1 Overview: Initiating an Internal Investigation and Assembling the Investigative Team

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I. INTRODUCTION

Since the 1990s, the business world has been roiled by one corporate scandal after another, each with its own accompanying corporate investigation. Internal investigations have uncovered some scandals and dissected others. Regardless of outcome, internal corporate investigations remain the single most effective management tool for identifying wrongdoing and instituting remedial relief. Today, more and more companies are vesting legal counsel with a broad mandate to investigate conduct, fashion remedies, and communicate findings—good or bad—to enforcement authorities.

Internal Corporate Investigations was first published in 1992, a time when there was no Holder Memorandum (1999), no Seaboard (2001), no Sarbanes-Oxley (2002), no Thompson Memorandum (2003), no McNulty Memorandum (2006), no Filip Memorandum (2008), no

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Dodd-Frank (2010), and no Yates Memorandum (2015).[1] It was also a time before the government's decisions not to prosecute Salomon Brothers (1992) and Prudential Securities (1994), and to prosecute Arthur Andersen (2002), all leaving their marks on enforcement policy for corporate white-collar crimes. While, in the intervening years, the mechanics of the investigative process have remained largely unchanged, these developments have complicated *and* directed the investigative process and the role of counsel within it.

For example, in 1992, most thought it highly implausible that an attorney conducting a corporate investigation would become a witness in a later criminal trial. Nor would we have envisioned that others would come to regard private counsel as agents of enforcement authorities. Nor did we see the likelihood of investigative counsel facing a lawsuit or state bar discipline over counsel's *Upjohn* admonitions.[2] And who could have anticipated the dramatic increase in the need for special litigation committees—wholly independent of management—who retain their own counsel and oversee counsel's investigation, threatening long-standing professional relationships and friendships and leading to disunity with unpredictable results?

A. *The Changing Nature of Federal Enforcement and the Rise of DPAs and NPAs*

One of the most impactful developments on the nature of investigations since the first edition of this book is the evolution of federal enforcement of white-collar corporate crime and the increased role companies play in policing

1. Memorandum from Deputy Attorney General Eric Holder, Jr., Bringing Criminal Charges against Corporations (June 16, 1999) [hereinafter Holder Memorandum]; U.S. Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Securities Exchange Act Release No. 44969 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm; the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745; Memorandum from Deputy Attorney General Larry D. Thompson, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memorandum]; Memorandum from Deputy Attorney General Paul J. McNulty, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memorandum]; Memorandum from Deputy Attorney General Mark Filip, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008) [hereinafter Filip Memorandum]; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), *available at* https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/html/PLAW-111publ203.htm; Memorandum from Deputy Attorney General Sally Quillian Yates, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memorandum].

2. *See* Pendergest-Holt v. Sjoblom, No. 3:09-cv-00578-G (N.D. Tex. Mar. 27, 2009); United States v. Nicholas, 606 F. Supp. 2d 1109 (C.D. Cal. 2009), *rev'd*, United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

their employees' behavior. Although the principle of holding corporations liable for the crimes of their employees has long been recognized,[3] the late 1980s and early 1990s saw an increased emphasis on prosecuting corporations. Most notable was the groundbreaking Operation "Illwind" investigation into procurement fraud, which targeted U.S. government and military officials as well as private defense contractors, resulted in scores of convictions of companies and individuals, and significantly affected the way the government investigates and pursues corporations.[4]

In 1991, the U.S. Sentencing Commission enacted the Federal Sentencing Guidelines for Organizations. These guidelines sought to affect corporate behavior by calling for lower fines for companies with effective compliance programs and less severe penalties for companies that self-disclosed misconduct and cooperated fully with authorities.[5] While the guidelines have been amended over time, they continue to reflect these principles and the use of corporate sentencing as both a carrot and a stick to influence corporate actions.

One of the most effective tools in shaping corporate behavior has been the rise of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). At an earlier time, prosecutors decided to charge or decline to charge a company based on the actions of individuals within the company. The use of DPAs and NPAs has made this decision more nuanced and allowed both the government and well-intentioned corporations to achieve compatible goals of preventing wrongdoing and correcting improper behavior, without the collateral consequences of an indictment or conviction.

The tool of deferring prosecution had been in use for individuals since the 1930s and the implementation of the "Brooklyn Plan" diversion program for first-time juvenile offenders, allowing them the opportunity to avoid harsh punishment with the hope of rehabilitating them and allowing them to be productive members of society.[6] The use of DPAs and NPAs for companies recognizes that the same

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3. *See* N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494–95 (1909) (holding that corporations can be held vicariously liable for the crimes of their employees if the crimes occur within the scope of the employees' employment).

4. *See A Byte out of History: The Lasting Legacy of Operation Illwind*, Fed. Bureau of Investigation, June 14, 2013, https://www.fbi.gov/news/stories/a-byte-out-of-history-the-lasting-legacy-of-operation-illwind1.

5. *See* U.S. Sentencing Commission, Guidelines Manual ch. 8 (1992).

6. *See* S.J. Rackmill, *Printzlien's Legacy, the "Brooklyn Plan," A.K.A. Deferred Prosecution*, 60 Fed. Probation 8 (1996), abstract *available at* https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=165231.

tenets underlying the Brooklyn Plan apply in appropriate circumstances in the corporate context, where companies with good intentions, but a few bad actors, could benefit from guidance, monitoring, supervision, and rehabilitation.

The first widely reported instance, in effect, of a corporate NPA—the decision not to prosecute Salomon Brothers in 1992 following an investigation into securities fraud—was a watershed moment. As announced in a government press release, Salomon Brothers was able to avoid the stigma and harsh collateral consequences of an indictment by cooperating fully with the government, agreeing to institute compliance measures, and paying a $260 million fine.[7] Then-U.S. Attorney for the Southern District of New York Otto Obermaier held Salomon up as an example, explaining, "Salomon's cooperation was exemplary. Such actions were virtually unprecedented in my experience."[8] Although the government and Salomon Brothers did not enter into a formal NPA, the investigation and public decision not to prosecute sent a message that companies who cooperated fully and were willing to recognize and address their internal problems could obtain favorable results—or at least more favorable than the consequences of criminal indictment.

The decision not to prosecute Salomon Brothers paved the way for formal corporate NPAs and DPAs, such as the DPA entered into between the U.S. Attorney's Office for the Southern District of New York and Prudential Securities in 1994.[9] That agreement required substantial internal reforms in exchange for the government's agreement to defer prosecution, a theme that would continue to permeate diversion agreements for decades to come.

Perhaps the most influential event in the rise of DPAs was the decision not to enter into one with Arthur Andersen following the government's investigation into the accounting giant for its role in the Enron scandal. Arthur Andersen reportedly viewed the government's demands as too onerous and was subsequently indicted in March 2002, leading to the firm's eventual collapse and the loss of tens of thousands of jobs, despite the U.S. Supreme Court's unanimous

7. Press Release, U.S. Department of Justice, Department of Justice and SEC Enter $290 Million Settlement with Salomon Brothers in Treasury Securities Case (May 20, 1992), *available at* https://www.justice.gov/archive/atr/public/press_releases/1992/211182.htm.

8. *Id.*

9. *Interview with Mary Jo White, Debevoise, New York, New York*, 19 Corp. Crime Rep. 48(11) (2005), *available at* http://www.corporatecrimereporter.com/news/200/interview-with-mary-jo-white-debevoise-new-york-new-york.

reversal of the firm's conviction in 2005. The fate of Arthur Andersen became a cautionary tale both for the government, as a reminder to take account of the very real collateral consequences of a corporate indictment, and for corporate decision makers, as a reminder that the government's demands for cooperation, even if seemingly onerous, might be better than the alternative.

Before Arthur Andersen's "corporate death sentence," DPAs were still relatively rare, but since that time, the documented use of DPAs has risen steadily, with reported agreements reaching double digits for the first time in 2005 and growing steadily.[10] In 2015, the government entered into 100 reported DPAs with companies, a record number. The increase in DPAs and NPAs has impacted the way internal corporate investigations are conducted in a number of respects, including the increased focus on cooperating fully with ongoing government investigations; gathering and providing information about individual employees; making recommendations for voluntary and early disclosures; and advising companies to develop and maintain robust compliance programs. In addition to uncovering facts about events relating to potential wrongdoing, investigation counsel must look more broadly to corporate culture and advising company management how to weed out bad actors and prevent potentially damaging acts from recurring.

B. *DOJ's Guidance: From Holder to Yates*

As the government increased its reliance on DPAs and NPAs for companies deemed to have cooperated, it offered a series of memoranda that provided guidance for companies and their investigation counsel on how to earn cooperation credit. The 1999 Holder Memorandum, announced by then-Deputy Attorney General Eric Holder, was entitled "Bringing Criminal Charges Against Corporations" and discussed general principles of corporate prosecution and holding companies, no less than individuals, accountable for violations of the law. The memorandum introduced factors to consider in deciding how to treat a corporate target.[11] Importantly, the memorandum focused on timely and voluntary

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10. Brandon L. Garrett & Jon Ashley, University of Virginia School of Law, *Federal Organizational Prosecution Agreements*, http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp (last updated Feb. 7, 2017).

11. The factors are the nature and seriousness of the offense, the pervasiveness of the wrongdoing, the company's history of similar conduct, the company's timely and voluntary disclosure, the existence and effectiveness of a compliance program, the company's remedial actions, and the collateral consequences of a conviction.

disclosure, and encouraged waiver of the attorney-client privilege for companies seeking to demonstrate their cooperation in federal criminal investigations. It also directed prosecutors to consider the collateral consequences of charging a company, including disproportionate harm to non-culpable shareholders and employees, and the adequacy of noncriminal remedies.[12]

The Holder Memorandum was superseded on January 20, 2003, by the Thompson Memorandum.[13] This memorandum, entitled "Principles of Federal Prosecution of Business Organizations," redefined traditional notions of cooperation by declaring, among other factors, that waiver of attorney-client privilege and advancement of legal fees could be considered in assessing "cooperation" and determining whether a business entity should be criminally charged. Prosecutors were to consider "whether the corporation appears to be protecting its culpable employees" by engaging in activities such as advancing attorney's fees, failing to sanction employees, and participating in joint defense agreements.

From the outset, the Thompson Memorandum drew sharp criticism from many corners of the profession, with concern that the new policy effectively *required* a company under investigation to waive its attorney-client privilege to demonstrate "cooperation."[14] In response to the public outcry, and with acknowledgment of the increasing self-enforcement of corporations, the U.S. Department of Justice (DOJ) in 2006 published the McNulty Memorandum.

The introduction to the McNulty Memorandum noted that the DOJ had "experienced unprecedented success in prosecuting corporate fraud during

12. Holder Memorandum, *supra* note 1.

13. Thompson Memorandum, *supra* note 1.

14. *See* Letter from Former Attorneys General, Deputy Attorneys General, and Solicitors General to Attorney General Alberto Gonzalez (Sept. 5, 2006) ("We believe that the 'Thompson Memorandum' is seriously flawed and undermines, rather than enhances, compliance with the law and the many other societal benefits that arise from the confidential attorney-client relationship. Therefore, we urge the Department to revise its policy to state affirmatively that waiver of attorney-client privilege and work-product protections should not be a factor in determining whether an organization has cooperated with the government in an investigation"). Beyond criticisms by the bar, in June 2006 a federal district court in *United States v. Stein* held that the Thompson Memorandum violated the Fifth and Sixth Amendments by denying defendants due process and right to counsel. 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008). On appeal, the Second Circuit affirmed the lower court's decision holding that government pressure on a company wishing to demonstrate its cooperation by refusing to indemnify the legal fees of its officers and directors violated the Sixth Amendment right to counsel.

In the midst of these proceedings, congressional hearings were held on the Thompson Memorandum and Senator Arlen Specter introduced in September 2006 the "Specter Bill," which rolled back portions of the Thompson Memorandum and addressed many of the concerns expressed by critics of the U.S. Department of Justice's (DOJ's) policy.

the last four years" and that the most significant result of its enforcement efforts "is that corporations increasingly recognize the need for self-policing, self-reporting, and cooperation with law enforcement."[15] The memorandum acknowledged the concerns of "responsible corporate officials" and created a new, two-tiered approach in requesting waiver of privileged information.[16] Although the McNulty Memorandum significantly altered the Thompson Memorandum, critics remained unsatisfied in that it still permitted prosecutors to seek privileged information in certain circumstances.[17]

On August 28, 2008, Deputy Attorney General Mark R. Filip announced yet one more revision to the Principles of Federal Prosecution of Business Organizations.[18] The Filip Memorandum shifted the emphasis from the attorney-client privilege to timely disclosure of relevant facts, removed any consideration of a corporation's advancing attorney's fees, disallowed prosecutors' consideration of joint defense agreements in evaluating cooperation, and disallowed consideration of a company's discipline of culpable employees.[19]

Seven years later, the DOJ in the Obama Administration announced another shift in prosecutorial priorities and considerations. At a September 10, 2015, conference at New York University, Deputy Attorney General Sally Quillian Yates announced a new DOJ initiative designed to address those critics who had expressed concern at the failure of the DOJ to prosecute individuals accountable for the 2008 financial crisis.[20] The initiative, entitled "Individual Accountability for Corporate Wrongdoing,"[21] states that to effectively combat corporate misconduct, "individuals who perpetrated the wrongdoing" must be held accountable.

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15. McNulty Memorandum, *supra* note 1.

16. The new policy required that prosecutors obtain written authorization from their U.S. attorney (who must consult the assistant attorney general for the Criminal Division) before requesting waiver; the policy also distinguished between waiver of purely factual information (Category I) and attorney-client communications or nonfactual attorney work product (Category II). McNulty Memorandum, *supra* note 1.

17. In June 2008, Senator Arlen Specter introduced another bill that, among other things, would have prohibited any governmental request for a waiver or from any negative consequence resulting from a refusal to waive privilege.

18. Filip Memorandum, *supra* note 1.

19. In Filip's remarks of Aug. 28, 2008, he stated that "credit for cooperation will not depend on whether a corporation has waived attorney-client privilege or work product production or produced materials protected by attorney-client or work product protections. It will depend on the disclosure of facts." Elsewhere, he stated "the new policy instructs prosecutors not to consider whether a corporation has advanced attorneys' fees to its employees, officers, or directors when evaluating cooperativeness."

20. Yates Memorandum, *supra* note 1.

21. *Id.*

The policy recognizes, however, that "it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt," especially given that "high-level executives . . . may be insulated from the day-to-day activity in which the misconduct occurs."

The policy outlines six factors "to strengthen our pursuit of individual corporate wrongdoing," including: (1) "To be eligible for *any* consideration for cooperation credit, companies must provide *all* relevant facts about each relevant employee; and (2) Criminal and civil corporate investigations should focus on individuals from the inception."[22] While the memorandum has been seen by some as groundbreaking in the DOJ's efforts to bring criminal cases against individuals, Assistant Attorney General for the Criminal Division Leslie Caldwell described the Yates Memorandum as "not really a shift in policy from what the Criminal Division has been doing and also some US attorney's offices have been doing in practice."[23]

It is too early to assess what constitutes "cooperation credit" under the Yates Memorandum or to gauge its impact on white-collar prosecutions. Company counsel has long understood that cooperation entails a full disclosure of misconduct. The 1999 Holder Memorandum made that clear, in requiring companies to disclose "the nature and seriousness of the offense." What is unclear at this point is the quantum of evidence that company counsel will be required to proffer regarding "each relevant employee," and to what extent a company will be required in effect to stand in a prosecutor's shoes.

In some ways, the government has come full circle in prosecuting white-collar corporate crime. A practice of aggressive prosecution of companies was followed by a recognition that in many cases prosecutors and the companies they were investigating had the same interests at heart—to weed out and punish bad actors—and that companies themselves could play an important role in achieving these goals. Although concerns that perhaps not enough bad actors were held accountable led to a renewed focus on the corporate entity and

22. The other four factors are: (1) criminal and civil attorneys should routinely communicate with one another; (2) absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individual; (3) corporate cases should not be resolved without a clear plan to resolve related individual cases; and (4) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

23. David Vascott, *An Interview with Leslie Caldwell*, Global Investigations Rev., Sept. 30, 2015, *available at* http://globalinvestigationsreview.com/article/4209/an-interview-leslie-caldwell.

refined definitions of corporate cooperation, it remains clear that a company's response to wrongdoing and its subsequent interactions with the government will greatly affect the outcome. The internal investigation remains a crucial aspect of these interactions.

C. *Congress's Approach to Corporate Criminal Liability: Sarbanes-Oxley and Dodd-Frank*

While the DOJ's guidelines for corporate criminal prosecutions have been evolving, Congress has taken its own steps to hold corporations more accountable, and these too have significantly impacted internal investigations. Investigative counsel must take into account the Sarbanes-Oxley Act of 2002[24] and its dramatic impact in this area of practice. Aimed at eliminating accounting fraud and implemented as an attempt to restore confidence in public companies, Sarbanes-Oxley has had an immediate effect on corporations throughout the United States, as well as the accounting, legal, and investment banking communities.

Sarbanes-Oxley affects internal investigations in three distinct ways.[25] First, it and related U.S. Securities and Exchange Commission (SEC) rules increased the number of channels through which claims of misconduct arise. Companies must report on the health of their internal reporting procedures, which in turn leads to elaborate certification processes. The act requires audit committees to set up systems for collecting confidential, anonymous "whistle-blower" reports. Wrongdoing disclosed to the chief legal officer through "reporting up" requirements is discharged only once the company makes an "appropriate response." Any one of these mechanisms can uncover instances of potential misconduct sufficient to require an internal investigation.

Second, Sarbanes-Oxley complicates the analysis of who should conduct and who should supervise an internal investigation. Although the act is short on specific guidance, a company wishing to conduct an internal inquiry will frequently form a special committee of the board, and the committee will engage independent counsel to conduct the investigation.

That companies have turned to special committees or called upon their independent audit committee is nothing new. What has changed in recent years is the

24. Pub. L. No. 107-204, 116 Stat. 745.

25. For a more detailed discussion of the effect of Sarbanes-Oxley on internal investigations, *see* Chapter 15, "SOX It to Me: Internal Investigations in a Sarbanes-Oxley World."