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1 The Decision to Conduct an Internal Investigation

1.1 What statutory or regulatory obligations should an entity consider when deciding whether to conduct an internal investigation in your jurisdiction? Are there any consequences for failing to comply with these statutory or regulatory regulations? Are there any regulatory or legal benefits for conducting an investigation?

Under U.S. law, there are few statutory or regulatory mandates that definitively require a company to conduct an internal investigation. But as a practical matter, companies face ever-increasing scrutiny by government regulators, a cross-section of stakeholders, the public, and press who are keenly focused on alleged company improprieties that may come to light, and internal investigations remain a critical component of responding to such instances.

When companies identify evidence of potential misconduct, perhaps the most useful tool they can wield to address the matter is an internal investigation. An investigation helps a company understand the relevant material facts, enabling it to respond thoroughly, deliberately, and appropriately, and can also be beneficial if in fact there is a government inquiry or a duty to disclose. If the investigation identifies facts evidencing a policy or legal violation, the company is positioned to take appropriate corrective action, such as terminating or disciplining bad actors, correcting and remediating fallout from any violations, changing policies as needed, and assessing the often difficult issue of whether to voluntarily disclose to relevant government regulators is warranted (discussed further below).

There are limited circumstances in which highly regulated companies may have a statutory obligation to investigate reports of alleged wrongdoing. For example, regulated companies must certify the accuracy of financial statements (to comply with the Sarbanes-Oxley Act) and, in order to accurately certify, the company may be required to investigate and resolve certain allegations of financial improprieties. States and localities also impose requirements. Additionally, certain non-governmental regulators, such as the New York Stock Exchange and the Financial Industry Regulatory Authority, also require companies they regulate to investigate certain types of alleged wrongdoing, such as improper trading by company insiders.

Regardless of whether there is an obligation to investigate, most federal government regulators – including the U.S. Department of Justice ("DOJ"), Securities and Exchange Commission ("SEC"), and Commodity Futures Trading Commission ("CFTC") – have articulated policies of crediting companies that investigate and voluntarily disclose violations or investigate in parallel with regulator investigations. Such parallel investigations often enable companies to provide better cooperation with regulators and thereby secure more favourable treatment or leniency as to self-reported violations.

Conversely, the consequence of failing to investigate an issue that regulators and the public later scrutinise can include criminal prosecution of the company, large civil fines, substantial financial and reputational damages in stockholder lawsuits, and negative publicity. An internal investigation in advance of, or in parallel with, such scrutiny could alleviate or lessen some or all of these consequences and enables a company to be better prepared, regardless.

1.2 How should an entity assess the credibility of a whistleblower's complaint and determine whether an internal investigation is necessary? Are there any legal implications for dealing with whistleblowers?

Most complaints of alleged wrongdoing warrant some level of inquiry, and whistleblower complaints often fall into the category warranting even further investigation. Companies should be sensitive to the fact that whistleblower allegations are often more likely to be disclosed to third parties and regulators, so a prompt decision as to whether to investigate or not is essential. Either way, it is good practice to have an established process for handling whistleblower complaints and documenting the basis for a decision to end an inquiry or conduct an investigation.

Factors to consider in whether to conduct a full investigation include the credibility of the evidence and whistleblower, the seniority of the alleged wrongdoer, the severity of the alleged misconduct, the pervasiveness and likelihood of a reoccurrence of the alleged violation, the implications for the soundness of internal controls, and the potential impact on company finances and goodwill. Other relevant factors include: the applicable law; the nature of the company; whether the company is highly regulated; whether the company has faced previous regulatory investigation; whether there are pending regulatory investigations; and whether there is a risk of disbarment or suspension of required regulatory approval or licensing.

Companies should also be careful how they treat a whistleblower. U.S. law provides protections for whistleblowers against retaliation. This means companies should limit disclosure of any whistleblower complaint on a need-to-know basis and guard against retaliation.

1.3 How does outside counsel determine who "the client" is for the purposes of conducting an internal investigation and reporting findings (e.g. the Legal Department, the Chief Compliance Officer, the Board of Directors, the Audit Committee, a special committee, etc.)? What steps must outside counsel take to ensure that the reporting relationship is free of any internal conflicts? When is it appropriate to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

The identification of the client is a threshold issue that should be determined at the outset of the investigation. The company counsel should also monitor and reassess that determination throughout the course of the investigation, especially if they identify any potential conflicts.

The primary touchpoint for assessing who should engage and direct outside counsel generally turns on whether the investigation implicates a conflict of interests between the company, any company insiders, in control positions, and/or members of the board. For most investigations, the company or its legal department will engage outside counsel, with the company as the client. This is true even when an investigation involves a potential conflict between the company and senior executives. In such scenarios, outside counsel typically reports to the legal department and conducts the investigation in a manner that screens and walls off those who may be implicated by facts underlying the investigation.

If facts giving rise to, or uncovered during, the investigation indicate that the legal department or certain of its personnel may have a potential conflict, then outside counsel is typically engaged by, and reports to, the company's board of directors or a committee of the board, such as the audit committee or a specially convened committee of independent persons tasked with overseeing the investigation. This engagement and reporting process helps protect the investigation's independence and integrity. In such scenarios, outside counsel should implement appropriate screens to avoid the appearance of any undue and inappropriate influence on the process, direction, and outcome of the investigation. And no screened person should have any control role, direct or indirect, in the investigation or be privy to privileged investigatory materials during the investigation.

2 Self-Disclosure to Enforcement Authorities

2.1 When considering whether to impose civil or criminal penalties, do law enforcement authorities in your jurisdiction consider an entity's willingness to voluntarily disclose the results of a properly conducted internal investigation? What factors do they consider?

A company that voluntarily and promptly discloses a perceived civil or criminal violation will generally receive some degree of leniency from the relevant enforcement authorities. This can enable a company, depending on the circumstances, to avoid the more adverse consequences of corporate insider violations; for example, including securing reduced penalties and better settlements.

Key government regulators, such as the DOJ, SEC, and CFTC, have in recent years increasingly emphasised the benefits of self-disclosure and cooperation and formalised their criteria for evaluating and incentivising self-disclosure and cooperation. The DOJ's key criteria include timely self-disclosure (before any imminent threat of disclosure or government investigation occurs and within a reasonable time after the company learns of the issue), a willingness to cooperate with the DOJ investigation, disclosure of individuals involved in or responsible for misconduct, the pervasiveness of wrongdoing within the company, the existence and effectiveness of a company's compliance programme, and meaningful remedial actions. The SEC and CFTC consider similar criteria, with the SEC also assessing whether the conduct involves widespread industry practice and remains ongoing.

2.2 When, during an internal investigation, should a disclosure be made to enforcement authorities? What are the steps that should be followed for making a disclosure?

Companies that conclude, based on credible evidence, that a civil or criminal violation occurred or if they otherwise have a duty to report should consider voluntarily disclosing the occurrence to relevant government regulators. Early disclosure will increase the likelihood the company can secure leniency and other benefits for voluntary cooperation.

2.3 How, and in what format, should the findings of an internal investigation be reported? Must the findings of an internal investigation be reported in writing? What risks, if any, arise from providing reports in writing?

Companies faced with substantial government and public scrutiny will often choose to carefully craft a privileged written report for internal use. Written reports help evidence a prompt and thorough corporate response and provide the board and other decision makers with the information needed to respond to the matter. If a report is published publicly, that could result in a waiver of attorney-client privilege. Many companies, though, choose to present investigative updates and ultimate findings in oral form. This approach also has several benefits, including that it helps protect against waiver of any privileges, and it prohibits adversaries who may acquire draft reports from exploiting discrepancies between or among those drafts.

3 Cooperation with Law Enforcement Authorities

3.1 If an entity is aware that it is the subject or target of a government investigation, is it required to liaise with local authorities before starting an internal investigation? Should it liaise with local authorities even if it is not required to do so?

A company is generally not required to coordinate with local authorities before commencing an internal investigation. However, some statutes and regulations impose special disclosure requirements and companies may have affirmative disclosure obligations under certain contracts with other parties. Those requirements to disclose investigations may result in early coordination with government regulators.

Even where prior coordination is not required, it is often prudent to cooperate with regulators during the course of an investigation. Many government regulators incentivise cooperation by offering leniency in sentencing and monetary penalties. Cooperation may also allow companies to bring exculpatory evidence to the attention of regulators, provide context for problematic conduct, and correct errors the government may have made.

However, leniency is never assured. The measure of cooperation is subjective, with government regulators making the

ultimate determination. Additionally, information disclosed to the government may not be protected from discovery in related civil proceedings. Cooperation is often in a company's interest, but the risks and benefits must be considered carefully in each matter.

3.2 If regulatory or law enforcement authorities are investigating an entity's conduct, does the entity have the ability to help define or limit the scope of a government investigation? If so, how is it best achieved?

Where an authority lawfully investigates a company's conduct, the company typically will not have much control over the scope of the investigation. However, if a company voluntarily discloses its conduct, it may be able to help shape the government's investigation by focusing the regulator on the issues addressed in the company's own investigation. Further, even where an investigation is initiated by a government regulator, if the company is in a cooperative posture and maintains a positive relationship with the investigating authority, it may be able to have some influence over the trajectory and pace of the investigation. A company can do this by establishing its credibility, retaining well-respected counsel, and providing substantial assistance. Ultimately, the scope will be determined by the investigating regulator.

3.3 Do law enforcement authorities in your jurisdiction tend to coordinate with authorities in other jurisdictions? What strategies can entities adopt if they face investigations in multiple jurisdictions?

There is an increasing trend of cooperation and coordination among law enforcement authorities across jurisdictions. Some jurisdictions have adopted explicit cooperation agreements, such as the U.S.-U.K. Bilateral Data Access Agreement, and some arrangements are less formal. As a result, companies under investigation by government regulators should assume that any information shared with one authority will make its way to others. To ease this process and ensure that all relevant regulators perceive the entity as cooperative and compliant, companies may want to meet with regulators early on to develop procedures for information sharing and disclosure. Disclosing the same or substantially similar information to all will help to keep the regulators on an equal footing, and also help to avoid negative reactions to uneven information-sharing. It is usually preferable to obtain a coordinated, single resolution, rather than multiple severed resolutions, and consistent information-sharing will help to keep the regulators on a similar track.

4 The Investigation Process

4.1 What steps should typically be included in an investigation plan?

A key to a successful investigation is to prepare a clear and comprehensive work plan. Although the specifics will differ depending on the particular matter, the investigation plan should typically cover the scope of the investigation, the anticipated timing, the relevant individuals, groups, or departments, and the plan for fact development, including document collection and review and witness interviews. The investigation plan should also address the form and timing of the final reporting in order to set expectations at the start.

4.2 When should companies elicit the assistance of outside counsel or outside resources such as forensic consultants? If outside counsel is used, what criteria or credentials should one seek in retaining outside counsel?

A company's decision to engage outside counsel will necessarily be made on a case-by-case basis, but companies can set basic parameters to help make such decisions. Companies often bring in external counsel in matters that go beyond routine issues or involve significant requests from government regulators. Where a regulator request is simple and appears to treat the company as a third-party witness, the in-house legal department may consider handling the investigation itself. However, in matters that involve significant communication with government regulators or otherwise involve civil or criminal exposure, outside counsel is often better suited to serve as an intermediary and to handle the day-to-day work. Outside counsel involvement may also signal that there is a level of independence involved in the investigation, which prosecutors and enforcement attorneys value.

Any decision to use outside consultants of a non-legal nature should be discussed with counsel and should be engaged by counsel in order to best protect the consultants' work as privileged. The utility of outside consultants, such as accountants, will depend on the complexity of the issues involved in the investigation and whether their services are necessary for counsel to do its work.

5 Confidentiality and Attorney-Client Privileges

5.1 Does your jurisdiction recognise the attorney-client, attorney work product, or any other legal privileges in the context of internal investigations? What best practices should be followed to preserve these privileges?

There is no U.S. law that generally protects investigations as privileged. Instead, companies should take specific action to ensure investigatory materials are covered by general privileges, including the attorney-client privilege, the common interest/joint defence doctrines, and the work product doctrine.

The attorney-client privilege typically protects communications between a client and counsel made for the purpose of obtaining legal advice. The common interest/joint defence doctrines permit counsel for separate parties to share otherwise privileged communications without waiving that privilege, provided the parties share a common legal interest (not just a business interest) and the communication furthers that interest. The work product doctrine protects documents and communications that reflect counsel's thoughts and impressions regarding investigatory work and legal strategy, but only if created for purposes of preparing for existing or anticipated litigation.

For the attorney-client privilege to apply to an investigation, the primary purpose of the investigation must be to obtain legal advice. Companies should ensure the scope and purpose of the investigation is documented in writing. The purpose of the investigation should plainly state that it is to obtain legal advice *and*, in most cases, to prepare for litigation (actual or anticipated). Companies should also ensure that counsel undertakes or, at the very least, supervises the investigation. An investigation that a compliance team, audit team, or third-party consultant conducts without oversight by counsel is generally viewed as routine and less likely to be protected as privileged.

5.2 Do any privileges or rules of confidentiality apply to interactions between the client and third parties engaged by outside counsel during the investigation (e.g. an accounting firm engaged to perform transaction testing or a document collection vendor)?

U.S. federal courts recognise the "Kovel" doctrine (named after a seminal case), which provides a narrow exception to the general rule that sharing privileged information with a third party constitutes waiver. The doctrine protects as privileged communications with third-party consultants – such as accountants, tax and financial planners, e-discovery vendors, and others with professional expertise – but only to the extent that a company consults directly or indirectly through counsel with such experts because their expertise is necessary, or at least highly useful, for effective consultation between the company and counsel.

5.3 Do legal privileges apply equally whether in-house counsel or outside counsel direct the internal investigation?

In general the company holds the privilege, and the privilege protects from disclosure any legal advice the company seeks from in-house counsel or outside counsel, including in connection with an internal investigation. Similarly, both work product created by both in-house counsel and outside counsel is also entitled to protection, provided it is created to address existing or anticipated litigation.

5.4 How can entities protect privileged documents during an internal investigation conducted in your jurisdiction?

Companies can best safeguard the privilege by carefully identifying documents that contain privileged information and explicitly marking them, where appropriate, as both privileged and work product. Companies should also keep careful track of, and control over distribution of, such privileged documents to ensure they are not inadvertently provided to third parties, which may waive the privilege. When reviewing materials in response to a regulator's requests for documents, companies should isolate for detailed and separate review any investigatory materials.

Companies should also carefully assess how investigative information is used after the investigation has concluded. The disclosure of otherwise privileged information by a witness at a deposition would waive the privilege. Similarly, a company risks waiver if it puts the contents of an investigation at issue in subsequent litigation by, for example, invoking an investigation as a defence to whistleblower or employment claims.

5.5 Do enforcement agencies in your jurisdictions keep the results of an internal investigation confidential if such results were voluntarily provided by the entity?

U.S. law provides limited protections from disclosure for materials provided to government regulators in the course of an investigation. Materials companies disclose to criminal regulators in response to a federal grand jury subpoena are generally protected from disclosure. Companies disclosing materials to federal and state government regulators in connection with government investigations will typically request the materials to be treated as confidential under the federal Freedom of Information Act ("FOIA") or state law equivalents. But the FOIA permits the public, including the press, to request and access such information unless the information falls into a discrete number of limited exceptions prohibiting disclosure, such as proprietary information. Companies should assume that information disclosed to regulators is at risk of disclosure in response to FOIA requests and in subsequent civil litigation.

6 Data Collection and Data Privacy Issues

6.1 What data protection laws or regulations apply to internal investigations in your jurisdiction?

Unlike other jurisdictions, the U.S. does not have comprehensive data protection or privacy regulations applicable to internal investigations. However, certain regulators, such as the DOJ and Federal Trade Commission, provide guidance related to non-disclosure of certain data, such as sensitive personal data.

Some states have passed their own data protection and data privacy laws. These laws can vary substantially, but many provide increased protections for consumers and employees. For example, the California Consumer Privacy Act ("CCPA") requires companies to disclose their data collection, use, and sharing procedures with consumers. Additionally, legislators in New York, Virginia, New Hampshire, and Florida have introduced bills since early 2020 regarding data privacy. The NY Privacy Act, for example, would require companies to disclose their data privacy policies and initiate safeguards for personal data sharing.

6.2 Is it a common practice or a legal requirement in your jurisdiction to prepare and issue a document preservation notice to individuals who may have documents related to the issues under investigation? Who should receive such a notice? What types of documents or data should be preserved? How should the investigation be described? How should compliance with the preservation notice be recorded?

Companies are not legally required to preserve data until an investigation or litigation commences or is reasonably foreseeable. However, it is prudent to maintain clear document retention policies in the ordinary course of business, which help to ensure relevant data exists when needed and to rebut any claims of intentional document destruction. Federal law prohibits the intentional destruction of evidence as well as the failure to preserve data once litigation commences or is foreseeable.

When a company initiates an investigation or receives notice of a government investigation, it should promptly issue a document preservation notice to (at a minimum) the individuals likely to have documents relevant to the investigation. The notice should note the investigation, summarise the relevant subject matter, explain the importance of retention, and identify the types of data subject to preservation. Preservation should include not only email, but also hard-copy documents, notes, other methods of communications (*e.g.*, chats), and any other documents that may be relevant to the investigation. Companies should also work with IT departments to ensure that data is electronically preserved.

6.3 What factors must an entity consider when documents are located in multiple jurisdictions (e.g. bank secrecy laws, data privacy, procedural requirements, etc.)?

Companies should assess the relevant jurisdictional regulations and procedures in each jurisdiction in order to fully cooperate with government requests. Companies are perceived as more cooperative when they quickly comply with these requests;

however, the ability to respond quickly may be hindered where documents are located across jurisdictions governed by different, and even conflicting, data protection laws. Multinational companies should prepare protocols to address these types of situations and should continually reassess those protocols as local laws and regulations change. In navigating cross-jurisdiction document collection issues, companies should consider engaging local counsel to guide them through the analysis and ensure timely compliance.

6.4 What types of documents are generally deemed important to collect for an internal investigation by your jurisdiction's enforcement agencies?

The types of documents deemed important will vary based on the facts and issues involved in a particular investigation. When commencing an investigation, a company should define the scope and determine the types of documents it should collect. Starting with key documents that relate to the commencement of the investigation itself will help determine where to focus next. Relevant document types will often include physical and electronic documents and correspondence as well as general business documents, payment records, company policies, and, perhaps, recorded communications.

6.5 What resources are typically used to collect documents during an internal investigation, and which resources are considered the most efficient?

Depending on the volume of data, companies may enlist third-party vendors to assist in collecting and reviewing data. This can help to ensure that the process is independent, credible, and efficiently executed. In investigations with outside counsel, counsel will often conduct initial scoping interviews to help identify relevant employees and data sources, as well as to better understand the company's systems. These measures help to make the collection process targeted and cost-efficient. Companies often collect the full email mailbox for each relevant employee, process that data, and search it using keywords or other criteria. Another option that works for some company systems is to search the mailbox using keywords or criteria before collecting the data and then collecting only the resulting targeted data source.

6.6 When reviewing documents, do judicial or enforcement authorities in your jurisdiction permit the use of predictive coding techniques? What are best practices for reviewing a voluminous document collection in internal investigations?

Companies would do well to assess and implement predictive coding or technology-assisted review ("TAR") tools in large investigations to more quickly identify relevant documents. When using such tools, companies should consider whether and, if so, when to inform government regulators of such use. In any event, it is prudent to carefully document how those tools are being used in case regulators later raise questions regarding the review process. Even where judicial or enforcement authorities insist on a full document-by-document review, which is an increasing rarity, TAR can still be a useful supplement to identify and push to the review team the most responsive documents first.

Regardless of the use of TAR, there are other methods companies can use to enhance review efficiency. In coordination with counsel and e-discovery vendors, companies should select a reasonable number of document custodians and employ search terms to narrow the universe of documents for review. They may also consider technological methods for further narrowing, such as email threading (a method in which only the latest email in a chain, or any other unique emails on the same chain are included in a review). As the review proceeds, companies and counsel should revisit search terms and protocols based on newly discovered information in order to continuously increase efficiencies.

7 Witness Interviews

7.1 What local laws or regulations apply to interviews of employees, former employees, or third parties? What authorities, if any, do entities need to consult before initiating witness interviews?

Companies are generally free to conduct witness interviews without first consulting authorities. Companies should, though, take special care conducting interviews when a parallel government investigation is ongoing in order to avoid any appearance of obstruction or altering witness testimony.

One applicable U.S. law, the Victim and Witness Protection Act ("VWPA"), creates a broad scheme to protect against witness tampering, prohibiting a person from knowingly intimidating, forcing, threatening, or misleading a witness with intent to influence testimony. Companies should be careful to avoid such conduct. To illustrate, although a company can inform covered employees of their constitutional right to assert the privilege against self-incrimination, and can work with an employee to present a set of facts in their "best light", counsel must be careful not to cross the line into coercive or deceptive behaviour that impedes a government investigation.

Counsel conducting witness interviews should take special care to inform the witness that counsel represents the company and not the witness, which is called an "Upjohn" warning, named after a seminal case (discussed further below).

7.2 Are employees required to cooperate with their employer's internal investigation? When and under what circumstances may they decline to participate in a witness interview?

Company employees have no general statutory obligation to cooperate with internal investigations. Some companies, though, have employees sign employment contracts or have Codes of Conduct, and many of those require employees to cooperate with internal investigations as a condition of their continued employment. Counsel conducting interviews can remind employees of such company policies and also note that employees may be subject to discipline, including dismissal, if they refuse to cooperate or provide truthful responses. Where no such contractual obligation exists, a witness is free to decline an interview. Such declination does not, however, insulate an employee from disciplinary action or dismissal for failure to reasonably cooperate (assuming the employee is not a whistleblower).

7.3 Is an entity required to provide legal representation to witnesses prior to interviews? If so, under what circumstances must an entity provide legal representation for witnesses?

U.S. law does not require companies to provide legal representation to employees prior to interviews. Company senior executives and officers, as well as directors, often have employment contracts, indemnification contracts, or company bylaws that

require, or permit, the company to pay their legal fees in matters relating to their role at the company. Even absent such contractual provisions, companies will often choose to pay for separate counsel for employees, especially senior employees, to avoid the appearance of any conflict and preserve, via a common interest arrangement, privilege over communications between company counsel and employee counsel. If an individual employee has retained separate counsel, additional considerations apply when interviewing such individuals (discussed below).

7.4 What are best practices for conducting witness interviews in your jurisdiction?

Company counsel should determine whether a witness is currently represented by counsel before conducting an interview. If the witness is currently represented, the company counsel should contact that counsel. At the outset of an interview of a company employee, company counsel should also make clear that counsel represents the company and not the individual, the interview is privileged and should be kept confidential, the company owns the privilege, and the company can unilaterally waive that privilege without notifying or consulting the witness. This Upjohn warning is essential to ensuring the witness understands counsel represents the company. Absent such a warning, a witness might form a belief that counsel represents the witness, which in certain U.S. jurisdictions and under specific circumstances can lead to the witness potentially waiving the privilege.

Inquiring counsel should generally be accompanied by an additional person who can take notes and, if later warranted, testify to statements made in the interview without disqualifying inquiring counsel. Exceptions exist that might make it preferable for the inquiring counsel to interview the witness alone. The absence of a notetaker or observer may increase the likelihood that a particular witness will speak more freely in a private conversation. Counsel should also be careful to limit those attending such interviews in order to avoid impairing any privileges that cover the interview. Counsel should also be careful to avoid, where possible, having one witness present for another witness interview, or sharing information provided by one witness with another witness. Absent such safeguards, the interview process could taint a witness' independent recollection of the matters discussed.

Interviews should generally be memorialised in writing by counsel. This written memorandum should not repeat what was said verbatim, but instead should reflect the mental impressions of the counsel present during the interview. The memorandum should also include a list of the individuals present at the interview, the approximate length of the interview, and whether the Upjohn warning was given.

7.5 What cultural factors should interviewers be aware of when conducting interviews in your jurisdiction?

Counsel conducting internal investigations frequently lack the coercive tools available to compel testimony in the same way as government regulators, so counsel must procure witness cooperation from witnesses through "soft skills". Cooperation frequently turns on the witness developing a measure of confidence in the inquiring counsel and expressing a willingness to provide information. Such rapport is built through various means, each having common characteristics, including civility, patience, candour, and availability. While the specific approach to interviewing each witness may vary according to the individual and the attendant circumstances, counsel should use interviewing techniques that are suited to their own personality.

7.6 When interviewing a whistleblower, how can an entity protect the interests of the company while upholding the rights of the whistleblower?

Companies are permitted to interview whistleblowers in the same manner they would any other employee – treating them with the collegiality and respect that would be expected in any employee interview. Companies should consider whether to provide separate counsel to the whistleblower at the company's expense, as such a step can signal to the whistleblower and government regulators that the company takes the matter seriously. Interviewing the whistleblower tactfully during the internal investigation may also help convince the employee that the company has heard any expressed concerns and will address them. This can at times convince the whistleblower there is no need to escalate the matter outside the company.

7.7 Can employees in your jurisdiction request to review or revise statements they have made or are the statements closed?

It is common for counsel representing an employee to ask to view the statements made by their client to investigators prior to the employee's retention of counsel. While no statute or rule requires a company to disclose such information to counsel, as long as such requests can be accommodated without resulting in any waiver of privilege or protection for the company, companies will frequently do so. Further, a witness will usually be permitted to clarify or supplement a prior statement as long as the requested clarification or supplement would advance the truth-finding process. Whether such a request reflects a sincere attempt to clarify the record, or an attempt to fabricate or muddy the waters, will typically be indicated by the circumstances surrounding such a request.

7.8 Does your jurisdiction require that enforcement authorities or a witness' legal representative be present during witness interviews for internal investigations?

U.S. ethics rules bar counsel from communicating about the subject of an investigation with an individual whom the counsel knows is represented by other counsel as to that investigation, so company counsel should be careful to determine whether an employee is represented by counsel before conducting any interview. Merely asking a corporate employee whether the employee is represented by counsel could chill that employee's response to subsequent questions or cause that employee to consider retaining counsel. If an employee is represented, obtaining consent to interview the employee may require disclosing the existence of an investigation, thus jeopardising its confidentiality. Further, if the employee's counsel insists on being present during the interview or refuses to consent to the interview, this places additional hurdles in the path of the investigation. Regardless, if the witness is currently represented, inquiring company counsel should contact the employee's counsel prior to the interview and permit that counsel to accompany the witness, unless the witness independently and voluntarily offers to be interviewed in the absence of counsel.

8 Investigation Report

8.1 How should the investigation report be structured and what topics should it address?

An investigation report can take a number of different forms, ranging from an informal oral update to a more formal written memorandum. The form typically varies depending on the nature of the investigation and the company, and whether the report will be shared with third parties. A company and counsel conducting the investigation should discuss the format of, and topics to be included in, any periodic or final report. Regardless of format, any final report should detail the investigation findings, which may include legal conclusions, and recommendations for remedial steps to the extent that broader or ongoing issues were identified in the investigation, and corrective measures already taken, if any.

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