

Internal Investigations Policy

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A policy addressing the process and management of corporate internal investigations. It includes policies for the use of outside counsel, preservation of privilege, document and data collection and preservation, and government reporting. This Standard Document has integrated drafting notes with important explanations and drafting tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

Internal investigations have become a necessary part of corporate governance. This Internal Investigation Policy focuses on the protocols essential to conducting an effective internal investigation, especially where there is the prospect of a government agency investigation or other legal action. This Policy is designed to ensure that internal investigations, regardless of the scope, are prompt, effective, well managed, and that the findings are responsibly addressed. This Internal Investigation Policy establishes protocols for:

- Initiating an investigation.
- Investigation design and management.
- Maintaining legal privileges.
- Engaging outside resources.
- Data collection and preservation.
- Witness interviews.
- Internal reporting.
- External reporting.
- Corrective action and necessary policy or procedure review.

Allegations of misconduct can come from a variety of sources including government agencies, employees, and audit findings. When faced with allegations of misconduct, regardless of the source, it is essential for corporations to take immediate action to determine:

- Whether the allegations have merit.
- The scope and cause of the alleged misconduct.
- How to best manage and defend against the legal and reputational damage associated with the misconduct, such as government reporting requirements and civil liability.
- The measures needed to remedy the compliance issues at the heart of the allegations.

Effective investigations depend on deliberate planning and careful execution. Companies that fail to plan or execute an effective internal investigation risk increasing their legal liability and harming

their public reputation. An effective investigation carefully considers:

- The nature of the allegations.
- The appropriate scope to encompass the allegations and any related compliance issues.
- Who should conduct the investigation.
- The timing of the investigation and the investigation methods, such as document preservation and employee interviews.
- Management of internal and external communication regarding the allegations and the investigation.
- Potential public reporting requirements.

In cases of suspected and confirmed corporate wrong-doing, the Department of Justice (DOJ) considers several factors in determining whether and how they will proceed against a corporation. These factors are set out in the US Attorneys' Manual's Principles of Federal Prosecution Of Business Organizations and include, but are not limited to:

- The nature and seriousness of the harm caused by an alleged offense, including risk of harm to the public.
- How pervasive the wrongdoing is within a corporation, including complicity in or condoning of the misconduct by management.
- A corporation's history of similar bad acts.
- A corporation's willingness to cooperate (see Yates Memo)
- Whether a corporation has an adequate pre-existing compliance program.
- A corporation's timely and voluntary disclosure of wrongdoing.
- Remedial actions including instituting or improving a compliance program, replacing responsible management, and employee discipline.
- The adequacy of prosecution of individuals.

(Department of Justice, US Attorneys' Manual § 9-28.300.)

This internal investigation policy applies to company boards, legal staff, employees, third parties, or other persons, as appropriate. This Policy provides a starting point, but companies are encouraged to

have experienced legal counsel review and assist in creating effective internal investigation policies and procedures. Consider adding an introduction by the company's CEO or General Counsel stressing the importance of cooperating with internal investigations. This will set an embracing tone of compliance and cooperation at the highest levels of the company.

The Company cannot rely solely on the internal investigation policy. Other policies are essential to navigating a government investigation. The company should also rely on a:

- Response policy, which will provide an ordered and uniform protocol for responding to any one of several ways a company may learn of a government investigation, where time is compressed and information may be sparse, such as when:
 - the government executes a search warrant on the company's premises (for more information see Responding to a Search Warrant Checklist ([W-000-8876](#)));
 - the government issues a civil investigative demand (CID) or subpoena on the company; or
 - the government contacts current or former employees.
- Communication policy, which will centralize and allow coordination of both internal and external communications, avoid unplanned and potentially binding statements by company representatives, and manage information communicated to:
 - markets;
 - clients;
 - customers; and
 - the media.
- Compliance policy, the effectiveness of which may impact determinations from the charging decisions to potential sanctions, including the calculation of criminal fines.
- Document and electronically stored information (ESI) preservation and retention policy, which provides guidance, organization, and clarity to those

responsible for preserving potentially important material.

- Employment policy, which should explain a company's stance on disciplining employees who refuse to cooperate with investigations, including termination (see *Gilman v. Marsh & McLennan Cos., Inc.*, 826 F.3d 69, 73, 75 (2d Cir. 2016) (holding that the company's interview demands were reasonable and it had cause to fire the two employees for refusing to comply); *McGrory v. Applied Signal Tech.*, 152 Cal. Rptr. 3d 154, 159, 167-68 (Cal. Ct. App. 2013) (holding that "being uncooperative or deceptive in an employer's internal investigation is not a protected activity under state or federal law").).

If an internal investigation is contemplated, but is not conducted, or if under similar circumstances an internal investigation would be conducted, counsel should document the actions taken to evaluate the situation and the reasoning behind the decision not to conduct an internal investigation.

BRACKETED ITEMS

Bracketed items in ALL CAPS should be completed with the facts of the transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices, to be selected, added, or deleted at the drafting party's discretion.

Internal Investigations Policy

1. Scope and Purpose.

[NAME OF COMPANY] ("**Company**") strives to conduct itself according to the highest standards of lawful and ethical conduct and to comply with all [[JURISDICTION] and] US laws and regulations. [While the Company endeavors to adhere to all applicable laws, the Company operates in the [SPECIFIC INDUSTRY] industry and pays special attention to its responsibilities under [SPECIFIC STATUTES OR REGULATIONS]]. The Company strictly prohibits and will not tolerate violations of the law in any form, including fraud, corruption, bribery, and failure to comply with laws and regulations. The Company treats allegations of violation of this policy seriously and will take all steps necessary to investigate and address allegations of misconduct.

From time to time, the Company may also become aware or involved with government inquiries, investigations, or other legal proceedings. Such inquiries may present a need for the Company to investigate its own operations in order to:

- Gather information to determine facts and circumstances.
- Accurately respond to requests for information.
- Defend against allegations of wrongdoing.
- Determine needed changes to current operations in order to better comply with the law.

Accordingly, this Internal Investigation Policy ("**Policy**") explains the specific requirements and prohibitions associated with internal investigations. This Policy informs all Company employees, including directors, officers, and agents, of the Company's expectations for conduct during an investigation.

- (a) **Applicability.** This Policy is applicable to all of the Company's operations [worldwide]. This Policy applies to all of the Company's directors, officers, and employees. This Policy also applies to the Company's agents, consultants, joint venture partners, and any other third-party representatives who have conducted business on behalf of the Company.

DRAFTING NOTE: APPLICABILITY

The scope of an internal investigation policy for a company should be wide enough to account for all those who work for the company. The scope should also include those who may work on behalf or for the benefit of the company through contractual relationships, but who are not employees. Depending on the type of relationship and the terms of a contractual agreement, this may include:

- Agents.
- Consultants.

- Independent Contractors.
- Joint Venture partners.
- Third-party representatives.

To ensure that these parties will comply with a company's compliance policies, the company should require a written acknowledgement of the policies. The acknowledgment should be obtained at the start of a relationship and annually thereafter.

(b) **Definitions.** For this policy, the following terms are defined as follows:

(i) "Communication" includes:

- (A) Written and oral communications.
- (B) Electronic communications.
- (C) Physical gestures, such as nods.
- (D) A customer's actions, such as transferring documents.

(ii) "Attorney-client Privilege" refers to a legal privilege that protects confidential communications between an attorney and a client from disclosure to third parties. Although company employees are not clients, the attorney-client privilege includes communications between Company legal counsel and Company employees that are made for the purpose of obtaining or providing legal advice. The privilege belongs solely to the company.

DRAFTING NOTE: ATTORNEY CLIENT PRIVILEGE

The attorney-client privilege is an integral part of internal investigations as the investigation may involve communication about a company's misconduct or noncompliance. It is crucial for counsel conducting the investigation and those cooperating in the investigation to

understand attorney-client privilege protections, waivers, and limitations. For more information regarding the attorney-client privilege in internal investigations, see Practice Note, Internal Investigations: US Privilege and Work Product Protection ([3-501-8418](#)).

(iii) "Attorney Work Product" means documents and tangible things that are prepared in anticipation of litigation. This privilege protects these materials from discovery by opposing counsel and, like the attorney-client privilege, belongs to the Company, not individual employees.

DRAFTING NOTE: ATTORNEY WORK PRODUCT

The Work Product Doctrine protects documents relating to an investigation if a company is engaged in or anticipates litigation at the time of the investigation and the documents are created primarily for the litigation rather than for some other purpose.

Similar to the attorney-client privilege, it is crucial for counsel conducting the

investigation and those cooperating in the investigation to understand the attorney work product doctrine and its protections and limitations. For more information regarding the work product doctrine in internal investigations, see Practice Note, Internal Investigations: US Privilege and Work Product Protection ([3-501-8418](#)).

- (iv) "Confidential Information" means information that may cause harm to the Company, its [customers/clients], employees, or other entities or individuals if improperly disclosed, or that is not otherwise publicly available. Damage may be to an individual's privacy, [ORGANIZATION]'s marketplace position or that of its [customers/clients], or legal or regulatory liabilities.
- (v) "Witness" refers to individuals, including Company employees, who may have knowledge related to an internal investigation.
- (vi) "Data" includes:
 - (A) Electronically stored data (ESI) and metadata, including all information found on computer hard drives and on other electronic data storage mediums, such as electronic documents, spreadsheets, emails, and metadata.
 - (B) Text messages.
 - (C) Hard copy and original documents.

2. Grounds for Internal Investigations. Internal investigations may be conducted for a variety of reasons. An investigation may be compulsory, while others may be discretionary and prompted by allegations regarding misconduct. The decision to engage in an internal investigation may be a matter of policy, regulation, or left to the discretion of the Company's board of directors or, if delegated by the board, the Supervisor.

- (a) **Retaliation.** Retaliation against any employee who reports suspected compliance violations or misconduct is strictly prohibited.

DRAFTING NOTE: GROUNDS FOR INTERNAL INVESTIGATIONS

Each matter that raises the specter of possible violation will not merit a full internal investigation. Often a short, limited inquiry is sufficient to determine facts and provide a basis for response. This policy is designed to apply to investigations that are determined by the General Counsel, or its designee, to warrant a fulsome internal investigation. At the outset, the General Counsel's Office should, in consultation with the department to which the information or complaint was initially directed, determine the initial scope

and scale of the investigation. An internal investigation should generally be conducted in response to any of the following:

- A government investigation.
- Credible allegations or confirmation of wrongdoing committed by the company's employees or its agents.
- A lawsuit against the company or one of its agents.

The decision to conduct an internal investigation is the responsibility of the board

of directors, though decisions regarding less serious allegations may be delegated to a company's senior management. When faced with a triggering event and the decision regarding whether to conduct an internal investigation, companies should consider:

- The credibility of the allegations levied against a company's employees or its agents, balanced with the seriousness of the claims. Companies may appropriately scale their investigations to the nature of the allegations, dedicating more resources to allegations that suggest the violation of law or regulation, as opposed to a claimed violation of an internal procedural policy.
- The legal and market or industry risks associated with the potential publication of the event or allegations.
- The potential benefits associated with conducting an investigation and disclosing the results to the government agency, such as receiving cooperation credit.
- The cost of an investigation.
- The interruption to business functions that an investigation may cause.

Specific circumstances may make conducting an internal investigation a requirement. These circumstances include:

- Regulatory requirements, such as those enforced by the Financial Industry Regulatory Authority (FINRA).

- Contractual obligations.
- Company workplace policy.

Most internal investigations will be discretionary, though certain allegations or circumstances may necessitate an investigation. These circumstances include:

- Grand jury subpoenas.
- Whistleblower allegations.
- Employee complaints.
- Certain audit findings.

Internal investigations may be prompted by allegations, investigations, or queries by government agencies. Conducting an internal investigation in relation to a government inquiry may help garner cooperation credit with the government agency and minimize criminal exposure. Where there is the prospect of criminal exposure, it is highly desirable to engage outside counsel with specific expertise and experience dealing with government investigations. However, the government agency may, either by law or by custom, believe it is entitled to the investigation findings to consider providing cooperation credit to the company. Government agencies often expect ready access to documents and a candid assessment of investigation findings in exchange for cooperation credit.

3. Investigation Management. Internal Investigations will be primarily overseen by an Investigation Supervisor ("**Supervisor**") who will be named by the [General Counsel/Board of Directors] or a special committee created by the Board of Directors in response to the allegations necessitating the internal investigation. The [General Counsel/Board of Directors] or special committee may see fit, depending on the circumstances of the investigation, to engage outside legal counsel to act as Supervisor of an internal investigation.

- (a) The role of the Supervisor in an investigation is to:
 - (i) Determine the initial scope and focus of the investigation.
 - (ii) Determine the facts of the allegations or events giving rise to the investigation.
 - (iii) Coordinate the investigation, including necessary adjustments to the scope, focus, and duration.
 - (iv) Communicate with the appropriate corporate representative(s) during the investigation.
 - (v) Identify and seek direction regarding any potential conflicts of interest that may be presented during the investigation.
 - (vi) Examine the company's reporting obligations and determine whether a report is required.

- (vii) Determine whether and to what extent the results will be reported, and if so, to whom and in what format.
- (viii) Design a corrective action plan, if needed, to address investigation findings.
- (ix) Assist in the development of stronger controls, policies, or compliance processes to address deficiencies identified during the investigation.

DRAFTING NOTE: INVESTIGATION MANAGEMENT

Investigation management is particularly important for large scale investigations or those with particularly troubling allegations. A determination should be made about which position or department takes primary responsibility for implementing an internal investigation.

- **General Counsel.** A corporation's general counsel may be most appropriate to implement and oversee simple investigations.
- **Audit Committee.** A corporate audit committee may be tasked with overseeing internal investigations that are large in scope, involve senior management, are high profile or involve significant risk of damage in the market, or where the potential penalties associated with noncompliance are severe. For more information regarding the role of audit committees, see *Audit Committee Roles and Responsibilities Toolkit* ([8-506-8180](#)).
- **Special Committee.** Typically, the company's Board of Directors creates a special committee to investigate serious allegations or larger matters where the independence of an internal investigation is a concern. For more information regarding special committees, see *Practice Note, Internal Investigations: Special Committees* ([W-005-5446](#)).

The investigation supervisor will be the point of initial coordination and will tailor the investigation responsibilities to the nature and scope of the issues or allegations. Where outside counsel is engaged, the investigation supervisor will be the primary liaison with the company. However, while companies should try to

designate an internal supervisor for internal investigations, the details of who conducts and manages the investigation, how it is conducted, and issues of internal and external communications depend closely on the circumstances specific to the event that prompted the investigation.

Internal investigations may be managed by:

- **In-house legal counsel.** In-house counsel may be most appropriate to conduct internal investigations involving lower-level employees with final reporting to the corporate board or other management within the company. The volume and nature of potential conflicts are such that in-house counsel is rarely appropriate for investigations involving company management.
- **Outside legal counsel.** Outside counsel is most appropriate for investigations involving significant misconduct, the corporate board or senior management, those that are prompted by or likely to lead to government investigations, whistleblowers, or shareholder suits. Outside counsel is often viewed as bringing needed independence to internal investigations and may appear more reliable or credible to government agencies or other external third-parties.

For more information regarding in-house counsel and investigations, see *Article, Government Investigations of Corporate Fraud: Consequences for In-House Counsel* ([5-502-0062](#)). For more information regarding outside counsel and investigations, see *Drafting Note, Outside Counsel*.

4. Employee Cooperation. Company appreciates and depends on the cooperation of its employees and agents when conducting internal investigations. [Company employees are required to cooperate with Company investigations [in accordance with [OTHER COMPANY POLICY]]. Employee refusal to cooperate in a company investigation may result in discipline measures. Discipline measures include all those deemed appropriate by the Company [or found in [COMPANY DISCIPLINE POLICY]][, including discharge].] Many investigations are conducted by the Company's legal counsel, and company employees may be asked for information related to an investigation by Company's legal counsel. Company legal counsel represent the Company, not any individual employee.

DRAFTING NOTE: EMPLOYEE COOPERATION

Companies sometimes have policies requiring their employees and agents to participate in internal investigations. This optional section gives a company the opportunity to either adopt such a policy or reiterate the requirement as stated in a separate employment policy. Companies should carefully consider whether there may be any legal ramifications associated with terminating employees who do not cooperate with an investigation.

The company should be aware of its obligation to provide counsel to defend officers, directors, employees, and others. These obligations can arise by statute, by law, or by company policy. The company should also be aware of any obligations to advise employees about obtaining their own counsel. Certain states, such as Missouri,

have ethical provisions requiring lawyers to advise unrepresented persons to secure counsel if they know or reasonably should know that the interests of the unrepresented person present a possibility of being reasonably in conflict with the interests of the lawyer's client. (MO R BAR Rule 4-4.3.) In many cases, counsel is unable to identify a conflict until after interviewing an employee and hearing an explanation of the employee's conduct.

The absence of employee cooperation may hinder the effectiveness of an internal investigation. This section also informs employees that violations of the requirement to cooperate may subject them to disciplinary action or jeopardize their employment.

5. Privileged Communication. The Company has a strong interest in maintaining the confidentiality of certain internal communication, including communication protected from disclosure to third-parties due to attorney-client privilege and attorney work product doctrine. Communication with Company legal counsel may be protected by the attorney-client privilege, but the privilege belongs to the Company and not any individual employee. This means that only the Company may waive the attorney-client privilege. The Company relies on its employees and agents to be mindful of confidentiality, privilege, and discretion when it comes to documentation and communication related to business activities.

- (a) **Written Documentation and Communication**. Company employees and agents should be instructed by counsel as to the limits and requirements of the attorney-client and work product protections when creating documents and communicating in writing, including by email and text. All privileged documentation and communication should be clearly labeled, although the presence of a label or legend on a document or communication will not by itself protect the contents.

DRAFTING NOTE: MAINTAINING PRIVILEGE

Properly maintaining the attorney-client privilege is one of the highest priorities for a company conducting an internal investigation. A company should seek to maximize attorney-client privilege and work product protection for communications made or documents created during internal investigations. This requires particular attention to the factors that courts apply to determine whether communications are protected. Companies can maximize privilege and work product protections

by taking the time to train management and employees on how to properly create, draft, and handle documents that relate to an internal investigation. This section informs employees of the importance of maintaining privilege and a company's expectation for discretion and mindfulness when communicating. For more information regarding privilege and internal investigations, see Practice Note, Internal Investigations: US Privilege and Work Product Protection ([3-501-8418](#)).

6. External Communication. [All employees must abide by the policies found in the Company's [NAME OF COMMUNICATIONS POLICY].] Unless [TITLE] authorizes, Company employees must not public disseminate Company information about an internal investigation. Only those employees or agents of the Company that are specifically authorized by the Company to speak on its behalf may communicate with government agencies on behalf of the Company. This Policy does not preclude employees from speaking to government agencies in their own, individual capacities.

DRAFTING NOTE: EXTERNAL COMMUNICATIONS

This section should complement a broader external company communications policy that limits who can communicate with persons, entities, and media, including social media, on behalf of a company. The optional first sentence makes specific reference to a company's broader communications policy. If a company does not already have an external communication policy, it should strongly consider adopting one. In crisis or rapid response situations, a company should consider engaging outside strategic communications counsel.

Inquiries or allegations from a government agency that prompt an internal investigation may involve substantial communication opportunities between the agency and a company. Due to the risk of impending litigation or penalties, this section seeks to limit communications with government agencies on a company's behalf to only individuals authorized by the company.

A company cannot preclude anyone from speaking to the government in their individual capacity (see *In the Matter of KBR, Inc.*, Exchange Act Release No. 74619, 2015 WL 1456619 (Apr. 1, 2015)).

To mitigate legal risk, communication on the company's behalf with government agencies must be:

- Precise.
- Correct.
- Conveyed with an eye toward potential parallel proceedings.
- Delivered in a manner that is sensitive to the situation.
- In proper context.

Therefore, it is suggested that authorization for communication with government agencies on the company's behalf be given to a limited number of individuals and filtered through a company's legal department.

7. Outside Counsel. In-house legal counsel[or a special committee] may engage outside legal counsel to advise on matters related to internal investigations. Independent outside counsel must be retained to manage all investigations involving Company [executives], including [[LEVEL OF EXECUTIVE MANAGEMENT] and above, including members of the Board of Directors] OR [[EXECUTIVE TITLES], and any member of the Board of Directors].

- (a) **Criteria.** Outside counsel engaged to advise on or manage an internal investigation should be highly qualified, experienced in the area and with the government agency involved, and should have no relationship with any entity or person that would pose a conflict of interest in the counsel's representation of the Company.
- (b) **Engagement.** Engagement and use of outside legal counsel must be compliant with [NAME OF COMPANY OUTSIDE COUNSEL POLICY].
- (c) **Individual Counsel Representation.** Employees of the Company have a right to their own legal representation.

DRAFTING NOTE: OUTSIDE COUNSEL

There are benefits to engaging outside counsel to conduct an internal investigation. For example, outside counsel may:

- Act as a neutral and independent advisor and investigator.
- Have expertise in a particular subject matter that is relevant to the investigation.
- Have expertise and relationships with government agencies relevant to the investigation.
- Give an investigation greater credibility with government agencies.
- Be better able to ensure communication is privileged, as there is no blurring of the lines between business and legal advice.

A special committee may be created by a company's board of directors to investigate serious allegations or more significant matters where the independence of the investigation is a particular priority, such as where allegations are made against high-level executive management. For investigations managed by a special committee, outside counsel's involvement in the investigation may be different than it is for other investigations. For more information regarding special committees, see Practice Note, Internal Investigations: Special Committees ([W-005-5446](#)). For more information regarding special committee investigations and outside counsel, see Practice Note, Internal Investigations: Special Committees: Retaining Advisors ([W-005-5446](#)).

This section is designed to work with other company policies regulating the hiring of outside legal counsel and contains an optional sentence in Section 7(b) where a company's specific policy for hiring outside legal counsel can be referenced. For an example of such a policy, see Standard Document, Use of Outside Counsel Policy ([W-001-5981](#)).

For model engagement letters for retaining outside counsel, see Standard Documents:

- Engagement (Retainer) Letter: Hourly Fee Arrangement ([6-521-3395](#)).
- Engagement (Retainer) Letter: Contingency Fee Arrangement ([0-521-9300](#)).
- Engagement (Retainer) Letter: Alternative Fee Arrangement ([4-523-3525](#)).

THE YATES MEMO

In 2015, the DOJ issued the Memorandum on Individual Accountability for Corporate Wrongdoing (Yates Memo). The Yates Memo specifically:

- Ties any eligibility for cooperation credit to the corporation providing the DOJ with all relevant facts about the individuals responsible for the misconduct.
- Requires that federal prosecutors focus on the individuals responsible for the misconduct from the beginning of the investigation and precludes them from releasing responsible individuals from civil or criminal liability when settling

the matter with the organization absent special circumstances and the approval of senior DOJ officials.

- Requires federal prosecutors to have a clear plan for resolving cases with individuals before it resolves the case with the corporation.

The Yates Memo may impact internal investigations in several ways, most notably by potentially:

- Hampering corporate internal investigations if employees do not

cooperate because they believe the company may expose them to criminal liability with the DOJ so that the company can obtain cooperation credit.

- Increasing the number of employee requests that companies provide individual counsel or the number of employees that retain their own individual counsel.
- Increasing the amount of work necessary to conduct an internal investigation to obtain cooperation credit.

8. Outside Consultants. The Supervisor may engage outside consultants to perform tasks essential to facilitate a thorough and complete investigation.

(a) Outside consultants may include:

- (i) Forensic accountants.
- (ii) Forensic document collection and examiners.
- (iii) Outside auditors.
- (iv) Subject matter experts.

Consultants must report directly to [the Supervisor/special committee] and shall maintain all investigation related documentation and information in such a manner as to preserve privilege under the attorney work product doctrine.

DRAFTING NOTE: OUTSIDE CONSULTANTS

Government agencies will not accept conclusions of deficient investigations and may even heighten their scrutiny of an organization that fails to conduct a robust and credible investigation. This makes it important to ensure the independence, scope, and methods of an investigation are appropriate considering the company's business practices, the industry, and the allegations. Independent outside consultants can greatly benefit an internal investigation by bringing impartiality, forensic capabilities, and subject matter expertise to:

- The investigation scope.
- The fact-finding methods.
- The examination and analysis of the findings.

- The identification of potential noncompliance or liabilities.
- The identification of defenses.

Outside consultants essential to an investigation may include:

- Forensic accountants, who look for problems and anomalies in a company's books and records.
- Forensic document and ESI collectors and examiners, including E-discovery consultants, who assist in the proper collection, management, and review of company data.
- Outside auditors, who review company internal compliance, prevention, and reporting systems, or who review compliance with regulatory requirements.

- Subject matter consultants, who can explain complex concepts particular to the industry within which a company operates, as well as identifying issues or deficiencies.

Where a special committee is not created and the company retains outside counsel to conduct the investigation, outside counsel

should retain any consultants to assist with internal investigations to preserve the neutrality and independence of the consultants and to try to have the attorney work product doctrine protect anything the consultants create. Counsel should take great care to preserve the privileged nature of information exchanged with consultants.

9. Data Preservation and Collection.

- (a) **Preservation.** Preservation of relevant hard copy documents, electronic data, and other physical material is an immediate concern upon indication of a potential issue that may trigger an internal investigation, government investigation, or litigation. Preservation requires immediate issuance of an appropriately tailored preservation notice to all persons who may have relevant materials. Steps must be taken to ensure that potentially relevant material is preserved, including the imaging of employee hard drives, if necessary. The Company will take immediate steps to preserve all data related to an investigation, including relevant inactive data residing on back-up tapes, archival media, cloud-based storage, or elsewhere. Employees are prohibited from deleting or destroying any data relevant to an investigation. Prior to collection, the Supervisor will notify the Company's [IT Department/[NAME OF DEPARTMENT(S)]] to develop a plan for identifying, collecting, and preserving electronic information in a forensically sound manner that preserves all relevant data, including metadata. Employees may be interviewed to determine whether they possess data relevant to the investigation, where it is stored, and how best to collect it.
- (b) **Documentation.** A record must be kept of all preservation efforts made by the Company. The record will include copies of all notices, memos, and communications related to the collection and preservation of data.
- (c) **Collection.** Data collection and preservation should begin as soon as the scope of the investigation has been reasonably determined. If relevant data may be destroyed in the normal course of business, efforts to preserve the data should start immediately, even if the scope of an investigation has not yet been determined. When in doubt, preserve. The Company may collect potentially relevant evidence (including hard copy documents, data, and other tangible items) from any source that the company owns, possesses, or controls. The Company may also take action to preserve and collect data stored on employees' personal devices as provided in [NAME OF COMPANY BRING YOUR OWN DEVICE POLICY]. Data may be collected from all mediums owned by the company. Collection may also occur from employee personal devices used in the furtherance of Company business in accordance with [NAME OF COMPANY POLICY FOR EMPLOYEE DEVICES]. As referenced in [NAME OF COMPANY DATA POLICY], information from sources owned by the Company belong to the Company. The Company cannot guarantee that employee personal emails, documents, text messages, or other data will not be collected, reviewed, or produced to a third party, including government agencies. In certain instances, as determined by the Supervisor, data collection may occur without notice to employees.

DRAFTING NOTE: DATA PRESERVATION AND COLLECTION

Data preservation and collection is crucial to the outcome of a successful investigation and required in situations involving government investigations and litigation. Insufficient or untimely collection and preservation of data may lead to:

- Spoliation of evidence crucial to the investigation through intentional or automatic deletion.
- Unfounded results or conclusions that an investigation is lacking and not credible.
- Claims of obstruction of justice.

Generally, data is collected and preserved through a company's document hold or litigation hold process. It is the Company's responsibility to preserve certain materials when there is the potential for litigation. As such, a company must take care to ensure that all potentially relevant materials are preserved by being over-inclusive in the initial stages of a preservation effort. Employees who may have information or materials relevant to the investigation will receive a document preservation or litigation hold notice with instructions for preserving relevant materials. The instructions should emphasize that they must be followed immediately and any questions should be directed to the investigation supervisor.

Interviews should take place with key employees to establish:

- What data is relevant to the investigation.
- Where and how the data is stored.
- The best methods for:
 - collection; and
 - preservation.
- Other employees who may have data relevant to an investigation.

A record should be kept by an investigation scrivener (see Drafting Note, Scriveners) of all preservation-related information, documentation, and communication. Preservation records are a primary tool used to refute allegations of spoliation of data or insufficient preservation efforts.

Collection should be conducted either internally by a company's IT department or, to avoid disruption, through a combination

of legal counsel and a competent outside vendor in order to preserve attorney-client privilege. It is important to involve internal personnel who understand the company's data management and storage structure so they can assist in defining the universe of documents and electronic data to be collected.

Once collected, data is reviewed for relevancy, privilege, and content. A review of collected data often requires a change in the scope of the investigation, as information discovered during a review may lead to new and unforeseen avenues of relevant information. For more information regarding the litigation hold process, see Practice Note, [Implementing a Litigation Hold \(8-502-9481\)](#) and Standard Document, [Litigation Hold Notice \(0-501-1545\)](#).

In cases of alleged fraud or if there is a reasonable likelihood that data may be intentionally deleted, companies must consider covert measures of data collection to ensure the integrity of information, including remote captures of information on hard drives or collecting files without prior notice to employees. It is important to consider not only the potential for spoliation of evidence in these cases, but also the appearance of spoliation when data collection methods are evaluated.

All sources holding information relevant to the investigation should be included in the data collection process. This includes employee owned devices if they are used for company business purposes. Section 9 (c) is drafted to coordinate with existing company data, litigation hold, and Bring Your Own Device (BYOD) policies. Company policy should reflect that personal information or communication, if stored on company property or a personal device subject to BYOD policies, may be collected and disclosed. However, companies should ensure that their collection of potentially personal information is for good cause and narrowly tailored to avoid an invasion of privacy claim. For more information regarding BYOD policies, see Standard Document, [Bring Your Own Device to Work \(BYOD\) Policy \(1-521-3920\)](#).

Coordination with a company's information technology (IT) department is essential to ensuring proper collection and preservation of data. The IT department can assist with:

- Data collection methods, such as imaging hard drives, remote captures of data, and collection of data from devices.
- Preventing automatic deletion of relevant data due to a company's automatic deletion practice.
- The secure storage of data.
- Maintaining a chain of custody for collection data.

10. Appointment of a Scrivener. A scrivener will be appointed by the Supervisor at the beginning of the investigation to keep records related to the investigation process, findings, and disclosures.

DRAFTING NOTE: SCRIVENERS

The scrivener's primary responsibilities are to:

- Document the order of events related to the investigation, including those occurring before the start of the investigation.
- Track and log major events in the investigation, including meetings and communications with government agencies.
- Oversee and document data collection, preservation, and review efforts, including, but not limited to documenting and maintaining:
 - an investigation timeline;
 - a list of potential witnesses to interview;
 - data collection and review efforts;
 - a log of information, documents, and emails, relevant to the investigation;
 - a log of privileged documents and emails; and
 - interview documentation, including interviewee information (such as name, title, work history), letters, memos, notes, and exhibits.
- Track and log document productions to government agencies, or civil plaintiffs.
- If necessary, contribute to drafting a final report.

11. Witness Interviews. The Company may interview current and former employees as a part of an internal investigation.

- (a) **Conduct**. Interviews will be conducted by the Company's legal counsel. It is the Company's expectation that parties involved in interviews be truthful and provide complete answers to interview questions. Retaliation for mere participation in an interview is strictly prohibited. All witnesses will be treated with respect and provided information regarding:
- (i) Interviewing counsel's role.
 - (ii) The reason for the interview.
 - (iii) Attorney-client privilege and its relevancy to the interview.
 - (iv) Potential disclosure of information discovered during the investigation to any third party, including government agencies.

DRAFTING NOTE: WITNESS INTERVIEWS

Witness interviews are essential to uncovering details and insights into information gathered during the

investigation. Witness interviews most often occur after data collection and analysis, in order that counsel may

incorporate relevant documents into the questions they pose to a witness. Certain interviews may be necessary at the onset of an investigation in cases where, for instance, it is necessary to interview a witness to determine the scope of the investigation, such as in cases involving whistleblowers. Data collection interviews (see Drafting Note, Data Collection and Preservation) are also conducted before data collection.

Interviews should be conducted by legal counsel engaged to conduct the investigation. The order of interviews and the topics addressed should be the subject of careful consideration, particularly where the company may be focused on leveraging information about individual wrongdoers for the company's benefit.

A second person should be present at interviews to document:

- The Upjohn Warnings given at the beginning of an interview verbatim (see Drafting Note, Confidentiality and Privilege in Witness Interviews).
- The date, location, names of attendees and witness, and other pertinent details regarding the interview.
- Notes about the interview content to be used as the basis of interview memos.

For more information regarding internal investigation witness interviews, see Conducting an Internal Investigation Checklist: Conduct Employee Interviews ([6-501-9464](#)).

Witness interview memorandums should be drafted after each witness interview. These memos:

- Document the interview.
- Highlight statements made by interviewees that are important to the investigation.
- Include the attorneys' thoughts, opinions, and mental impressions.
- Aid in the drafting of an investigation report (see Drafting Note, Investigation Report), if necessary.
- Or some or all of their contents may be disclosed to comply with the Yates Memo (see Standard Document, Internal Investigations: Witness Interview

Memorandum: Disclosure to the Department of Justice ([W-001-3894](#))).

For more information regarding witness interview memos and their content, see Standard Document, Internal Investigations: Witness Interview Memorandum ([W-001-3894](#)).

CONFIDENTIALITY AND PRIVILEGE IN WITNESS INTERVIEWS

Witnesses interviewed by legal counsel must be given *Upjohn* Warnings where they are advised prior to the start of the interview that the information gathered in the interview is considered protected by attorney-client privilege and how the privilege is preserved between legal counsel and the client company. *Upjohn* Warnings given by legal counsel to company employees acting as investigation witnesses should be specific, clear, and congenial. The warnings should include explanations that:

- Legal counsel represents the employee's company, not the employee.
- All communications between legal counsel and the employee are protected by the attorney-client privilege.
- The privilege belongs solely to the employee's company and not to the employee.
- Attorney-client privilege can be waived by the employee's company.
- At the employee's company's discretion, communications from the interview could be disclosed to any third party, including government agencies.
- The disclosures may be given without employee prior notice or consent.
- To preserve the attorney-client privilege of what is discussed, the employee should not share the contents of the interview with anyone except their legal counsel.

While witness employees should be instructed to not share the contents of an interview with others to preserve privilege, an employee cannot be prohibited from communicating with government agencies about the underlying conduct that may have been discussed in the interview.

It is sound practice to have a second person memorialize the *Upjohn* Warning verbatim.

Also, consider having the employee sign a non-disclosure agreement that prevents disclosure of the contents of the interview, but not the underlying conduct, except to the employee's counsel.

For more information on how to give effective *Upjohn* Warnings, see In House Counsel: Giving an Upjohn Warning Checklist ([W-008-2630](#)).

12. Investigation Report.

(a) **Preparation of the Investigation Report.**

- (i) Company counsel will develop an Investigation Report detailing the investigation, its findings, and recommendations for final review by the Supervisor, which may be either written or oral.
- (ii) The Supervisor has full authority over the Investigation Report.

(b) **Presentation of the Final Investigation Report.** The nature, scope, and content of any presentation of findings of the Investigation Report shall be determined by the Supervisor.

DRAFTING NOTE: INVESTIGATION REPORT

At the end of an investigation, counsel should consider what form an investigation report should take, either written or oral, as well as the contents of the report. The format, nature, and scope of investigation reports are dependent on the type, scale, and facts of the investigation. Written reports are typically more consistent, accurate, and detailed than oral reports, although they may also be discoverable or potentially jeopardize confidentiality and privilege. Oral reports are less likely to be discoverable by the government or private litigants, but may be more likely to be misconstrued or misinterpreted. For more information regarding the decision to write a report or give it orally, see Standard Document, Internal Investigations: Investigation Report: Decision to Write a Report ([W-001-4318](#)).

The content of an investigation report is also determined by the type, scale, and facts of

an investigation. Generally, investigation reports may include:

- Background and scope information.
- A summary of the investigation methodology.
- Data collection strategy.
- A list of pertinent documents.
- A witness and interview list.
- The findings of the investigation.
- Applicable law and legal conclusions.
- Recommendations for remediation.
- Recommendations for disclosure to government agencies (see Drafting Note, Government Reports).
- Appendix of related documents.

For more information regarding investigation reports and their presentation, see Standard Document, Internal Investigations: Investigation Reports ([W-001-4318](#)).

13. Government Reports.

- (a) **Required Disclosure.** Information regarding misconduct, culpable individuals, violations, and other information discovered during the course of an internal investigation that are required by law or by contractual agreement to be disclosed to the government, the public, or other parties must be properly disclosed within the legally specified time frame.
- (b) **Voluntary Disclosure.** Information regarding misconduct, culpable individuals, violations, or other information discovered during an internal investigation which is not required by law to be disclosed to the government, the public, or other parties may nevertheless be disclosed at the discretion of the Board of Directors.

DRAFTING NOTE: GOVERNMENT REPORTS**REQUIRED DISCLOSURE**

Disclosure of the report or findings of an internal investigation may be required by:

- Statute, regulation, or other legal rule.
- Contractual obligation, previous settlement, or monitoring agreement.

Publicly traded companies must determine whether disclosure to regulators or investors is required in order to not render company statements misleading. Companies that contract with or are chartered by the federal government may be required to disclose internal investigation findings to the government agency's Office of Inspector General (OIG).

VOLUNTARY DISCLOSURE

Voluntarily disclosing the results of an investigation can have several advantages, from allowing the company to control the message and timing, to leveraging the disclosure for legal or regulatory credit, to managing damage to the company's image and correcting false narratives. Factors relevant to determining if voluntary disclosure will benefit a company include whether:

- The information is already publicly known.
- The investigation report concludes there was no criminal or significant financial exposure to the company.

- The voluntary disclosure will be favorably considered in the government's decision to charge the company.
- The investigation report conclusions are consistent with the focus on individual accountability as referenced in the Yates Memo.
- The investigation report puts pressure on the company to discipline individual wrongdoers.

The most significant impact of voluntary disclosure, however, is on the attorney client privilege. All federal circuit courts except for one have rejected the notion of selective waiver, instead holding that disclosure of an investigative report to a government agency is a waiver of privilege and will expose it to the civil discovery process. (*Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977); *In re: Columbia/HCA Healthcare*, 293 F.3d 289 (6th Cir. 2002); *In re Pacific Pictures*, 679 F.3d 1121 (9th Cir. 2012); *In re Qwest Communications International Inc.*, 450 F.3d 1179 (10th Cir. 2006); *United States v. Mass. Institute of Technology*, 129 F.3d 681 (1st Cir. 1997); *In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2^d Cir. 1993); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3^d Cir. 1991); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).)

14. Corrective Action. Employee misconduct, as well as deficiencies in controls, policies, and standards identified by the investigation must be analyzed and corrective action must be taken to address them. Disciplinary action warranted by the findings of an internal investigation will be administered according to [Company policy/[NAME OF A SPECIFIC COMPANY POLICY]].

- (a) **Cease Misconduct.** Any illegal acts, criminal conduct, or other misconduct identified during the internal investigation will be immediately stopped.
- (b) **Development of a Corrective Action Plan.** The Supervisor will develop a Corrective Action Plan (CAP) to address each specific deficiency, violation of law, or element of misconduct found during an internal investigation. The Supervisor will work with the [Company executive responsible for compliance within the department(s) relevant to the investigation findings/Chief Compliance Officer/[TITLE]] to implement the CAP. A CAP may include employee discipline in accordance with [Company policy/[NAME OF A SPECIFIC EMPLOYEE DISCIPLINE POLICY]]. The CAP will include an implementation schedule and protocols for verifying that the corrective actions are effective in remediating the deficiencies or misconduct.

- (c) **Development of strong compliance controls.** The Supervisor will work with the [Company executive responsible for compliance within the department[s] relevant to the investigation findings/Chief Compliance Officer/[TITLE]] to ensure that new or revised policies and controls are implemented to address compliance concerns found during an internal investigation.

DRAFTING NOTE: CORRECTIVE ACTION

All investigation findings that negatively affect a company should be corrected, however misconduct and illegal acts should be remediated immediately upon discovery. This section is drafted to work with a company's existing legal compliance program and discipline policies with regards to remediation efforts.

A corrective action plan (CAP) is a plan containing specific corrective measures designed to address specific misconduct or violations identified during an investigation. This Policy gives responsibility for CAP development to the investigation supervisor, as the supervisor will have the most extensive knowledge of the investigation findings. However, this section offers the option of making another company position, such as a compliance officer or general

counsel, in charge of the implementation of the CAP.

A company should identify whether non-compliance identified during an investigation is generally caused by deficient:

- Policies.
- Practices.
- Internal Controls.
- Compliance culture.

Once identified, compliance controls can be developed and implemented to address and prevent future non-compliance. This Policy offers the option of naming a position, such as a compliance officer or general counsel, to oversee building stronger compliance controls.

15. Policy Compliance. Company employees, agents, and counsel must understand and comply with the provisions of this Policy. Violations of this Policy by Company employees are subject to disciplinary action, up to and including dismissal. Third-party representatives, including outside legal counsel, who violate this Policy may be subject to termination of all commercial relationships with the Company. Any Company employee, agent, or counsel who suspects that this Policy may have been violated must immediately [notify the General Counsel/make a report through the reporting process outlined in [COMPANY ETHICS POLICY]]. Any Company employee who, in good faith, reports suspected legal, ethical, or Policy violations will not suffer any adverse consequence for doing so.

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