decision to disclose is set in motion.

Voluntary disclosure may also have a chilling effect upon the cooperation of employees in the course of internal investigations. Employees are likely to be far more guarded in their response to internal inquiries if they know their responses will be routinely disclosed to government investigators. Accordingly, disclosure of witness interview memoranda and other internal investigative materials may ultimately prove self-defeating insofar as the overall goals of the program are concerned, both from the government's and the contractor's perspective. This point should be underscored in any effort by the company to reach agreement with the government at the outset as to the manner in which disclosure is to be made.

Obviously, the benefits and risks of disclosure must be carefully weighed by the company on a case by case basis. However, it is important to observe that without any affirmative steps to bring a problem to the government's attention, necessary actions to correct the problem may in any event lead to its discovery by the government. Thus, for example, where a contractor uncovers a pattern of labor mischarging that calls for correcting journal entries on the books of the company, the journal entries may flag the problem during a DCAA vulnerability assessment or audit. Similarly, adjustment of a contract price to correct a defective pricing problem

by its own terms will reveal the fact that the contract price was incorrectly priced in the first place. Failure to correct such problems in order to avoid their disclosure would compound the underlying deficiency and bring the contractor's integrity into serious question based upon both its current and past conduct. The fact that necessary corrective action may itself lead to discovery of the problem may therefore militate in favor of affirmative acts of disclosure in order to benefit from the DoD and DOJ policies in this area.

Another factor in determining whether to make a disclosure to the government is the proliferation of qui tam suits. Under the amended False Claims Act, 31 U.S.C. § 3729, individuals with knowledge of fraud can obtain a significant percentage of any recovery that results from suits they file in the name of the government. Such actions are originally filed under seal. The government has the opportunity to investigate the allegations to determine whether it wants to join the suit and take over prosecution of the action, or to decline to intervene and allow the relator to proceed alone. Whether or not the government intervenes, the relator is guaranteed a percentage of any recovery or settlement.

The number of qui tam suits filed has increased since the 1986 amendments to the False Claims Act. As of October 1996, more than 1,550 qui tam suits have been filed since 1986, and the government has recovered in excess of $1.1 billion. Furthermore, qui tam actions are moving beyond defense procurement fraud

to areas such as Medicare fraud and scientific research fraud. Similarly, many environmental statutes permit private attorneys general actions. With the growing attention on environmental enforcement, such suits are likely to multiply as well.

As a result of these developments, it is increasingly likely that the government will discover the misconduct, even absent the company's affirmative disclosure. Under these circumstances, disclosure may become an important "damage control" tool. In fact, the False Claims Act provides for a reduction of potential damages from treble actual damages to double actual damages if the violator voluntarily discloses the fraud and fully cooperates with the ensuing government investigation. 31 U.S.C. § 3729(a).

10. Persuading the Government that Criminal Prosecution is Not Warranted.

The adverse consequences of indictment and prosecution of corporations and their officers and employees are self-evident. Where government contractors are concerned, the immediate consequence of indictment almost invariably will be its suspension from government contracting. Avoiding criminal charges is generally regarded by most corporations, and by government contractors in particular, as being of paramount importance. Accordingly, corporations faced with the possibility of criminal charges will often want to make a detailed presentation to the prosecutor as to why the facts of the case do not justify prosecution.

Generally, such presentations are most effectively made in writing, after there has been adequate internal inquiry to assure that the facts are known. There also must have been sufficient dialogue with the prosecutor to identify the government's principal areas of concern, and assess whether the prosecutor still has an open mind about the case. Where the prosecutor has raised specific questions regarding the facts and circumstances of the contractor's actions, it will be necessary to address these points directly if the submission is to be persuasive. By being specific, and dealing in detail with all of the facts, the company demonstrates to the prosecution that it is prepared to go forward – perhaps better prepared than the government – and that if an indictment is sought, the government will have a difficult battle on its hands.

An effective submission must address all of the critical facts of the case, especially those likely to be perceived as most incriminating when viewed in the light least favorable to the company. In evaluating a case for prosecution, the government often tends to look at facts in isolation under a lens which magnifies their negative aspects. A submission therefore must place the facts in a context which tends to neutralize any inference of criminal intent or knowledge.

In order to accomplish this objective, the company will in effect have to provide the government with a blueprint of its defense of the case. This may include furnishing helpful documents of which the government is as yet unaware, as

well as proffers of testimony which the contractor expects to be available from favorable witnesses. In so doing, the contractor may well be sacrificing any advantage of surprise which it might otherwise obtain if the case ultimately were to proceed to indictment and trial. Thus, by making a submission, the company better enables the government to anticipate and counter its defenses to the possible charges of criminal misconduct. The company must therefore weigh the tactical disadvantages of a submission in the event it proves unsuccessful in deterring indictment, against the potential it may have to persuade the prosecutor not to indict the case.

This equation has become considerably more complex as a result of developing case law with regard to waiver of privilege and work product protection in the context of submissions to government agencies. The decision of the United States Court of Appeals for the Fourth Circuit, In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988), illustrates one area of particular concern. There, William C. Pollard, a former employee of Martin Marietta, was indicted in connection with a scheme to inflate company travel costs which were reimbursed by the government. The indictment evidently was based to some extent upon information provided to the government by the company from the results of its internal investigation. In order to prepare his defense, Pollard sought from the company a wide range of materials including witness statements and internal audit reports. The company objected to

these particular requests on grounds of the attorney-client privilege and work product doctrine.

The Fourth Circuit rejected these objections. It ruled that the attorney-client privilege had been waived with respect to the entire subject matter as to which the company had made disclosures in its written submissions to the government. Id. at 623-24. It also held that work product protection had been waived in substantial measure:

> The disclosure of Martin Marietta was made broad by its express assurance of completeness of its disclosure to the United States Attorney, so that the subject matter of the disclosure and the waiver is comprehensive, and includes all of the company's non-opinion work-product relating to the investigation that it conducted.

Id. at 625.

Martin Marietta may be distinguishable from other cases in which the materials in question (i) have not been quoted by the company in its statements to the government, cf. In re Woolworth Corp. Sec. Class Action Litig., 94 Civ. 2217 (RO), 1996 U.S. Dist. LEXIS 7773 (S.D.N.Y. June 6, 1996), and (ii) are not relevant to the defense of an individual implicated by the company in its statements to the government. Where the government has accepted a submission on the condition that it not be construed as a waiver of privilege, it would seem that the government, as opposed to a third party such as Pollard, would be estopped from arguing that the privilege has been waived. Nonetheless, the Martin Marietta opinion may invite the

government to invoke arguments similar to those raised by Pollard in an attempt to discover the fruits of the company's internal investigation.[5] Accordingly, it is advisable to obtain the government's express agreement that it will not treat any submissions made on behalf of the company as a waiver of the attorney-client privileges and work product doctrine protection. A provision to this effect is included in the revised DoD XYZ Agreement. However, even such an agreement by the government may not preclude a finding that there has been a waiver of attorney-client privilege and work product protection in other contexts. Westinghouse, 951 F.2d at 1425; In re the Leslie Fay Co. Sec. Litig., 152 F.R.D. at 45-46. But see In re Steinhardt Partners, 9 F.3d 230, 236 (2d Cir. 1993).

The thrust of any submission will of course vary depending upon the facts and circumstances of each case. Thus, in some cases, although there may have been questionable judgments regarding complex technical matters, the company may

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[5] The United States Court of Appeals for the Second Circuit, in In Re Six Grand Jury Witnesses, 979 F.2d 939 (2d Cir. 1992), narrowly construed both the work product doctrine and the attorney-client privilege and upheld a district court's ruling that prosecutors had properly compelled company employees to testify in the grand jury about analyses they conducted at the behest of defense counsel.

be persuaded that none of its employees or officers have engaged in any criminal misconduct. The company will in such cases want to stand behind the individuals involved as to their lack of criminal intent, even if conceding that with the benefit of hindsight their judgment as to certain matters may have been questionable. A joint submission by the company and the individuals might be desirable in these circumstances.

In other cases, it may appear that one or more employees acted improperly, but there may be a host of arguments as to why the company should not be held vicariously liable even if it is determined that the individuals possessed criminal knowledge and intent. For example, the individuals may be fairly low level employees who were acting contrary to explicit management policy and directives for personal benefit rather than the benefit of the company. The company may have taken prompt corrective action upon discovery of the problem, including disclosure to the government and termination of the culpable employees.

Almost without regard for the particulars of the case, the key issue in determining criminality will be that of intent. Since intent is typically established circumstantially – i.e., through inferences drawn from the facts and circumstances of the matters at issue – any argument that no criminal conduct occurred will have to place the conduct in a context which supports an inference of good faith. Where, as is often the case, prosecution is grounded in the false claims and false statements

statutes, this generally means that the employees or officers involved had a good faith belief that any challenged statements or claims were true, and did not intend to mislead, deceive or defraud the government.

In presenting the case against indictment, it is useful for counsel to review the Department of Justice's own "Principles of Federal Prosecution," a manual of detailed guidelines published in July 1980 to ensure equitable and uniform criminal enforcement policies. Under the Principles, two threshold determinations must be made in deciding whether or not a prosecution should be brought. First, the prosecutor must evaluate whether a federal offense has been committed. Second, the prosecutor must conclude that the person or persons under investigation will probably be found guilty if indicted and tried. However, even if the government believes that both of these threshold tests have been satisfied, the Principles state that prosecution should be declined where no federal interest would be furthered by prosecution or where there exists an adequate noncriminal alternative to prosecution.

The Principles offer a useful structure for arguing against prosecution in most corporate criminal cases. Initially, the company will want to maintain that the facts do not support an inference of criminal knowledge or intent. It will also be essential to point out the reasons for which acquittal would be likely if the case were brought to trial. Prosecutors should know from experience that it can be extremely difficult to obtain a conviction where, for example, there is no improper economic

motive for that alleged misconduct, or where there is no harm to the government and no unjust enrichment of the defendant. Similarly, where complex regulations and myriad technical, financial and other data are involved, there is often a strong argument that a jury would conclude that the individuals involved were acting in good faith, and honestly believed in the correctness of their conduct and truthfulness of their statements even if mistakes or errors in judgment were made.

There are also often a number of grounds on which a strong argument can be made that no substantial federal interest would be served by prosecution. These include: (i) the conduct in question is a low enforcement priority relative to other areas; (ii) that prosecution is not necessary to achieve deterrence; (iii) whether or not in the context of a voluntary disclosure, the company's actions have already achieved all the benefits that could be gained from prosecution; (iv) there is no evidence of corrupt motive; (v) the company has no criminal history and an excellent record of service in the national interest; (vi) the company has been and will continue to be, fully cooperative with the government's investigation; (vii) available civil remedies are equal to the probable sentence if a conviction were to be obtained; and (viii) the adverse consequences of prosecution, including disruption of important federal programs and economic dislocation of the company workforce, would be contrary to the national and public interest.

In addition, the Department of Justice has a stated a policy against over-dependence on the criminal process where adequate civil remedies are available. Coupled with corrective actions to ensure against any recurrence of the problem, it may be possible to demonstrate that a civil rather than criminal approach is more appropriate in a given case.

2. CONCLUSION.

Internal investigations are the key to the proper handling of incidents of possible misconduct on the part of a corporation. It is impossible for management to chart an appropriate course in the face of potential allegations of wrongdoing without sound legal advice about the company's areas of exposure. Counsel cannot provide that advice unless they have ascertained the facts through a thorough internal inquiry. Nor can the risks of criminal prosecution or other adverse consequences be minimized unless the company has carefully scrutinized its own conduct and objectively assessed its vulnerabilities. In short, all sound actions to protect the company's interests depend upon a command of the facts that can only be obtained through a skillfully conducted internal investigation.