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# Conducting an Effective Internal Investigation and Avoiding Common Pitfalls



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# Agenda

- Benefits of an Internal Investigation
- Key Phases of an Investigation
  - Assess the Allegation(s)
  - Define Scope and Team
  - Fact Gathering
  - Report to Management/Board of Directors
- Self-Disclosure to Enforcement Authorities



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## **William J. Stellmach**

### *Partner, Co-Chair of White-Collar Defense Group*

William is a Partner in Willkie's Washington, D.C. office and Co-Chair of the firm's White Collar Defense Group, where he leads one of the premier compliance, investigations and enforcement defense practices in the United States. He is a distinguished former federal prosecutor and regulator, and previously served as head of the Fraud Section of the U.S. Department of Justice's Criminal Division as well as in the Division of Enforcement at the Securities and Exchange Commission. Drawing on a unique range of experience, he regularly represents a broad range of companies, financial institutions and their executives in matters involving securities fraud, foreign bribery, sanctions, antitrust, cybersecurity, insider trading and money laundering. He also has extensive experience representing corporations and individuals outside the United States in responding to inquiries and investigations.



## **Soumya Dayananda**

### *Partner, Litigation*

Soumya Dayananda is a partner in Willkie's Litigation Department, where she is a member of the Investigations & Enforcement Practice in Washington, DC and New York.

Soumya has over 20 years of public service experience, including handling complex government investigations, crisis management and congressional oversight. She represents private companies, public entities and individuals facing scrutiny by the federal government, including the DOJ, State Attorney Generals and Congress.



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## **Sean Sandoloski**

### *Counsel, Investigations & Enforcement*

Sean Sandoloski serves as Counsel in the firm's Investigations & Enforcement Group. Sean previously worked in government, advising the Executive Branch on a range of matters, including litigation and policy initiatives, and serving in the Appellate Section of the Department of Justice's Antitrust Division. His practice focuses on government investigations, including those undertaken by Congress, as well as tackling complex legal issues and appeals. Leveraging his experience in government—as well as representing clients before the full spectrum of government authorities and at every level of the federal judiciary—Sean focuses on providing holistic solutions to clients' complex problems. His multidisciplinary approach enables him to successfully tackle high-stakes, fast-moving issues, and to advise clients on strategic and regulatory matters. Additionally, Sean has extensive experience in administrative and antitrust law and litigation.



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# Benefits of an Internal Investigation and Costs of Not Conducting One

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# Benefits of an Internal Investigation

- An effective internal investigation provides a number of benefits, including:
  - Fact-gathering and legal exposure assessment
  - Opportunity to stop any ongoing improper activity and remediate
  - **Determine if should disclose to regulators or investors**
  - Prepare a defense for later regulatory or civil actions
  - Less disruption of a government investigation and reduce potential penalty



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# Costs of Not Conducting an Internal Investigation

- Lose all of the benefits of an internal investigation
- Less control over how the matter progresses
- May lead whistleblower to report to enforcement authorities
- Enforcement authorities expect companies to conduct internal investigations, and failure to do so will lead to increased penalties

**U.S. Department of Justice  
Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated September 2024)**

## **Introduction**

The “Principles of Federal Prosecution of Business Organizations” in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision” and the corporation’s remedial efforts “to implement an adequate and effective corporate compliance program or to improve an existing one.” JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000).

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# Key Phases of an Investigation

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# Assessing the Complaint or Allegations

- Nature of allegation
- Is it specific and credible?
- Has the complainant had opportunity/perspective into alleged conduct?
- Has the complainant identified her/himself?



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# Assessing the Complaint or Allegations

- What types of issues are raised? Employment/HR? Bribery? Fraud?
  - Are they serious? (e.g., illegality, impact on financials, etc.)
- Is the organization's compliance program implicated?
- Is immediate action necessary? (e.g., suspend payments, personnel, etc.)



# Initial Steps of Internal Investigation

- Data preservation
  - Understand data storage practices
  - Consider initial “scoping” interviews to identify data sources and custodians
  - Suspension of document retention/destruction procedures
  - Data snapshots
  - Ephemeral messaging (e.g., WeChat, Jabber, WhatsApp, etc.)
- Legal hold notices
  - Timing
  - Substantive scope
  - Distribution



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# Pitfall: Data Preservation

- Data preservation often requires effective coordination among in-house Legal, IT, and HR
- Common data preservation issues that can occur:
  - Failure to identify all relevant data sources
  - Failure to suspend automatic deletion programs or procedures
  - Failure to account for increased data storage needs
  - Failure to preserve available data for recently departed employees or employees who depart mid-investigation

# Initial Steps of Internal Investigation

- Building a team
  - Legal (internal or external)
  - Forensic accountants (internal or external)
  - Other experts (computer/technical, business intelligence, foreign language capability)
- Internal supervision/reporting
  - Privilege
  - Independence
- Develop a written investigation plan

WILLKIE FARR & GALLAGHER LLP

MEMORANDUM

TO: CLIENT  
FROM: Willkie Farr & Gallagher LLP  
RE: Investigation Work Plan  
DATED: October 31, 2024

*Privileged and Confidential  
Attorney Client Communication  
DRAFT Attorney Work Product*

## I. Introduction

Set forth below is a proposed work plan for assisting Client in identifying and addressing potential anticorruption and money laundering issues based on suspicious payments recently identified by Client's Compliance Department. The investigation will analyze whether there are any violations of law and identify whether any improvements to policies, procedures or other aspects of the compliance program are necessary.

## II. Scope of Review

## III. Recommended Investigative Steps

- A. Initial Interview of Compliance Personnel
- B. Document Collection and Requests
- C. Interviewing Relevant Individuals

Based on a preliminary review of the relevant materials, we may need to conduct interviews. A preliminary list of interviewees is below:

- Sales Employee 1
- Sales Employee 2
- Manager of Sales Employees 1 and 2

## D. Reporting Findings

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# Privilege

- Attorney-client privilege
  - Protects communications between clients and their lawyers in a confidential setting, **if** the communications relate to legal advice
- Work product doctrine
  - Protects documents that clients or their lawyers (or representatives of either) prepare in preparation for anticipated litigation

# Privilege

- Mounting pressure on privilege
  - “Facts” are not protected
  - Disclosure to enforcement authorities may lead to waiver
  - Disclosure to independent auditor may lead to waiver
  - Non-lawyers should only act under supervision of attorneys

*“For avoidance of doubt, a corporation is not required to waive its attorney-client privilege or attorney work product protection to be eligible to engage in cooperation or satisfy any threshold.” DOJ Justice Manual*

*To earn [cooperation] credit, however, the corporation does need to produce . . . relevant factual information—including relevant factual information acquired through . . . interviews . . . .” DOJ Justice Manual*

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# Pitfall: Investigation Not Privileged

- Investigations must be for the purpose of providing legal advice
  - Investigations for the purpose of determining policy violations may not be privileged
    - *Buckley, LLP v. Series 1 of Oxford Ins. Co.*
  - Investigations prompted by concerns of independent auditors may not be privileged
    - *SEC v. RPM International, Inc.*
- Non-lawyers should only act under supervision of attorneys
  - Copying lawyers on emails is insufficient
  - Lawyers must be actively overseeing conduct of investigation
  - Enforcement authorities are skeptical of privilege claims over investigations conducted by non-lawyers, even when supervised by lawyers



# Fact Gathering — Document Review

- Document review
  - Preserve/gather broadly, review more narrowly
- Consider engaging eDiscovery third-party
- Draft a document review protocol for consistency and accuracy
- Laws affecting data collection (e.g., data privacy, labor laws)
- Create and update a fact chronology



# Pitfall: Incomplete or Improper Data Collection

- Preserve too narrowly
  - As investigations progress, new information may require additional searches
  - Preserving only what is to be reviewed at the outset may lead to spoliation
- Failing to work through issues raised by local laws
  - Many jurisdictions outside the U.S. have strict laws limiting data collection including:
    - Data privacy
    - Labor law
    - Blocking statutes
    - State secrets



# Fact Gathering — Witness Interviews

- Who to interview — rely on the chronology to identify witnesses
- When to conduct interviews
  - Usually after document review is completed, but not always
- In-person vs. remote
- Sequencing of interviews
  - Concentric circle approach (outside-in)
  - Key witnesses early
  - Spoliation or collusion concerns



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# Fact Gathering — Witness Interviews

- Arranging interviews
  - How much to disclose in advance about interview's scope and purpose
- Take steps to protect attorney-client privilege
  - Use attorneys for interviews
  - Provide *Upjohn* warnings

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# Fact Gathering — Witness Interviews

## ABA Rule 4.2

*In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.*

## NY Rules of Prof. Conduct 4.2

*In representing a client, a lawyer shall not communicate or **cause another to communicate** about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the **prior** consent of the other lawyer or is authorized to do so by law.*

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# Fact Gathering — Witness Interviews

- Why?
  - “Barring lawyers from communicating directly with an opposing party represented by counsel preserves the integrity of the attorney-client relationship...” (**Polycast Tech. Corp. v. Uniroyal. Inc.**)
  - “The purpose of Rule 4.2 is to prevent a skilled advocate from taking advantage of a non-lawyer.” (**Rule 4.2(a), cmt. 8.**)
  - “This Rule applies even though the represented person initiates or consents to the communication.” (**S.E.C. v. Lines**)
- In Practice
  - Delays progress of investigation
  - Schedule witness interviews with counsel for witness; route all follow-up requests through counsel
  - Counsel can attend witness interviews, but their participation should be limited

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# Report of Investigation

- Who receives it?
  - Privilege considerations
  - Independence considerations
  - Once a document is shared, it is nearly impossible to recapture
- Report format
  - Oral report vs. PowerPoint vs. written report
  - Interim vs. final



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# Self-Disclosure to Enforcement Authorities

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# Self-Disclosure to Enforcement Authorities?

- **Highly individualized and context-specific**
- DOJ, SEC, CFTC similar approach; DOJ more written guidance
- Benefits of Disclosure
  - DPA, NPA, or declination
  - More leeway in calculating appropriate penalty
  - Some greater ability to frame facts as presented in resolution



# Self-Disclosure to Enforcement Authorities?

- Drawbacks of Disclosure
  - Enforcement authorities may not otherwise learn about conduct
  - Even without disclosure, significant benefits for cooperating and remediating
  - Collateral consequences (share price, follow-on litigation and investigations)



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# Case Study: Albemarle Energy (2023)

- **Between 2009 and 2017 conspired to pay bribes to government officials to obtain and retain chemical catalyst business with state-owned oil refineries in Vietnam, Indonesia, and India**
- **“Benefits” of Albemarle’s Self-Disclosure — Some Real, Some Imagined**
  - Paid \$218 million in fines, penalties, disgorgement in 2023
    - 45% reduction off the U.S. Sentencing Guidelines Range
  - Cooperation and remediation credit — but no credit for disclosure
    - DOJ did not find disclosure to be “reasonably prompt”
  - A three-year Non-Prosecution Agreement
    - Regular reports to DOJ regarding improvements to compliance program, as well as continued cooperation
  - Credit under the Division’s Compensation Incentives and Clawbacks Pilot Program
    - A ~\$750,000 reduction of the penalty for withholding bonuses from qualifying employees
    - Likely to be dwarfed by cost of litigation with employees over withheld bonuses

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# Spotlight: Changes to DOJ Policy re: Self-Disclosure

- Presumption that DOJ won't require guilty plea when a company has:
  - voluntarily self-disclosed,
  - cooperated, and
  - remediated misconduct, absent "aggravating" factors
- Even if aggravating factors (such as recidivism), prosecutors may still decline to prosecute when:
  - Disclosure is made "immediately" upon discovery — not defined
  - Company has effective compliance program and controls
  - "Extraordinary" efforts to cooperate and remediate — not defined

# Spotlight: Changes to DOJ Policy re: Self-Disclosure

- If criminal resolution is warranted, even if self-disclosed, cooperated, and remediated, “generally” no compliance monitor
- Higher possible discount for self-disclosure
  - 50%-75% off bottom of USSG range if self-disclose, cooperate, remediate
  - If no disclosure, up to 50% off of low end



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# Spotlight: Changes to DOJ Policy re: Self-Disclosure

- A former AAG: “Of course, we can never articulate, in advance, what exactly will or will not satisfy these provisions.”
- Cited ABB resolution re: “extraordinary” cooperation. ABB:
  - “Made foreign-based employees available for interviews” in the U.S.
  - “Produced relevant documents located outside the U.S. *in ways that did not implicate foreign data privacy laws.*”
  - “Analyzed and organized” the information and provided translations

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# Spotlight: Changes to DOJ Policy re: Self-Disclosure

- For “extraordinary” remediation, a former AAG stated:
  - “Conducting root cause analyses and taking action . . . even in the face of substantial cost or pressure from the business”
  - Could “require significant structural changes” to ensure compliance personnel “have adequate access” to corporate data and decisionmakers
  - Could also mean holding “wrongdoers accountable, whether through termination, suspension, or recoupment of compensation”

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**Questions?**

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# Attorney Profiles



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