

**American Bar Association
30th Annual Forum on Franchising**

**COPING WITH INTERNAL AND
GOVERNMENT INVESTIGATIONS**

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October 10 – 12, 2007
JW Marriott Desert Ridge
Phoenix, AZ

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I. INTRODUCTION¹

With the rise of white collar enforcement efforts at both the federal and state levels, government investigations into possible corporate misconduct are an unfortunate fact of life for companies today. Often, there may be very little warning before a company, its executives, and its inside and outside counsel are faced with the prospect of law enforcement visits, investigative demands, search warrants, and subpoenas. In some cases, those inquiries may lead to administrative complaints and lawsuits, or even to criminal proceedings, including grand jury investigations, indictments, and trials. Even before the government comes knocking, a board of directors may require that counsel launch an internal investigation of transactions or conduct. Whether you are inside or outside counsel, you may be called upon to provide prompt, practical advice to protect the rights and defend the innocence of your clients, your company, and your franchise system. Counsel involved in government or internal investigations will be faced with a litany of difficult choices, and will be required to act promptly, often without the benefit of complete information. Missteps, even early in the process, can have serious adverse repercussions.

This Paper discusses the considerations involved in responding appropriately to government investigations and conducting effective internal investigations.² After an introduction to the challenges to franchisors and franchisees posed by government investigations, the Paper provides an overview of the governmental personnel and agencies that potentially could be involved in civil and criminal investigations and prosecutions. The Paper then discusses current federal charging policy in criminal cases against business organizations, including controversial issues currently raging regarding the so-called “Thompson” and “McNulty” Memoranda and the circumstances under which federal prosecutors may take into consideration a corporation’s waiver of the attorney-client privilege and its decision to indemnify employees implicated in criminal proceedings. The Paper then sets out various considerations involved in responding to criminal investigations at all stages, from initial visits by federal or state investigators to grand jury subpoenas to search warrants. The Paper next discusses issues relevant to internal investigations, including the appropriate use of outside investigative tools such as private investigators, “mystery shoppers,” and surveillance camera and recording devices. Finally, the Paper discusses the dangers of “parallel investigations” — when a company is faced with simultaneous federal and state criminal and civil investigations, private civil suits, and/or internal investigations into the same conduct.

II. IT CAN HAPPEN TO YOU: CRIMINAL INVESTIGATIONS AND FRANCHISE ORGANIZATIONS

As a result of the highly publicized scandals arising out of the stock market meltdown of 2000, the prosecution of corporate crime has become a high priority for the United States Department of Justice (“DOJ”) and many state Attorneys General and prosecutors. By late 2001, several leading corporations, including Global Crossing, Tyco International, Adelphia Communications, and Enron, as well as Enron’s auditor, Arthur Andersen, all found themselves embroiled in or on the brink of criminal investigations by state and federal prosecutors.

Although government investigations into corporate misconduct present immense challenges for any company, they can present particularly vexing issues for franchisors and

¹ The authors would like to express their appreciation for the substantial insights and contributions of Aphrodite Kokolis, a partner at Schiff Hardin LLP.

² This Paper does not provide legal advice for any specific matter. Readers should consult an attorney directly for such advice.

franchisees. Franchising by its nature can implicate areas of law in which the government has demonstrated a keen interest, including employment (e.g., wage and hour, discrimination, sexual harassment), antitrust, and the Americans with Disabilities Act, among many others. In addition, franchisors must be mindful not only of the consequences of a government investigation into their own conduct, but also of the possible effect of an investigation targeted at their franchisees.

In April 2007 Jackson Hewitt experienced firsthand the impact of just such a government investigation into the practices of one of its franchisees, when news broke that the United States had filed civil injunction suits against five corporations that operate Jackson Hewitt tax preparation franchises. According to the suits, the franchisee allegedly paid low wages to its tax preparers and directly tied preparers' overall compensation to the number of tax returns prepared, without regard to the honesty or quality of the tax returns. Because this was the third time in the past year that Jackson Hewitt's franchisees had been targeted by federal authorities, Jackson Hewitt's shares plunged \$5.87, or 18%, the day the news was reported. Jackson Hewitt quickly responded with a press release acknowledging the seriousness of the claim, while advising that it could not comment on franchise litigation.

Although this incident involved one Jackson Hewitt franchisee, industry observers acknowledged that this one franchisee's actions could adversely affect other Jackson Hewitt offices. As Robert Purvin, chairman of the American Association of Franchisees and Dealers, was quoted as saying: "Hearing about a bad experience at one location may make you less likely to go into another location. That's a fact of life of franchising."³

Although franchisees run independent businesses, government investigations into franchisee conduct also can result in possible vicarious liability for the franchisor, as well as bad publicity and loss of goodwill for the franchise system as a whole. Moreover, just as a franchisor may feel the need to investigate not only the conduct of its own employees, but also that of its franchisees, both franchisors and franchisees may need to conduct investigations when it appears that suppliers, brokers, or other third parties with whom they deal may have engaged in questionable conduct. It is imperative, therefore, that all corporations involved in franchising, public and private, have in place a process for responding to government investigations and conducting internal investigations, and retain counsel experienced in dealing with these issues.

III. BEHIND THE SCENES: KEY FACTS ABOUT THOSE WHO INVESTIGATE AND PROSECUTE

Responding appropriately to a criminal investigation of your company first requires an understanding of the roles of the governmental entities and personnel involved.

A. The United States Department of Justice: The Basics

1. Organization

The United States Department of Justice was created in 1870 as an executive department of the United States, and is headed by the Attorney General, the chief law enforcement officer of the federal government. The DOJ has the authority to handle the legal

³ See Jessica Dickler, *Death by Tax Fraud: Some Jackson Hewitt Franchise Owners May Be Feeling the Heat After U.S. Sues a Franchisee for Tax-Fraud Schemes*, CNNMoney.com, Apr. 17, 2007, http://money.cnn.com/2007/04/16/smbusiness/jackson_hewitt/index.htm.

business of the United States, and has control over federal criminal prosecutions as well as civil lawsuits in which the United States has an interest.⁴

The bulk of the DOJ's litigation work is carried out by the United States Attorneys and their staffs located throughout the country and its territories. United States Attorneys are appointed by the President, with the advice and consent of the Senate, for four-year terms.⁵ One United States Attorney generally is assigned to each of the federal judicial districts and serves as the chief law enforcement officer of the United States within his or her jurisdiction.⁶

The DOJ is organized into various agencies and divisions, including its litigation divisions (Antitrust, Civil, Civil Rights, Criminal, Environment and Natural Resources, and Tax) and its bureaus, such as the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration, and the Bureau of Prisons, among others.⁷

The DOJ's Criminal Division exercises general supervision over the enforcement of all federal criminal laws, with the exception of those statutes whose enforcement is assigned to other Divisions.⁸ For example, enforcement of federal antitrust laws is the primary responsibility of the Antitrust Division. Nevertheless, although most antitrust investigations are conducted by the Antitrust Division, in some cases the Antitrust Division may refer antitrust investigations to a United States Attorney, particularly when localized price-fixing or bid-rigging conspiracies are involved, or when the antitrust violations are part of criminal conduct already being investigated by the United States Attorney's Office. At that point, the United States Attorney's Office becomes primarily responsible for the investigation and prosecution of the case. All antitrust investigations, however, are subject to supervision by the Assistant Attorney General for the Antitrust Division in order to ensure a consistent national policy regarding antitrust issues.⁹

Significantly, in July 2002, in the wake of the massive scandals that rocked the corporate world, the Corporate Fraud Task Force was created by Executive Order with the goal of "restoring the integrity of the market and the confidence of the nation."¹⁰ The Task Force is led by the Deputy Attorney General and is comprised of a DOJ group (including representatives from the FBI, Assistant Attorneys General for the Criminal and Tax Divisions, and United States Attorneys from various districts) and an interagency group (including the Secretaries of the Treasury and of Labor; the Chairmen of the Commodities Futures Trading Commission, the Federal Communications Commission, the Federal Energy Regulatory Commission, and the

⁴ 28 U.S.C. §§ 501, 503; see United States Department of Justice, Mission Statement and Statutory Authority, <http://www.usdoj.gov/02organizations> (last visited Aug. 1, 2007); United States Department of Justice, United States Attorneys Mission Statement, <http://www.usdoj.gov/usao/index.html> (last visited Aug. 1, 2007).

⁵ 28 U.S.C. § 541. The controversial firing of several United States Attorneys beginning in late 2006 raised anew the issue whether United States Attorneys serve at the pleasure of the President. See, e.g., United States Attorneys' Manual § 3-2.120 ("United States Attorneys are subject to removal at the will of the President.") [hereinafter U.S. Attorneys' Manual], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title3/2musa.htm.

⁶ See 28 U.S.C. § 547.

⁷ For an organizational chart of the DOJ, see <http://www.usdoj.gov/dojorg.htm>. For additional information, see the United States Attorneys' Manual, *supra* note 5.

⁸ See United States Department of Justice, Organization, Mission and Functions Manual, Criminal Division, <http://www.usdoj.gov/jmd/mps/manual/crm.htm> (June 20, 2002).

⁹ See U.S. Attorneys' Manual, *supra* note 5, § 7-1.100 (Antitrust Resource Manual, Department of Justice Policy and Responsibilities) (Oct. 1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title7/1mant.htm.

¹⁰ See United States Department of Justice, The President's Corporate Fraud Task Force, <http://www.usdoj.gov/dag/cfff> (last visited Aug. 1, 2007).

Securities and Exchange Commission; the Chief Inspector of the United States Postal Inspection Service; and the Director of the Office of Federal Housing Enterprise Oversight). The Task Force focuses on enhancing DOJ criminal enforcement activities and maximizing joint federal regulatory and enforcement efforts in the area of “financial crimes,” including “securities fraud, accounting fraud, mail and wire fraud, money laundering, tax fraud based on such predicate offenses, and other related financial crimes committed by commercial entities and directors, officers, professional advisers, and employees thereof.”¹¹ Since its establishment, the Task Force has reviewed all corporate fraud matters under federal investigation, and maintains an online list of all “significant criminal cases and charging documents,” organized alphabetically by company name.¹²

2. Criminal Investigations

a. The FBI and Other Investigative Agencies

United States Attorneys have the authority to investigate and prosecute criminal offenses against the United States.¹³ The United States Attorney often will request that other federal investigative agencies assist in conducting criminal investigations. These federal investigators operate under the supervision of their bureau or agency, and ordinarily are not subject to direct supervision by the United States Attorney’s Office.¹⁴

The principal investigative arm of the DOJ is the FBI, established in 1908.¹⁵ “Top priority” is currently assigned to investigations in five areas: counterterrorism, drugs and organized crime, foreign counterintelligence, violent crimes, and financial crimes. The FBI is a factfinding and reporting agency only. According to FBI policy, the results of FBI investigations are furnished without recommendation or conclusion to the United States Attorney, who has the sole responsibility to determine the appropriate action to take.

b. The Grand Jury

United States Attorneys also have available to them the investigative powers of the grand jury. Although the grand jury’s principal role is to determine whether there is probable cause to believe that a federal offense was committed within the venue of the district court, and either to indict or to return a “no bill” (no indictment), the grand jury has extensive investigatory powers, and may subpoena documents as well as persons to testify before it, including the “subjects” or “targets” of the investigation.

A “target” is a person as to whom the prosecutor or the grand jury has “substantial evidence” linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization that is a target is not automatically considered a target, even if his or her conduct contributed to the commission of the crime by the target organization. Likewise, an organization that employs an officer or

¹¹ See Exec. Order No. 13,271 (July 9, 2002), *available at* <http://www.usdoj.gov/dag/cfff/execorder.htm>.

¹² See United States Department of Justice, Corporate Fraud Task Force Cases and Charging Documents, http://www.usdoj.gov/dag/cfff/cases_a_c.htm (last visited Aug. 1, 2007).

¹³ See 28 U.S.C. § 547.

¹⁴ See, e.g., 18 U.S.C. § 3061 (investigative powers of postal inspectors).

¹⁵ See 28 U.S.C. §§ 531, 533.

employee who is a target is not automatically deemed a target itself. A “subject” of an investigation is a person whose conduct is “within the scope of the grand jury’s investigation.”¹⁶

The DOJ has a longstanding policy to advise known targets of a grand jury investigation that their conduct is being investigated for possible violation of federal criminal law. United States Attorneys also have the discretion to inform a target that he or she no longer is considered to be a target by the United States Attorney’s Office, although such notification may not necessarily give the target a “clean bill of health,” and does not necessarily preclude reinstating grand jury proceedings. The Antitrust Division’s procedures with respect to these matters are slightly different, however. The Antitrust Division generally follows the DOJ policy of informing individuals that they are targets and advising them of the opportunity to appear voluntarily before the grand jury, but the same opportunity does not extend to corporate entities, although the United States Attorney normally will advise counsel for the corporation if an indictment is being contemplated. In addition, counsel for corporate and individual targets of antitrust investigations may request the opportunity to argue against indictment to the Deputy Assistant Attorney General for Criminal Enforcement or other Antitrust Division officials, provided that counsel already has discussed the issues with the United States Attorney, who will be notified of any such meeting.

Before a known target is subpoenaed to testify before a grand jury about his or her involvement in the crime under investigation, the United States Attorney will attempt to secure the target’s voluntary appearance. Furthermore, sometimes a target or subject who is not subpoenaed or requested by the government to testify before the grand jury will desire to tell the grand jury his or her side of the story. Although there is no “right” to testify before grand juries, in order not to “create the appearance of unfairness,” the United States Attorney may consider granting such a request if it will not create a burden upon the grand jury or delay the proceedings, and provided that the witness explicitly waives his or her privilege against self-incrimination and is represented by counsel, or voluntarily and knowingly appears without counsel and consents to full examination under oath.¹⁷

Although the United States Supreme Court has not yet decided whether a grand jury witness must be advised of his or her Fifth Amendment right against self-incrimination, it is DOJ policy to advise the witness if he or she is a target or subject of the grand jury investigation. An “Advice of Rights” form will be appended to any grand jury subpoena directed to a target or subject, and the warnings are repeated to the witness at the grand jury hearing. The form advises that the grand jury is conducting an investigation into possible violations of federal criminal laws (and, for targets, that the target’s conduct is being investigated); that the witness may refuse to answer any question “if a truthful answer to the question would tend to incriminate” the witness; that anything the witness says may be used against him or her by the grand jury or in a subsequent legal proceeding; and that the witness may step outside the grand jury room to consult with retained counsel.¹⁸

3. The Decision to Prosecute (or Not)

The United States Attorney is authorized to initiate prosecution by filing a complaint, requesting an indictment from the grand jury, and, when permitted by law, filing an information.

¹⁶ See U.S. Attorneys’ Manual, *supra* note 5, § 9-11.151 (Criminal Resource Manual, Advice of “Rights” to Grand Jury Witnesses) (Sept. 2006), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm.

¹⁷ See *id.* § 9-11.152 (Criminal Resource Manual, Requests by Subjects and Targets to Testify Before the Grand Jury) (Sept. 2006), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm.

¹⁸ See *id.*

Absent a defendant's consent, however, the Fifth Amendment requires that a grand jury indictment be obtained for all capital and "infamous" crimes — generally, federal felony offenses punishable by more than one year of incarceration.¹⁹ The Fifth Amendment's grand jury requirement does not apply to the states, which, as a matter of federal constitutional law, may choose to prosecute without a grand jury indictment. Many states, however, have their own state law requirements of a grand jury indictment under similar circumstances.²⁰

Under DOJ policy, a United States Attorney should commence prosecution if he or she believes that the person's conduct constitutes a federal offense and that "admissible evidence will probably be sufficient to obtain and sustain a conviction," unless (1) no "substantial Federal interest" would be served by prosecution (including a consideration of such factors as current federal law enforcement priorities, the nature and seriousness of the offense, the deterrent effect of a prosecution, the person's culpability and criminal history, his or her willingness to cooperate with the government, and the probable sentence or other consequences if the person is convicted); (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an "adequate, non-criminal alternative to prosecution," such as civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; referrals to licensing authorities or to professional organizations such as bar associations; and pretrial diversion.²¹

Finally, a United States Attorney, with supervisory approval, may enter into a "non-prosecution" agreement with a person who potentially could be prosecuted in return for his or her cooperation, if that person's timely cooperation "appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective."²² Normally, non-prosecution agreements are entered into only after alternative means of obtaining the person's cooperation have proved, or probably will prove, ineffective, such as (1) obtaining a conviction and then seeking the person's cooperation in the investigation or prosecution of others, with the prospect of a reduced sentence in return for cooperation; (2) reducing the charges or potential charges against the person in return for a guilty plea and cooperation; and (3) obtaining a court order granting "use immunity," which compels the person to testify while providing that the testimony may not be used against him or her in any criminal case, except a prosecution for perjury or failure to comply with the order.²³ Moreover, a United States Attorney normally will seek to limit the scope of the non-prosecution agreement to his or her district, thereby allowing for prosecution by other United States Attorneys and other federal agencies.

B. Other Federal Agencies

Other federal agencies also may be involved in investigations of franchisors or their franchisees, and their officers, directors, and employees. In particular, in this post-Enron era, the Securities and Exchange Commission ("SEC") has undertaken an increasingly more aggressive role in investigating securities fraud.

¹⁹ See Fed. R. Crim. Proc. 7(a).

²⁰ See, e.g., *Campbell v. Louisiana*, 523 U.S. 392, 398-99 (1998).

²¹ See U.S. Attorneys' Manual, *supra* note 5, §§ 9-27.220 to .250 (Criminal Resource Manual, Principles of Federal Prosecution) (Jan. 2007), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

²² See *id.* §§ 9-27.600 to .640.

²³ See 18 U.S.C. §§ 6001-6003 (immunity of witnesses).

Established in 1934 in the aftermath of the 1929 stock market crash and the Great Depression, the SEC's mission is to enforce the federal securities laws, promote stability in the securities markets, and protect investors. The SEC has five Commissioners, who are appointed by the President, with the advice and consent of the Senate, to serve five-year terms. To maintain the non-partisan nature of the Commission, no more than three Commissioners may belong to the same political party. The President also designates one of the Commissioners as the Chairman, the SEC's chief executive.²⁴

The SEC operates through eleven regional offices and four divisions (Corporation Finance, Market Regulation, Investment Management, and Enforcement). The Division of Enforcement investigates possible violations of federal securities laws; recommends Commission action, including federal civil suits and administrative actions; and negotiates settlements on behalf of the Commission. Common securities laws violations include insider trading; misrepresentations or material omissions regarding securities, including but not limited to false or inaccurate financial statements; stock price manipulation; and mishandling of customer funds, among many others.²⁵

It is important to note, however, that in contrast to the DOJ, the SEC has only *civil* enforcement authority.²⁶ The SEC does not have the authority to institute federal criminal proceedings. Nevertheless, the SEC works closely with both federal and state criminal law enforcement authorities in investigating potentially criminal conduct.

The SEC's Enforcement Division has available to it both formal and informal investigative means, and develops evidence of possible violations of federal securities laws from a variety of sources, including its own investigations, the self-regulatory organizations (such as the stock exchanges), the media, and investor complaints. The Enforcement Division then presents its findings to the Commission. At this stage, the investigation and the Enforcement Division's report typically are not made public.²⁷ If the Commission issues a formal order of investigation, the Enforcement Division also may subpoena testimony and documents.

The Commission can bring enforcement actions in a federal civil suit, an administrative action before an administrative law judge, or both.²⁸ Among the factors the SEC considers are the seriousness of the alleged wrongdoing, the technical nature of the matter, tactical considerations, and the type of sanction or relief available.

In civil actions filed in federal district court, the SEC may seek injunctive relief, including the imposition of audits and accountings; the suspension or bar of individuals from serving as corporate officers or directors; monetary penalties; and the disgorgement of illegal profits. In actions before administrative law judges, sanctions can include cease-and-desist orders, suspension or revocation of registrations, prohibition of employment in the securities industry,

²⁴ See United States Securities and Exchange Commission, The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, <http://www.sec.gov/about/whatwedo.shtml#create> (modified July 31, 2007).

²⁵ See *id.*

²⁶ See 15 U.S.C. § 78u(a)(1); 17 C.F.R. § 202.5(f) ("[N]either the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.").

²⁷ See, e.g., 17 C.F.R. § 202.5(a).

²⁸ See, e.g., 15 U.S.C. §§ 77t(b), 78u(d) (federal civil action); 15 U.S.C. § 78u-2 (administrative proceeding); 17 C.F.R. § 202.5(b) (same).

monetary penalties, and disgorgement. The “initial decisions” of ALJs can be appealed to the Commission, and from there to the appropriate federal Court of Appeals.

C. State Authorities

Civil and criminal investigations at the state level can be conducted through a wide variety of agencies and personnel, including state Attorneys General, criminal prosecutors, consumer protection divisions, and franchise regulators. The varied nature of these state and local authorities makes it all the more imperative to consult with counsel experienced in dealing with these agencies.

IV. GOVERNMENT INVESTIGATIONS

A. Evolution of Federal Policy for Bringing Criminal Charges Against Business Organizations

The high priority the federal government has been placing on the prosecution of corporate crime reached a new level of controversy in January 2003, when United States Assistant Attorney General Larry Thompson issued a memorandum, directed to federal prosecutors but made available to the public, entitled "Principles of Federal Prosecution of Business Organizations."²⁹

The DOJ's longstanding position had been that, under federal law, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents if the illegal actions of the corporate agent (1) were within the scope of his duties; and (2) were intended, at least in part, to benefit the corporation.³⁰ The Thompson Memorandum, which purported to set DOJ charging policy in corporate cases that would be binding on all federal prosecutors, was controversial for two reasons. First, it strongly suggested that the DOJ expects corporate leaders to be proactive in detecting criminal conduct by upper-, middle-, and lower-level managers and employees and disclosing that misconduct to federal or state law enforcement authorities. Second, the Thompson Memorandum indicated that the DOJ expected corporations to act essentially as co-prosecutors during the course of federal investigations into alleged corporate wrongdoing by, among other things, (1) waiving the attorney-client and work product privileges in connection with internal investigations, and (2) refusing to obtain or pay for counsel to represent corporate employees who are the subjects or targets of the investigation. Thus, listed prominently among the nine factors that prosecutors were instructed to consider when contemplating charging a corporation with criminal conduct were the existence and adequacy of the corporation's pre-existing compliance program, the corporation's timely and voluntary disclosure of wrongdoing, and the corporation's willingness to "cooperate" in the investigation of its agents.

²⁹ Memorandum from Larry D. Thompson, Deputy Attorney General, to the Heads of Department Components, United States Attorneys, on Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

³⁰ *See, e.g., United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006). Sometimes, however, an employee's motivation in performing an illegal act is difficult to nail down. Illegal conduct by an employee within the scope of his duties but intended *solely* to benefit the interests of the employee or a third party will not support an indictment against the corporation. Likewise, illegal conduct undertaken by an employee that is clearly against the interests of the corporation will not support corporate criminal charges. However, courts have been quick to find that illegal conduct by an employee that is at least partially intended to benefit the corporation will support criminal charges against the corporation. *See, e.g., United States v. Automated Med. Labs., Inc.*, 770 F.2d 399 (4th Cir. 1985); *United States v. Sun-Diamond Growers*, 138 F.3d 961, 969-70 (D.C. Cir. 1998); *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982).

The Thompson Memorandum began to draw fire from the white collar criminal defense bar, the ABA, and eventually many other organizations, including the American Civil Liberties Union, the Association of Corporate Counsel, and the United States Chamber of Commerce. At its annual meeting in August 2005, the ABA's House of Delegates unanimously adopted a resolution strongly opposing the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege and work product doctrine.

At its next annual meeting in August 2006, the ABA's House of Delegates addressed more specifically additional problems with the Thompson Memorandum. ABA Resolution 302B voiced the ABA's strong opposition to government policies that "have the effect of eroding the constitutional and other legal rights of current or former employees, officers, directors or agents" by allowing prosecutors to assess the level of a corporation's cooperation in a government investigation by taking into account whether the corporation (1) paid the employee's attorneys' fees; (2) entered into a joint defense agreement, or "shared its records or other historical information," with the employee; and (3) failed to terminate or discipline an employee who invoked his or her Fifth Amendment right in response to government inquiries.³¹

Meanwhile, in June 2006, a federal district court judge held that federal prosecutors had violated KPMG employees' due process and Sixth Amendment rights when, in determining whether to charge KPMG with a federal criminal offense, they adhered to the Thompson Memorandum policy of considering the corporation's payment of the employees' attorneys' fees as evidence of the corporation's lack of cooperation with the government investigation.³²

On the heels of this firestorm of criticism, the Senate Judiciary Committee held hearings on the Thompson Memorandum in September 2006. In December 2006, Committee Chairman Arlen Specter of Pennsylvania introduced the Attorney-Client Privilege Protection Act of 2006, which would preclude federal prosecutors or agents from (1) requiring the disclosure of information protected by the attorney-client privilege or the work product doctrine; (2) conditioning a civil or criminal charging decision on any valid assertion of the attorney-client privilege or work product doctrine, the provision of counsel or contribution to employee legal defense fees, or the entry into a joint defense or information-sharing agreement; or (3) conditioning a civil or criminal charging decision on a corporation's failure to terminate or otherwise sanction an employee because of his or her decision to exercise constitutional rights or any other legal protections.³³

In the aftermath of the ABA resolutions, complaints by various industry groups, and the decision in the KPMG case, and in an apparent effort to forestall Senator Specter's proposed legislation, in December 2006 the DOJ replaced the Thompson Memorandum with a new memorandum authored by then-Deputy Attorney General Paul McNulty. The "McNulty

³¹ See ABA Task Force on Attorney-Client Privilege, Res. 302B (Aug. 2006), available at www.abanet.org/media/docs/302BRevised.pdf.

³² *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). In mid-July 2007, Judge Kaplan dismissed criminal charges against 13 former KPMG executives based on his earlier finding that the government had violated their constitutional rights by pressuring KPMG to stop paying their legal fees. The court, however, denied motions to dismiss the charges by three other former KPMG employees, finding that they could not establish that KPMG would have paid their legal fees even without the government's interference. The government has appealed this ruling.

³³ See S. 30, 109th Cong. 2d Sess. (2006). The Senate adjourned without action on Senator Specter's 2006 bill, but it was reintroduced in 2007 and is pending at the time of this Paper. See S. 186, 100th Cong. 1st Sess. (2007). In addition, in July 2007, a companion bill was introduced in the House of Representatives by Congressmen Bobby Scott, D-Va. and Randy Forbes, R-Va. The bill is supported by House Judiciary Committee leaders from both parties. See H.R. 3013, 100th Cong. 1st Sess. (2007).

Memorandum" was released on December 12, 2006, along with a press release which stated that the Memorandum was being issued "after careful review and numerous meetings with those in the business and legal communities who raised concerns about the Department's guidance."³⁴ The DOJ trumpeted the McNulty Memorandum as adding new restrictions for prosecutors seeking privileged information and creating new approval requirements with which federal prosecutors must comply. But in a press release issued the same day, ABA President Karen Mathis branded the McNulty Memorandum as falling "far short of what is needed to prevent further erosion of attorney-client privilege, work product, and employee protections during government investigations."³⁵ In the view of one commentator:

[T]he "new" Department of Justice policy is simply a dressed-up version of the "old" Department of Justice policy, and little more than a public relations ploy. By announcing with great fanfare a "revision" of its policy, which implements a superficial (but virtually meaningless) system of checks and balances, the department is purposely doing as little as possible to revise its policies while creating the perception that something meaningful has been undertaken, and to mislead Congress into believing that Senator Specter's legislation is not necessary. I believe this only highlights the department's unwillingness to revise its policies, and that legislative action must be aggressively pursued.³⁶

B. Current Department of Justice Policy on Charging Business Organizations

1. Factors Affecting Charging Decisions

According to the McNulty Memorandum, the same general factors are used in charging both business organizations and individuals.³⁷ The McNulty Memorandum, however, goes on to reiterate the Thompson Memorandum's list of additional factors that federal prosecutors "must consider . . . in reaching a decision as to the proper treatment of a corporate target," including conducting investigations, determining whether to bring criminal charges, and negotiating plea agreements.³⁸

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in or condoning of the wrongdoing by corporate management;
3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;

³⁴ See Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components, United States Attorneys, on Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memorandum], available at www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

³⁵ See Press Release, ABA, Statement by ABA President Karen J. Mathis Regarding Revisions to the Justice Department's Thompson Memorandum (Dec. 12, 2006), available at <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=59>.

³⁶ N. Richard Janis, *Taking the Stand: The McNulty Memorandum: Much Ado About Nothing*, DC Bar, Feb. 2007, http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/february_2007/stand.cfm.

³⁷ See *supra* Part III(A)(3); McNulty Memorandum, *supra* note 34, at 2-7.

³⁸ See McNulty Memorandum, *supra* note 34, at 4 (emphasis added).

4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
5. the existence and adequacy of the corporation's *pre-existing* compliance program;
6. the corporation's remedial actions, including any effort to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. collateral consequences, including disproportionate harm to shareholders, pension holders, and employees not proven personally culpable, and the impact to the public arising from the prosecution;
8. the adequacy of the prosecution of the individuals responsible for the corporation's malfeasance; and
9. the adequacy of remedies such as civil or regulatory enforcement actions.³⁹

2. **Waiver of Attorney-Client and Work Product Privileges, Joint Defense Agreements, and Payment of Attorneys' Fees Incurred by Employees**

a. **Attorney-Client and Work Product Privileges**

The McNulty Memorandum purports to soften the Thompson Memorandum's position on waiver of the attorney-client and work product privileges by stating that such waiver is not a prerequisite to finding that a company has cooperated in the government's investigation. The McNulty Memorandum adds, however, that the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure. The McNulty Memorandum also leaves federal prosecutors with largely unfettered discretion to consider "voluntary waivers of these privileges in connection with plea negotiations,"⁴⁰ and goes on to authorize prosecutors to request waiver of attorney-client and

³⁹ The McNulty Memorandum cautions that the practices and policies of some of the Department's Divisions may override some of these factors. For example, the Antitrust Division has established a policy of not giving a corporation credit at the charging stage for a compliance program and of providing amnesty only to the first corporation to make full disclosure to the government. Likewise, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Finally, the McNulty Memorandum makes it clear that a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution: "A corporation should not be able to escape liability merely by offering up its directors, officers, employees or agents in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing." *Id.* at 12.

⁴⁰ In connection with plea agreements, the McNulty Memorandum gives federal prosecutors full freedom, without prior approval, to request that corporations waive the attorney-client privilege and work product protection, make employees available for debriefing, disclose the results of its internal investigation, file appropriate financial statements, agree to government or third-party audits, and take "whatever steps are necessary to ensure that the full scope of corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted." *Id.* at 19.

work product protection when there is a legitimate need for the privileged information, based on a consideration of the following factors:

1. the likelihood and degree to which the privileged information will benefit the government's investigation;
2. whether the information can be timely and completely obtained using alternative means;
3. the completeness of the voluntary disclosure already provided; and
4. the collateral consequences to the corporation of the waiver.

If a legitimate need exists for the protected information, prosecutors are instructed to first seek purely factual information, such as copies of key documents, witness statements and purely factual interview memoranda, organization charts created by counsel, factual chronologies, and factual summaries or reports. This collection of purely factual information is called "Category I" information. With respect to requested waivers of privilege for Category I information, federal prosecutors are required to obtain written permission from the United States Attorney, who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request. If the request to seek a waiver of the attorney-client or work product information is granted, the United States Attorney must communicate the waiver request in writing to the corporation. The McNulty Memorandum instructs that a corporation's response to this request *may be considered* in determining whether a corporation has cooperated with the government's investigation.

When Category I information is deemed to provide an incomplete basis upon which to conduct a thorough investigation, the McNulty Memorandum gives federal prosecutors the option to request a corporation to waive the attorney-client and work product privileges with respect to "Category II" information. Category II information includes legal advice given to the corporation before, during, and after the underlying misconduct. Examples of Category II information are attorneys' notes, memoranda or reports containing mental impressions of counsel, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation. Prosecutors are cautioned that this type of information should be sought only in rare instances and that they *must not consider a refusal to provide this information in connection with a charging decision*. Before requesting a waiver of the attorney-client and work product privileges for Category II information, federal prosecutors must obtain authorization in writing from the Deputy Attorney General. Finally, the McNulty Memorandum states that Category II information requiring the approval of the Deputy Attorney General does not include legal advice contemporaneous with the underlying misconduct when the corporation or one of its employees is relying on an advice-of-counsel defense and legal advice is given in furtherance of a crime or fraud and coming within the crime-fraud exception to the attorney-client privilege. These categories of privileged information are considered to be Category I information.

As one commentator correctly has observed, however, requests for waivers of the attorney-client and work product privileges remain an important factor in assessing an organization's cooperation in federal investigations; United States Attorneys are unlikely to deny requests for such waivers; and DOJ review of such requests is likely to be perfunctory.⁴¹ Thus, giving an organization credit for voluntary waivers "creates an inherently coercive environment

⁴¹ See Janis, *supra* note 36.

in which companies and directors will feel no choice but to waive when they are told by a prosecutor (with a straight face) we are not penalizing a company that doesn't waive but, of course, when assessing who will get credit and who will not, we certainly give more credit to a company that waives than to a company that doesn't."⁴²

b. Joint Defense Agreements with Employees

Pursuant to a written or oral joint defense agreement, information may be communicated by and between several persons or companies who are the subjects or targets of a criminal investigation without losing the protections of the attorney-client privilege or the work product doctrine. In weighing the extent and value of the corporation's cooperation, however, federal prosecutors are instructed by the McNulty Memorandum to consider whether the corporation appears to be "shielding" its employees by retaining them without sanction for their misconduct or by providing information to present or former employees pursuant to a joint defense agreement promising to support the employees. Some believe this policy has the effect of coercing corporate counsel not to enter into joint defense agreements with counsel for the individual employees, for fear that such agreements will prove detrimental to their efforts to avoid prosecution of their corporate clients.⁴³

c. Payment of Employees' Attorneys' Fees

The McNulty Memorandum instructs federal prosecutors that they "generally" should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation or indictment. Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation, and many corporations have such provisions in their charters, by-laws, or employment agreements. Thus, a corporation's compliance with state law and its contractual obligations cannot be considered a failure to cooperate. The Memorandum is silent, however, as to whether a prosecutor can consider the voluntary payment of attorneys' fees for employees and agents in connection with a charging decision.

Many find troublesome the McNulty Memorandum's policy "generally" not to consider an organization's payment of employees' legal fees.⁴⁴ Because this policy is tied to compliance with state law or the corporation's contractual obligations, it is open to question whether the DOJ will take the position that a corporation's *voluntary* payment of employees' attorneys' fees will be considered to be a lack of cooperation. (Many state statutes and provisions of corporate by-laws simply permit, but do not require, the corporation to reimburse employees for attorneys' fees for actions taken in the course of discharging their corporate duties.)⁴⁵ Indeed, in the KPMG case, even though KPMG had a contractual obligation to pay the legal fees of only one of its employees, the court held that the government had violated the constitutional rights of all the KPMG employees by causing KPMG to cut off the payment of their attorneys' fees.⁴⁶

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

C. Practical Advice to Corporate Counsel Regarding Federal Criminal Investigations

Two factors conspire to make advice regarding federal criminal investigations difficult to give in the abstract. First, as discussed above, the McNulty Memorandum's embellishments on the policies articulated in the Thompson Memorandum have made the application of DOJ policies more dependent on the circumstances surrounding a specific investigation. Thus, for example, whether the prosecutor will request a broad waiver of the attorney-client privilege, a narrow waiver, or no waiver at all now depends on a host of factors that had been irrelevant under the Thompson Memorandum. Second, and more important, Congress may enact the current or a compromise version of the Attorney-Client Protection Act, which would bar federal prosecutors from conditioning a charging decision on cooperation by an organization; rewarding or penalizing an organization for waiving or declining to waive the attorney-client and work product privileges; and penalizing an organization for paying its employees' attorneys' fees, entering into a joint defense agreement, or failing to discipline or terminate an employee who has exercised his or her constitutional rights or other legal protections.⁴⁷ Nevertheless, what follows are a few principles that might serve as general guideposts for corporate counsel to follow.

1. Compliance Programs

To decrease the likelihood of a corporate criminal indictment (except, perhaps, for violations of antitrust laws),⁴⁸ business organizations with more than a single office or production facility should have a pre-existing compliance program designed to bring wrongdoing to the attention of senior management or the board of directors. The need for an adequate compliance program increases dramatically if the organization has been the subject of a prior criminal, civil, or regulatory proceeding. An adequate corporate compliance program should involve a concerted effort to educate employees as to the specific criminal laws that are most likely to be violated by salespersons, production workers, and the middle- and lower-level managers who supervise them. An adequate compliance program will also make it easier for employees to report suspected wrongdoing to senior management. Because many complaints to governmental authorities come from disgruntled or terminated employees,⁴⁹ it is prudent to require employees to disclose what they know about suspected wrongdoing by other employees during disciplinary or termination proceedings or exit interviews. A widely publicized corporate policy forbidding violations of federal, state, or local laws and requiring employees to "ask before acting" is also a good idea. A strong, pre-existing compliance program not only can help an organization avoid criminal charges, but also can insulate senior managers from individual criminal charges.

2. Internal Investigations

A necessary prong of any corporate compliance program is a protocol for the investigation of any information regarding criminal conduct brought to the attention of senior management or the board of directors. But even without a compliance program, an organization would be hard pressed not to investigate any serious allegation of wrongdoing by employees, managers, or business units.⁵⁰

⁴⁷ See *supra* note 33.

⁴⁸ See *supra* note 39.

⁴⁹ See *infra* Part IV(C)(4).

⁵⁰ See *infra* Part V.

3. Disclosure Issues

The voluntary disclosure of criminal conduct by one or more employees can be a difficult decision and should never be undertaken without a careful internal investigation conducted by experienced outside counsel. Only experienced counsel can adequately assess the risks that the conduct will be discovered by federal or state law enforcement agencies, how much weight a prosecutor will give to a voluntary disclosure in connection with a charging decision, and whether disclosure is required under the Sarbanes-Oxley Act of 2002⁵¹ or some other federal law. In light of the McNulty Memorandum's admonition that voluntary disclosure and cooperation do not provide a free pass to the avoidance of criminal charges, counsel conducting the internal investigation will probably have to assess each of the other factors listed in the McNulty Memorandum before deciding whether voluntarily to disclose any serious wrongdoing. For example, the Justice Department's Antitrust Division prosecutes *per se* violations of the antitrust laws such as price-fixing, bid-rigging, and the allocation of customers or territories among competitors in cases substantially affecting a significant volume of interstate commerce. A prompt investigation and assessment of the risks and rewards of voluntary disclosure of these activities is particularly important in view of the Antitrust Division's policy of offering amnesty only to the first company to make such disclosure.⁵²

4. Government Informants and Wiretaps

Federal criminal investigations do not always begin with a visit by a law enforcement officer, a grand jury subpoena, or a search warrant. Increasingly, federal and state investigators are using informants and consensual wiretaps to gather incriminating information, or at least sufficient information to justify court-approved electronic surveillance or a search warrant. The vast majority of leads obtained by federal and state law enforcement are from disgruntled or terminated employees. Because these employees have a motive to fabricate or embellish their allegations of wrongdoing by their employer, investigators often ask them for documentary information or to engage in electronically monitored conversations in an attempt to gain corroboration for their allegations. Thus, care should be taken to ascertain whether any disgruntled or about-to-be-terminated employee who is likely to have knowledge of possible wrongdoing within the organization actually has such knowledge. These steps should be taken regardless of whether the organization has a compliance program.

The question often arises whether an organization can take steps to ascertain whether its telephones are tapped or listening devices are planted in its offices. Some prosecutors have taken the position that 18 U.S.C. § 2232(d) criminalizes disclosure of the existence of listening devices.⁵³ This statute, however, makes clear that the "sweeper" must know that a federal agent has applied for or obtained a court order to conduct the electronic surveillance and that the sweep must be for the purpose of obstructing, impeding, or preventing such interception. Thus, if the sweep is being conducted without knowledge that the bug was placed by a federal agent pursuant to an application for a court order, or if the purpose of the sweep is not to remove the bug or to obstruct or impede the investigation, then the statute would not apply.

⁵¹ 15 U.S.C. §§ 7201-7266.

⁵² See *supra* note 39.

⁵³ 18 U.S.C. § 2232(d) provides in relevant part: "Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral or electronic communication, in order to obstruct, impede, or prevent such interception, gives notice or attempts to give notice of the possible interception to any person shall be fined under this title or imprisoned not more than five years or both."

Nevertheless, some private investigators will not conduct electronic sweeps to uncover listening devices if they have reason to believe that devices were placed by law enforcement. On the other hand, some criminal defense attorneys believe that taking steps simply to ascertain whether there is a listening device on private property does not amount to an obstruction of justice, even if the tenant has reason to suspect that the device was placed by a law enforcement agency. Although removing or attempting to avoid the listening device becomes more problematic, most law enforcement agencies will remove the device themselves once they believe the subject knows or highly suspects that the device is in place. Most federal and state investigative agencies believe that the quality of the recorded information will be impaired if the subject knows that he or she is being recorded.

In any case, there is every reason to retain experienced counsel as soon as a company suspects that it is under investigation. The earlier experienced counsel is consulted, the more likely it is that a federal or state investigation can be resolved without criminal charges.

5. Visits by Federal or State Investigators

Many criminal defense attorneys advise all their corporate clients that employees should not submit to an interview by a federal or state investigator regarding a potentially criminal matter without first consulting an attorney experienced in criminal investigations and having counsel with him or her during the interview. Such actions, however, could be interpreted by the federal government as an attempt to obstruct the investigation. It is imperative, therefore, that the company not give any directives to employees that could be construed as directives not to cooperate with authorities. Nor should the company suggest what an employee should say during an interview with the government. Experienced counsel can usually determine the reason or purpose for the interview as well as the topics to be covered during the interview. Counsel will then discuss these with the person to be interviewed as well as with other corporate employees who may have relevant knowledge. This will remove the element of “shock and awe” that often surrounds impromptu interviews with federal or state investigators. More important, experienced counsel will be able to advise the persons to be interviewed of their legal options, including advising them of their right to obtain independent counsel.

During the interview itself, the presence of counsel in the room tends to minimize the investigator's ability to engage in trickery or heavy-handed tactics. Experienced counsel can also learn quite a bit about the investigation from the questions asked during the interview.

Finally, the presence of counsel during the interview generally causes the investigator to make a more accurate and complete report regarding the interview. For these reasons, many attorneys believe that it is almost always a bad idea for a corporate manager to submit to an interview without retaining counsel and having counsel present during the interview.

6. Grand Jury Subpoenas

The issuance of a grand jury subpoena requiring the production of documents is a common way for federal investigations to begin. Unlike search warrants or court-approved electronic surveillance, there no need to make a showing to an independent magistrate that there is probable cause to compel the production of documents or testimony. Records subpoenas are usually very broad, but prosecutors commonly will narrow the scope of the subpoena, allow the documents to be produced directly to the government without an appearance before the grand jury, extend the time for compliance, and allow the documents to be produced piecemeal over an extended time period.

Counsel who is experienced in dealing with federal investigations should be retained to comply with the subpoena. Experienced counsel can usually read between the lines of a subpoena to ascertain what is being investigated, thereby helping the company focus on areas in which compliance or remediation efforts are necessary. Counsel can also ascertain whether there may be any documentary evidence of wrongdoing by reviewing the documents prior to production to the government.

DOJ Antitrust Division investigations are typically conducted primarily by lawyers rather than federal agents, and it is not unusual for them to wait until the documents requested by a grand jury subpoena are digested before conducting interviews or serving subpoenas on individuals to testify before a grand jury. Other white collar criminal investigations are typically conducted by federal investigators under the supervision of an Assistant United States Attorney. In non-antitrust investigations (and more frequently in criminal antitrust investigations as well), federal investigators will attempt to interview corporate managers at the time they serve the subpoena and will also attempt to make unannounced visits to employees believed to have knowledge of the suspected wrongdoing. If so, the company and/or the employee might consider retaining counsel to handle both compliance with the subpoena and subsequent interviews with corporate employees.

Prior to the Thompson Memorandum, federal prosecutors usually allowed counsel retained by the corporation to represent all employees from whom interviews were requested or upon whom testimonial subpoenas were served, except those employees whom the prosecutor believed had first-hand knowledge of facts that would inculcate the corporation or a managerial employee. In those cases, they usually politely suggested that the corporation obtain separate counsel for the prospective witness. It was also considered routine for the corporation to pay for the employees' attorneys' fees and that counsel for the corporation and counsel for the employees would share information pursuant to a joint defense agreement that offered umbrella protection against waiver of the attorney-client and work product privileges. As discussed above, the Thompson Memorandum changed this landscape, and the McNulty Memorandum, in the view of many white collar criminal defense attorneys, did little to return to the pre-Thompson Memorandum era.

7. Search Warrants

A team of federal agents swarming a corporate facility with a search warrant authorizing them to search for and immediately seize documents, physical objects, and computers or computer servers and hard drives can be a company's worst nightmare. It generally means that a federal prosecutor is already in possession of sufficient evidence of criminal conduct to cause a federal magistrate or district justice to justify this intrusion on the company's business. In some jurisdictions, federal magistrates are issuing warrants to seize computers, hard drives, and servers with the proviso that they be returned to the company within as much as 90 days, effectively putting the company out of business for some period of time unless its electronic information is copied and stored in an offsite location. In other federal jurisdictions, magistrates are requiring the agents to copy or "mirror image" computer hard drives and servers at the site of the search.

Typically, the federal agents conducting the search and seizure will avail themselves of the opportunity to question company employees, quite often by the use of outlines or scripts prepared by the prosecutor who obtains the search warrant.

Without specifically saying so, the McNulty Memorandum indirectly suggests that business organizations might avoid the nightmare of a search and seizure of virtually all of their

electronically stored information by heeding Factors 4, 5, and 6,⁵⁴ which purport to influence the decision whether to charge a business organization with criminal conduct undertaken by one or more of its employees. Factor 4 encourages a corporation to voluntarily disclose to the government any evidence of wrongdoing found pursuant to a compliance program or during any internal investigation conducted by the company, even if it means waiving the attorney-client or work product privileges. Factor 5 encourages a corporation to have an effective corporate compliance program. And Factor 6 encourages a corporation to take remedial action, pay restitution, discipline or terminate the wrongdoers, and cooperate with the relevant government agencies.

Through legislation or judicial rulings, it is possible that federal prosecutors will be precluded from basing a charging decision on a company's waiver of the attorney-client privileges, or its entering into joint defense agreements or paying its employees' attorneys' fees. As the McNulty Memorandum itself points out, the primary factors in deciding whether to charge an organization with criminal conduct committed by one or more of its employees are the strength and the sufficiency of the evidence and the likelihood of success at trial. If the government's investigation does not uncover sufficient evidence of criminal wrongdoing that is likely to lead a jury to convict the organization, no charges will be brought. Thus, it is essential to retain counsel with substantial experience in defending criminal investigations at the earliest possible time after senior management has reason to suspect that employees might be engaged or have been engaged in criminal conduct.

V. INTERNAL INVESTIGATIONS

A company also may choose to conduct its own investigation in anticipation of a government probe or threatened private litigation, or simply as a company-initiated effort to investigate potential problems, rectify any that are discovered, and take steps to prevent a repetition of the conduct in the future.

Below are some basic issues for counsel to consider when faced with a request to conduct an internal investigation.

A. The Objectives

To be of any benefit to the company, an internal investigation must be thorough, balanced, and conducted with the intent to uncover the truth. Although this may seem like an obvious proposition, the natural inclination of some companies, including their counsel, who are trained advocates, can be to "spin" the investigation in an attempt to exonerate the company, or at the very least to place its conduct in the best possible light. Of course, any reports that are generated as a result of the internal investigation should include exculpatory and mitigating information, to the extent available. But an investigation that skews or misrepresents facts will get the company nowhere, particularly insofar as the government is concerned. Prosecutors and agency officials have made very clear that a purported internal "investigation" that is slipshod or otherwise inadequate will not be viewed favorably and, in fact, might suggest that the company has something to hide, prompting the government to investigate even more thoroughly and to view with skepticism any representations made by the company or its counsel. One of the purposes of a properly conducted internal investigation is to demonstrate to the government that its involvement is unnecessary because the company will proceed expeditiously to investigate and extirpate any wrongdoing. An improperly conducted investigation will have the opposite effect.

⁵⁴ See *supra* Part IV(B)(1).

B. Authorizing and Conducting the Investigation

Internal investigations can be authorized by a number of sources in the corporation, including the Board, officers (including in-house counsel), or special committees, such as the audit committee. Deciding who should authorize, oversee, and conduct the investigation will depend upon the potential seriousness of the matter being investigated.

To the extent potential wrongdoing by high-level officers and directors is suspected, or the government already is or may become involved, or the matter involves significant amounts of money or could have a serious impact on shareholders, the internal investigation should be authorized and overseen by a special committee consisting of outside directors. That special committee should retain its own, independent counsel (separate from in-house or outside counsel for the company) with extensive criminal and/or agency experience and, ideally, who have not previously been retained by the company on other matters. Under those circumstances, retained counsel represents the special committee, not the company. The government may consider investigations overseen by inside management, in-house counsel, or outside counsel with ties to the company as potentially tainted and, therefore, not truly independent.

Other cases — for example, those involving low-level employees, or in which the government is not and probably will not become involved — might appropriately be handled by inside management and counsel, who, in turn, may choose to retain their own outside counsel. Bear in mind, however, that the potential seriousness of the suspected wrongdoing, or the possible criminal involvement of high-level management, may not be apparent at the beginning of the investigation. Thus, an internal investigation that is overseen by persons who ultimately are implicated in the wrongdoing, or who have ties to those who are, may be compromised from the start.

In any investigation, inside and/or outside counsel should be involved from the outset. Even if the results of the investigation ultimately will be disclosed to the government, the investigation should be constructed from the beginning with a view toward maintaining the confidential and privileged nature of the investigation, whether through the attorney-client privilege, the work product doctrine, the self-evaluative privilege, or similar privileges.⁵⁵ To that end, counsel's involvement will be essential.

Counsel involved in internal investigations also should understand that their conduct will be scrutinized carefully by the government, which will be on the lookout for any indication that the investigation was conducted with an eye to skewing the facts or, worse yet, obstructing the investigation or “covering up” any misconduct.

⁵⁵ The privileged nature of any communication may vary from state to state. Illinois, for example, has a “control group” test for the attorney-client privilege, and a narrow view of what constitutes attorney work product. See, e.g., *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250-52, 257 (Ill. 1982). (In federal criminal matters, the federal common law of privilege generally applies. See Fed. R. Evid. 501.) But even if your investigation is conducted primarily within a state with an expansive view of privilege and work product, the privilege that attaches to those communications may not be retained in subsequent litigation in another state. Many states view privilege as a procedural issue generally determined by the law of the forum. See, e.g., *Restatement (Second) of Conflicts of Laws* § 139 (1971). Consequently, if there is subsequent litigation in a state with a narrow view of those privileges, the communications generated during the course of an internal investigation, which initially were believed to be privileged, may have to be disclosed. For these and many other reasons, the internal investigation should be kept confidential and conducted so as to maximize the potential that the communications will be deemed privileged. In any event, in conducting the investigation counsel should continually be aware that the communications ultimately may be disclosed either voluntarily or through court order.

Finally, counsel should consider carefully precisely what actions they will take in the investigation. For example, if in-house counsel overseeing the investigation actually conduct employee interviews,⁵⁶ they could render themselves fact witnesses and, therefore, ineffective in any subsequent negotiations with the government. Instead, in-house counsel who are overseeing an investigation should consult with outside counsel on the appropriate method for proceeding under the particular circumstances.

C. Retention of Documentary and Electronic Evidence

To the extent your company does not already have in place an appropriate document-retention policy, it should institute one immediately. The details of such policies are beyond the scope of this Paper, and in any event must be tailored to the specific needs of the company and its industry.

But the existence of an internal investigation makes a proper document-retention policy all the more imperative. The failure to preserve relevant evidence could have several adverse consequences, including but not limited to the government's calling into question the integrity of the investigation and intensifying its independent efforts to investigate wrongdoing; a court's authorization of an "adverse inference" instruction or a spoliation claim in subsequent litigation; and, even more serious, possible obstruction of justice charges.

Counsel must ensure that all existing documentary and electronic evidence that *potentially* could be relevant to the investigation is preserved, and that all such evidence is preserved going forward. Thus, "hold" orders should be distributed to all those who might possess relevant evidence now or in the future.

Preservation of electronic evidence can be particularly tricky. Electronic evidence easily can be destroyed inadvertently. For example, many companies have archive or deletion programs by which e-mails, voicemails, and other electronic communications (including those on backup systems) are deleted automatically at specified intervals. Electronic communications also can reside in a myriad of locations in addition to your company's network, such as on individual employee's work-issued computers, PDAs, and even their home computers. Counsel should consider whether to retain an outside firm to assist not only in the preservation of electronic data, but also in conducting any searches of electronic databases.

D. Disclosure Obligations and Insurance Notification Issues

Although beyond the scope of this Paper, the possibility of corporate wrongdoing could trigger various disclosure obligations to the government and outside auditors, particularly in the wake of Sarbanes-Oxley. Likewise, insurance carriers may need to be notified if coverage potentially could exist for individual officers and directors or the company itself.

E. Employee Interviews

In conducting interviews of employees, both present and former, counsel should bear in mind that they are representing the company, not its officers, directors, or employees. Thus, employees should be given so-called "*Upjohn*" warnings⁵⁷ that counsel represents the company,

⁵⁶ See *infra* Part V(E).

⁵⁷ *Upjohn v. United States*, 449 U.S. 383 (1981).

not the employee, and that the interview is confidential and (if applicable) privileged. In addition, depending on the particular circumstances and the applicable ethical rules, counsel may wish to advise the employee to retain independent counsel. Indeed, counsel also may choose to provide employees with “Zar” warnings that any false information provided may be reported to the government for possible criminal charges, particularly in light of recent attempts by the DOJ to bring obstruction charges against employees who lied to their company’s *internal* investigators. (The theory behind the prosecutions was that the employees provided false evidence knowing that it would be passed on to the government).⁵⁸

Of course, in determining how to proceed with employee interviews, counsel must take care that these “warnings” or other actions on the part of counsel do not serve to dissuade employees from providing full and truthful information. Such “overwarning” might be seen as witness tampering or obstruction of justice — part of a collusive attempt to scuttle the investigation by shutting down employee cooperation. Employee interviews, like all other aspects of the internal investigation, should be conducted so that they are — and appear to be — sincere and thorough efforts to get to the bottom of any potential wrongdoing.

F. The Aftermath

Once an investigation is complete, the company will be faced with a number of decisions, including whether to disclose the results of the investigation to the government, and in what form, and the nature of any disciplinary or adverse employment action to be taken with respect to any officers, directors, and employees implicated in wrongdoing. The company should consult counsel — including criminal and labor and employment counsel — on the appropriate course of action.

VI. OUTSIDE INVESTIGATIVE TOOLS

When conducting an investigation, an organization has at its disposal a number of legitimate tools and resources it can use to obtain information, such as private investigators, “mystery shoppers,” surveillance cameras, and recording devices. The use of such investigative tools is becoming more prevalent in our society. Police surveillance cameras, for example, continue to be installed on streets across the United States, while private companies also use them to prevent criminal acts and assist law enforcement officials in apprehending wrongdoers.

As recent scandals demonstrate, however, a corporation must be very careful in selecting the methods it uses and the outside companies it employs to obtain such information. The Hewlett-Packard “pretexting” fiasco is one stark example. In the Fall of 2006, in an effort to determine the source of leaks to the media that appeared to originate from Hewlett-Packard Board members, HP Chairwoman Patricia Dunn authorized a team of well-respected outside experts to “mine” the records of telephone and e-mail communications from the private, non-company devices of other Board members as well as journalists. One of the techniques employed to obtain these records was “pretexting” — contacting telephone companies, banks, credit card companies, and other entities and using false pretenses to obtain an individual’s personal, nonpublic information, such as Social Security numbers, bank account numbers, and telephone and other records. Through an analysis of the pattern of telephonic and other contacts, the investigators in the HP case were able to determine the source of the leak (who, it turned out, was a Board member). When the pretexting was disclosed at an HP Board meeting,

⁵⁸ See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, 371-74 (2007).

one Board member resigned in protest, but the company did not disclose the reasons for the resignation in its securities filings.⁵⁹

The affair eventually became public — and a public relations nightmare for HP. Even though the legality of pretexting is still a grey area (at least when pretexting is not used to accomplish a criminal purpose, such as identity theft), the scandal that erupted led to the resignation of Dunn and others, including the company's general counsel; to state criminal charges against Dunn, a former HP lawyer, and outside investigators (the charges against Dunn ultimately were dismissed; the other charges were reduced to misdemeanors); to federal criminal charges against one of the investigators (who eventually pleaded guilty to conspiracy, wire fraud, and other charges); to investigations and congressional hearings into the conduct of HP's outside counsel; to a California Attorney General suit and multimillion-dollar settlement by HP; to an SEC investigation and cease-and-desist order finding that HP had violated federal securities laws in not disclosing the reasons for the HP director's "protest" resignation; to shareholder and other private suits; and to renewed federal and state attention to the legality of pretexting, including a number of very contentious congressional hearings.

Similarly, in *Midwest Motor Sports v. Arctic Cat Sales, Inc.*,⁶⁰ the president of a franchisee snowmobile dealer had secretly recorded conversations with the franchisor's employees. Subsequently, a private investigator hired by the franchisor secretly taped conversations with an employee of the franchisee. Both the Eighth Circuit and the district court found that, although not illegal, the taping of conversations by the investigator to attempt to elicit admissions from the franchisee's employees was unethical and grounds for evidentiary sanctions. The franchisor's attorney attempted to shift the blame to the investigator, but the court rejected that argument because the investigator was acting as an agent for the franchisor.⁶¹

A company that chooses to use outside investigators, therefore, should have in place guidelines governing the hiring and methods used by these companies, as well as a program to monitor the status of the investigation. One important lesson from the Hewlett-Packard case is that hiring a legitimate, well-established company to assist in an investigation is not enough. Failing to supervise its methods and inquire into the ethics of the intended investigation process, and/or failure to have internal investigative protocols, can be costly and dangerous to a company's reputation (and its management). Likewise, as the *Midwest Motor Sports* case demonstrates, it is important to ensure that an outside investigator does not violate franchisee privacy rights, but still obtains all necessary information and data.

If a company chooses to use one or more of the various outside investigative techniques, it should take the following matters into consideration in order to protect its brand and reputation.

⁵⁹ See, e.g., David A. Kaplan, *Intrigue in High Places: To Catch a Leaker, Hewlett-Packard's Chairwoman Spied on the Home-Phone Records of Its Board of Directors*, Newsweek Business, Sept. 6, 2006, <http://www.msnbc.msn.com/id/14687677/site/newsweek>.

⁶⁰ 347 F.3d 693 (8th Cir. 2003).

⁶¹ The franchisee was not sanctioned because its "secret" recording was neither directed nor ratified by an attorney. The franchisor's recording of the private investigator was performed at the direction of the franchisor's attorney, which violated several ethical provisions, according to the Eighth Circuit.

A. Private Investigators

As previously stated, the use of private investigators often is necessary to obtain certain information. They can provide valuable assistance in conducting background checks or pre-employment verifications. They also may assist in other investigations, such as computer crimes (e.g., identity theft, harassing e-mails, and illegal downloading of copyrighted material), and are trained to perform physical surveillance, which may include the use of video cameras, binoculars, or photos. Because they represent the corporation, it is very important that a company using outside investigators have a written policy for their selection and retention. Specifically, the policy should include the following:

1. It should identify who within the corporation is authorized to hire investigators. It might be prudent to limit the number of such individuals within an organization in order to ensure that adequate records are kept relating to the retention of the investigators and to provide a consistent process for communicating the corporation's investigation policies.
2. It should require that the investigators be licensed and bonded.
3. It should require the investigators to agree in writing to abide by all laws, perform the investigation ethically and consistent with the corporation's written expectations, and abide by the corporation's investigator code of conduct.
4. It should include a provision that investigators maintain the confidentiality of any proprietary information provided to them, as well as confidentiality of any information obtained.
5. It should contain an affirmative statement that certain investigative methods, such as pretexting, impersonation of a journalist, or impersonation of any individual to obtain sensitive or confidential individual consumer information (including but not limited to credit card information, utility information, or user IDs and passwords for accounts) will not be used.

B. Mystery Shoppers

"Mystery shopping" is a tool used by companies to measure the quality of retail service. Companies specializing in mystery shopping send individuals to act as shoppers in return for some combination of cash, store credit, purchase discounts, or reimbursement for the goods or services purchased. Instructions to mystery shoppers can include a script of behavior, questions to ask, complaints to give, purchases to make, and measures to record, such as the time it takes to receive attention from an employee or receive a service, or the responses given to questions. The goal is to help businesses increase sales and improve employee customer service awareness.

In general, the pros of using mystery shoppers are

- specific, real-time, detailed feedback;
- ease of implementation;

- the identification of immediate deficiencies;
- the use of scores to reward employees; and
- third-party validation.

The cons are

- they provide only a one-time experience;
- the reports are only as good as the individual mystery shopper; and
- employees can become resentful of “spying.”

Franchisors use mystery shoppers to confirm that a franchisee is complying with the franchise agreement and the franchisor’s operating standards. These third-party witnesses can lend substantial credibility to a franchisor’s case.⁶² A franchisor, however, should be honest and “communicate the essence of what franchisees can expect.”⁶³ The mystery shoppers should be typical of real customers and should be given guidance on how to assess the goods and/or services. The mystery shoppers should be rotated so they do not visit the same location continuously, and should not be related to anyone providing service in the industry they are being asked to shop. The franchisor should also develop a system for reporting the results to the franchisee and should be careful when reviewing anomalies in the report. If this occurs, another mystery shopper should be sent to the location to test the same service.

C. Surveillance Camera and Recording Devices

The use of surveillance cameras, closed-circuit televisions, and recording devices is increasingly common. Deterring criminal conduct and ensuring personal security are compelling reasons for their use in public places and office buildings across the nation. For example, after the 2005 London bombings, and the 2007 would-be bombings, closed-circuit television footage was used to identify the perpetrators. Surveillance cameras also have been credited with providing valuable information in solving abductions and homicides.

In less dramatic circumstances, such devices also can be used to record service-oriented conversations and provide valuable information to corporations interested in improving customer service and accuracy. Their use must be carefully monitored, however. Many organizations have run afoul of the law by using and installing cameras in inappropriate locations (e.g., women’s locker rooms, restrooms, hotel rooms). Companies that choose to use these tools must be vigilant about where they are installed and must ensure that there are no local laws prohibiting their use. The Federal Communications Commission currently has no rules regarding the recording of telephone conversations by individuals, but federal and many state laws may prohibit this practice.⁶⁴ Franchisors and franchisees must be cognizant of the relevant laws governing this practice and ensure that they comply with such laws.

⁶² Joseph Schumacher, Edward Wood Dunham, & G. Adam Schweickert III, *Retaining and Improving Brand Equity by Enforcing System Standards*, 24 Franchise L.J. 10 (Summer 2004).

⁶³ *Id.*

⁶⁴ Federal wiretapping laws can be found at <http://www.fbi.gov>.

Investigative tools and outside investigators can be helpful to any organization interested in either improving service or detecting and deterring crime. But an organization must be fully informed about the methods used and the reasons for their use, particularly given the current regulatory environment and the potential for costly mistakes. A corporation must take into consideration not only the technical legal requirements applicable to these practices, but also the governing ethical standards. Franchisors have additional practical considerations when conducting investigations of their franchisees, because they must take into consideration the trust and ongoing relationship that must be maintained with their franchisees.

VII. THE PERILS OF PARALLEL INVESTIGATIONS

The fact that federal and state criminal and civil agencies have the authority simultaneously to investigate a company and its officers, directors, and employees can pose a tremendous challenge to counsel. Evidence generated during the course of a civil investigation — including statements from the client itself — potentially can be used in a contemporaneous or subsequent criminal proceeding.⁶⁵ This challenge can be compounded by the existence of parallel civil suits by private parties (including investigations conducted by nominally private, self-regulatory organizations like the National Association of Securities Dealers), and even by internal investigations launched by the company itself. Counsel must navigate the minefield of these multiple-pronged attacks, anticipate the potential impact of one investigation on another, and endeavor to ensure that actions taken and evidence generated in one investigation do not redound to the client's detriment in another.

Federal agencies, including perhaps most prominently the SEC, generally have the authority to refer to the DOJ and state and local authorities evidence of potential criminal violations uncovered during the course of their investigations and civil and administrative proceedings.⁶⁶ Such referrals, which normally are not disclosed publicly, have become increasingly frequent in recent years. Potentially incriminating information also can be generated during the course of civil suits by private third parties and, of course, by a company's own internal investigation.

Although the SEC, other civil agencies, and private parties generally may share such information with the DOJ, the reverse normally is not true: federal prosecutors are barred from revealing information regarding a matter that is the subject of a grand jury investigation. As a result, the civil or administrative investigation or proceeding typically will precede (or at least run concurrently with) a federal criminal investigation, and can generate evidence that eventually can be used to initiate a criminal investigation and, possibly, an indictment.

⁶⁵ See, e.g., *United States v. Kordel*, 397 U.S. 1, 13 (1970). Although less common, there also can be a risk of a dual or successive prosecution. There is no federal constitutional "double jeopardy" protection against subsequent prosecutions brought by a different sovereign for the same conduct. See, e.g., *Abbate v. United States*, 359 U.S. 187 (1959). Thus, there is no federal constitutional impediment to a federal prosecution in the wake of an acquittal (or conviction) in state court. Nevertheless, federal statutes restrict the circumstances under which subsequent federal prosecutions may be brought with respect to certain offenses, and as a matter of DOJ policy, federal prosecutions following a state prosecution based on the same acts will not be initiated unless the matter involves a substantial federal interest, the prior prosecution left that interest "demonstrably unvindicated," the conduct constitutes a federal offense, and the prosecution is approved by the appropriate Assistant Attorney General. See U.S. Attorneys' Manual, *supra* note 5, § 9-2.031 (Criminal Resource Manual, Dual and Successive Prosecution Policy ("Petite Policy")) (July 2007), available at <http://www.usdoj.gov/jmd/mps/manual/crm.htm>.

⁶⁶ See, e.g., 15 U.S.C. § 78u(d)(1) ("The [SEC] may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.").

Parallel civil and criminal proceedings are not *per se* unlawful. To the contrary, courts have recognized the right of civil and criminal agencies vigorously to pursue their separate agendas and to enforce the laws within their sphere of authority.⁶⁷ Recently, however, renewed concerns have surfaced over the potential for abuse inherent in this situation, whereby the DOJ theoretically could “use” SEC or other civil investigations and proceedings to generate evidence for a criminal indictment, without having to inform defendants in the civil proceedings that they are the subject of a criminal investigation, thereby potentially violating the defendants’ Fifth Amendment and due process rights.

For example, a federal district court in Oregon recently dismissed a securities fraud indictment against executives of FLIR Systems, Inc. based on the government’s “egregious misconduct” in concealing from the defendants the fact that, during the course of a civil SEC investigation, criminal proceedings were being contemplated. The civil proceeding was then used to generate evidence for the criminal prosecution, including statements from the defendants themselves, who were not fully informed of the potential criminal consequences of their statements to the SEC, and therefore did not attempt to invoke the Fifth Amendment right against self-incrimination or to attempt to seek immunity from and cooperation with prosecutors.⁶⁸ The court held that “a government agency may not develop a criminal investigation under the auspices of a civil investigation” and that it would be a “flagrant disregard of individuals’ rights to deliberately deceive, or even lull someone into incriminating themselves in the civil context when activities of an obvious criminal nature are under investigation.”⁶⁹ The court specifically noted that the defendants had attempted to discover in the SEC proceeding whether they were targets of a criminal investigation, but the SEC, while never making outright misrepresentations, was “evasive and misleading,” referring the defendants to a form given to all testifying witnesses, whether or not targets, informing them of their right to counsel, their Fifth Amendment rights, and the “routine uses” made of information generated in SEC proceedings, including referrals to United States Attorney’s Offices.⁷⁰ The court concluded that these “warnings” were insufficient, particularly in light of the active cooperation between the SEC and the DOJ in that case.⁷¹

Likewise, in *United States v. Scrushy*,⁷² a federal accounting-fraud case brought against former HealthSouth CEO Richard Scrushy, the court suppressed Scrushy’s deposition taken in an SEC civil investigation because of the alleged “collusion” between the SEC and the DOJ. Scrushy had been cooperating with the SEC in its civil investigation, only to learn later that the DOJ had been monitoring the SEC proceeding and working closely with the SEC to develop evidence for its subsequent criminal prosecution.

The court conceded that it is often difficult to distinguish a “legitimate, parallel investigation from an improper one.”⁷³ The court held that while the prosecution “may use evidence acquired in a civil action in a subsequent criminal proceeding,” it may not do so if such use “would violate [the defendant’s] constitutional rights or depart from the proper administration

⁶⁷ See, e.g., *SEC v. Dresser Indus.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980) (“Effective enforcement of the securities laws requires that the SEC and Justice to be able to investigate possible violations simultaneously.”).

⁶⁸ See *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006).

⁶⁹ *Id.* at 1089 (internal quotations omitted).

⁷⁰ *Id.*

⁷¹ *Id.* at 1087-90. *Stringer* currently is on appeal.

⁷² 366 F. Supp. 2d 1134 (N.D. Ala. 2005).

⁷³ *Id.* at 1136.

of criminal justice.”⁷⁴ In this case, the court concluded, the DOJ and SEC had “departed from the proper administration of justice” by, among other things, strategizing about the topics to be covered in the deposition so as to avoid tipping off the defendant and his attorneys about the existence of the federal criminal investigation; indeed, the DOJ had advised the SEC not to oppose the defendant’s request to move the deposition from Atlanta to Birmingham so that the DOJ could establish venue there for a perjury charge, along with the other criminal charges the DOJ was contemplating. Thus, “[d]espite the Government’s assertions that the S.E.C. civil investigation was separate from and parallel to the Justice Department’s criminal investigation, the facts belie that assertion. To be parallel, by definition, the separate investigations should be like the side-by-side train tracks that never intersect. By contrast, . . . the S.E.C. civil investigation merged with the Justice Department criminal investigation.”⁷⁵

To be sure, these decisions could offer some protection against government abuses of “parallel track” proceedings. Nevertheless, it is unclear whether these decisions represent a trend of increased skepticism toward interagency cooperation and parallel investigations, and whether any such trend will be seconded by the various courts of appeal. Defense attorneys today are (or should be) aware of the very real possibility of criminal investigations and proceedings running concurrently with civil investigations. Indeed, several courts have rejected or limited the principles of these decisions to instances of egregious governmental misconduct.⁷⁶

What, then, can counsel do to attempt to minimize the risks of parallel proceedings? Although there are no easy answers, and the correct course of action will depend on the particular facts and circumstances of your case, here are some steps to consider.

First, consider asking the agency conducting the civil investigation whether it has contacted, or been contacted by, federal or state criminal enforcement officials regarding the conduct being investigated; whether there is an active criminal investigation of your client; and whether your client is a subject or target of that investigation. If you receive an affirmative response (or anything less than an outright denial), you then are in a better position to consider what additional steps to take with respect to the criminal investigation, including seeking immunity from or cooperation with prosecutors.

Second, consider carefully whether and under what circumstances to invoke the Fifth Amendment right against self-incrimination on behalf of individual officers, directors, and/or employees.⁷⁷ Although invoking the Fifth Amendment can serve to protect the individuals’ rights in a criminal proceeding, it can spell trouble for civil proceedings. A court could permit the trier of fact in the civil proceeding to draw an “adverse inference” from the refusal to testify, or refuse to allow the individual to use affirmatively the evidence originally withheld by the privilege.

⁷⁴ *Id.* at 1138 (internal quotations omitted).

⁷⁵ *Id.* at 1139. In an enormous setback for the government, in 2005 Scrusby was acquitted of accounting fraud charges. However, he subsequently was convicted of bribery in connection with a donation to a foundation established by former Alabama governor Don Siegelman and, in June 2007, was sentenced to seven years in prison.

⁷⁶ See, e.g., *United States v. Moses*, 219 Fed. App’x 847, 849-50 (11th Cir. 2007) (refusing to vacate conviction on grounds that defendant’s SEC testimony should have been suppressed due to existence of parallel investigations); *United States v. Luce*, No. 05 CR 340, 2006 WL 2850478, at *6 (N.D. Ill. Sept. 29, 2006) (refusing to suppress defendant’s SEC testimony, and specifically upholding as adequate use of SEC form: “The language used in the form is clear and adequately advised [the defendant] that his testimony may be used in criminal proceedings . . .”).

⁷⁷ The Fifth Amendment privilege against self-incrimination does not apply to corporations. See, e.g., *Bellis v. United States*, 417 U.S. 85, 89-90 (1974).

Finally, consider seeking a stay of discovery in the civil proceedings pending completion of any criminal investigation on the ground that a stay is necessary to avoid substantial and irreparable prejudice.⁷⁸ Because the scope of discovery normally is much broader in civil cases,⁷⁹ government agencies may be able to obtain discovery from your client in civil proceedings that they would not be entitled to receive in a criminal case. (Conversely, a government agency sometimes will seek to stay discovery in a concurrent civil proceeding so as to limit the *defendant's* access to information.) If a stay is denied, consider asking the court for a protective order barring use of evidence obtained in the civil proceeding in the criminal case. Such protective orders, however, are controversial and rarely granted.

VIII. CONCLUSION

This Paper has attempted to identify a number of issues of interest to counsel faced with a government or internal investigation into corporate misconduct. Of course, each case is unique, and there is no “one size fits all” solution to the myriad complex issues presented by such investigations. Early retention of counsel experienced in white collar criminal cases and government investigations is therefore essential to place the client in the best possible position and to avoid, or least lessen, any adverse consequences.

⁷⁸ See, e.g., *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 901-03 (9th Cir. 1989) (discussing factors to consider in determining whether to issue stay).

⁷⁹ Compare Fed. R. Civ. P. 26(b)(1) (allowing discovery of “any matter, not privileged, that is relevant to the claim or defense of any party”) with Fed. R. Crim. P. 16(a)(1) (requiring disclosure of defendant’s oral or written statements, prior criminal record, documents and reports material to defense or intended to be used in prosecution’s case-in-chief, and summary of expert testimony intended to be used in prosecution’s case-in-chief), Fed. R. Crim. P. 16(b)(1) (requiring disclosure of documents, reports, and tests, and summary of expert testimony, intended to be used in defendant’s case-in-chief), *Brady v. Maryland*, 373 U.S. 83 (1963) (requiring disclosure by prosecution of exculpatory evidence), and *Giglio v. United States*, 405 U.S. 150 (1972) (requiring disclosure of impeachment evidence of government witnesses).

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