Internal Investigations of Environmental Crimes

by Craig D. Galli

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Summary

The initiation of a government environmental criminal investigation or discovery of a serious compliance issue often triggers the need to conduct an internal investigation. The decision to conduct an internal investigation entails complex issues regarding the scope of the investigation, who conducts the internal investigation, how to conduct the investigation in parallel with an ongoing government investigation, how to use experts to assist in the investigation, how to manage whistleblowers, when and how to disclose the results of the investigation to regulators and prosecutors, and many other issues. This Article addresses internal corporate investigations in the environmental compliance context and provides practical tips for handling the investigations.

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I. Introduction

Much has been written regarding the techniques and legal considerations associated with conducting internal investigations in the context of employment law claims, securities issues, and general corporate crimes.[1] Environmental criminal investigations and compliance issues pose difficult, often unique, challenges due to the complexity of the governing law and the highly technical nature of environmental regulatory requirements. This Article addresses internal corporate investigations in the environmental compliance context and provides practical tips for handling the investigations.

Everything about internal investigations of alleged environmental crimes is complex, multivariable, and high stakes. In play are substantial possible civil or criminal fines and penalties, or even injunctive relief, against the company; the careers and (in a worst-case scenario) even the liberty of employees, executives, and in-house counsel; company debarment from governmental contracts; and the good name and reputation of all involved. There are many potential pitfalls in commencing, conducting, and completing a proper internal investigation, and many decision points where a fine balancing of competing goals, risks, and unknowns is required. Successfully navigating these shoals requires extensive experience in managing internal investigations, sound judgment, and credibility with regulators and government lawyers that comes only from a well-deserved reputation for integrity and ethics.

II. Whether and When to Conduct an Internal Investigation

No matter how stringent a company's internal compliance program and its environmental management practices, from time to time, complex industrial operations invariably run afoul of environmental regulatory requirements. This may be due to upset conditions, ambiguous regulatory requirements or permit conditions, negligence, or the intentional conduct of a rogue or misguided employee. Launching an internal investigation every time that any environmental compliance issue is detected or suspected, however, would distract company personnel, demand excessive resources, and ultimately be of little value. Other compliance tools exist to detect and manage routine compliance issues, including routine compliance audits, robust training, and competent environmental management personnel.[2] There are multiple factors that a company should

1. *See, e.g.*, Barry F. McNeil & Brad D. Brian, Internal Corporate Investigations (3d ed. 2007).
2. A compliance audit may be the best prophylactic means to reduce risks of serious environmental violations requiring an internal investigation. Routine

consider in assessing whether to conduct an internal investigation, including:

- The seriousness and credibility of the allegation of environmental noncompliance;
- Potential consequences if the allegation proves accurate;
- Whether investigating the allegation is mandated by law or corporate policy;
- Whether disclosure of the allegation to shareholders or regulators is mandatory;
- The cost and time required to conduct the investigation;
- The company's ability to mitigate or reduce consequences by conducting the internal investigation;
- Whether identifying and disclosing the violation to regulators represents the best strategy to avoid or minimize civil penalties or criminal liability;
- Whether informed decisions can be made without conducting an investigation; and
- Whether the investigation would assist the company in defending subsequent related litigation or a government enforcement action.

In addition to these factors, at least four situations exist in which many companies would normally consider it prudent to conduct an internal investigation. First, the company receives notice or otherwise learns that the U.S. Environmental Protection Agency (EPA), a state attorney general, or state environmental agency has opened a *criminal* investigation of the company or its compliance practices. Second, a *high-profile incident* occurs that involves significant environmental harm, personal injury, or substantial risks to human health, usually bringing media attention and increased regulatory scrutiny. Third, during a government *civil enforcement* action, some circumstances warrant a parallel internal investigation. Fourth, the company identifies *serious violations* not yet known to regulatory officials. Each scenario is briefly addressed below.

A. *Government Criminal Investigation of Alleged Environmental Crimes*

Various environmental statutes give EPA the authority to initiate administrative, civil, or criminal enforcement actions as well as to recover certain response and cleanup costs for contamination.[3] If a company receives information that EPA or a state regulatory agency has opened a criminal investigation into its conduct or practices, an internal investigation is almost always warranted. Most sophisticated companies immediately engage counsel to conduct an internal investigation upon learning that a government environmental criminal investigation has been initiated. An internal investigation provides additional detailed information regarding the extent of knowledge or acquiescence within the company, identifies any weakness in management systems that should be addressed, and provides needed information to assert legal defenses to defend or settle the enforcement action.

Companies that fail to remain actively aware of a government criminal investigation and cooperatively engaged in a dialogue with the government risk finding themselves flat-footed with exposure to the company and its officers, senior management, and possibly parent companies. By contrast, companies that quickly gather facts, cooperate with government investigators and prosecutors, and aggressively assert legal defenses with government prosecutors, stand the best chance to convert a criminal investigation to an administrative or civil enforcement action, or to negotiate a more reasonable plea should the matter remain criminal.

Cooperation during a government investigation often provides little downside and can greatly reduce exposure. The U.S. Department of Justice (DOJ) has issued guidance describing mitigating factors considered by the government in the exercise of criminal environmental enforcement discretion. The three principal factors include: (1) timely and complete voluntary disclosure; (2) cooperation; and

periodic compliance audits are generally performed by third-party technical consultants (often with help from internal environmental management personnel) to evaluate a company or a facility's environmental performance and compliance against regulatory requirements and a company's stated environmental policies and objectives. Compliance audits can be multimedia or limited to specific media such as waste management, Clean Water Act, or Clean Air Act. Environmental audits can be performed with assistance from counsel under the attorney-client privilege to identify and correct specific compliance deficiencies or address the adequacy of environmental management systems. *See generally* Lawrence B. Cahill & Raymond W. Kane, Environmental Health and Safety Audits (9th ed. 2011). The results of an environmental audit, like that of an internal investigation, can be self-reported, as discussed below.

3. These environmental laws include: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405; Clean Air Act (CAA), 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618; Clean Water Act (CWA), 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607; Safe Drinking Water Act (SDWA), 42 U.S.C. §§300f-300j-26, ELR Stat. SDWA §§1401-1465; Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011; Oil Pollution Act (OPA), 33 U.S.C. §§2701-2761, ELR Stat. OPA §§1001-7001; Environmental Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. §§11001-11050, ELR Stat. EPCRA §§301-330; Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§136-136y, ELR Stat. FIFRA §§2-35; and the Toxic Substances Control Act (TSCA), 15 U.S.C. §§2601-2692, ELR Stat. TSCA §§2-412.

(3) the existence of a company's preventive measures and compliance programs.[4] Without proactively conducting an internal investigation, a company might not be in a position to avail itself of these options. Note that there may be circumstances, however, where the results of the internal investigation and legal analysis indicate that cooperation may not be in the best interest of the company and would not likely enable it to avoid prosecution or reduce penalties.

B. High-Profile Incidents

A pipeline or refinery explosion, or an oil spill in an urban environment or one causing substantial personal injury and property damage, impacts to wildlife, and visible environmental degradation, all grab headlines. With the media exposure come congressional inquiries and pressure on regulators to aggressively enforce the law and punish bad actors to appease public outrage. Crisis management situations pose some of the most challenging scenarios for counsel in conducting internal investigations and defending the corporate client.

Corporate public affairs staff and senior officers may be inclined toward more public disclosure than is prudent when they focus on restoring public and shareholder confidence. Statements by company representatives can be used by criminal prosecutors and plaintiffs' attorneys as statements against interest admissible against the company as well as a roadmap for discovery. Accordingly, press statements and responses to government requests for information must be carefully vetted and wisely considered with help from counsel, especially during the initial stages of an internal investigation when accurate facts remain unknown or uncertain.

Corporate crisis management teams that lack the backstop of having experienced counsel immediately mobilized to conduct a thorough investigation of the underlying facts and governing law can increase the exposure the company already faces beyond that posed by the event itself. Counsel's job is not to restrain all communications with the press and regulators, but rather to manage and moderate the risks such communications pose to the company's reputation and status in the context of criminal enforcement and regulatory, civil, or shareholder litigation. Corporate management, public affairs staff, and legal counsel must deliberate to ensure the credibility and accuracy of a company's public statements in response to a crisis event without unduly incriminating the company and its employees. In the weeks and months that follow a high-profile incident, state and federal regulatory authorities and members of Congress may formally or informally request information from the company regarding the incident, remediation, and corrective measures. An internal investigation can develop critical information needed to respond to such inquiries and vet the accuracy of responses.

C. Significant Civil Enforcement

Many alleged violations of environmental laws would potentially lead to substantial civil penalties and exposure for environmental contamination, yet would not warrant an internal investigation. Routine EPA information requests, such as those issued pursuant to §104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[5] may require the gathering of facts and preparation of detailed responses with the assistance of counsel, but normally would not warrant a formal internal investigation. Similarly, EPA inspectors conduct routine (sometimes unannounced) inspections of industrial facilities that may result in the assessment of administrative or civil penalties. Depending on the circumstances, such inspections and the issuance of notices of violation or assessments of civil penalties may not warrant an internal investigation, but may require the assistance of counsel to manage.

Normally, company management should consider conducting a formal internal investigation with outside counsel in connection with a civil enforcement action (absent a high-profile incident) in two situations. First, the nature and/or number of alleged violations could provide a reasonable or suspected basis for referral by regulatory personnel to criminal investigators or prosecutors. EPA guidance governing the exercise of investigative and prosecutorial discretion favors prosecution for repeated violations or patterns of the same type of violations:

> While a history of repeated violations is not a prerequisite to a criminal investigation, a potential target's compliance record should always be carefully examined. When repeated enforcement activities or actions, whether by EPA, or other federal, state and local enforcement authorities, have failed to bring a violator into compliance, criminal investigation may be warranted. Clearly, a history of repeated violations will enhance the government's capacity to prove that a violator was aware of environmental regulatory requirements, had actual notice of violations and then acted in deliberate disregard of those requirements.[6]

4. Regarding cooperation, the guidance explains:
   > The attorney for the Department should consider the degree and timeliness of cooperation by the person. Full and prompt cooperation is essential, whether in the context of a voluntary disclosure or after the government has independently learned of a violation. Consideration should be given to the violator's willingness to make all relevant information (including the complete results of any internal or external investigation and the names of all potential witnesses) available to government investigators and prosecutors. Consideration should also be given to the extent and quality of the violator's assistance to the government's investigation.

   See U.S. Dep't of Justice (DOJ), Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (1991), *available at* http://www.justice.gov/enrd/3058.htm; *see also* U.S. DOJ, United States Attorneys Manual §9-28.700 (2008) (discussing "the value of cooperation" in connection with the "Federal Prosecution of Business Organizations"), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.700.

5. CERCLA §104(e), 42 U.S.C. §9604(e).

6. U.S. Envtl. Prot. Agency (EPA), The Exercise of Investigative Discretion, at 4 (1994), *available at* http://www2.epa.gov/sites/production/files/documents/exercise.pdf.

The second situation is where the company has information not known by the government, but which the government likely will learn, that could cause regulatory personnel to consider a criminal referral. While restrictions exist on the flow of information from criminal investigators to civil regulators, no wall prevents civil regulatory personnel from turning over information to criminal investigators.[7] Moreover, no policy requires that regulatory personnel inform subjects who may be cooperating with a civil investigation that they have also become the subject of a criminal investigation.

Understanding the basic division of responsibility within EPA and DOJ is essential to understanding the risk that a civil enforcement action could develop into a criminal investigation and prosecution.[8] Specifically, EPA generally uses different technical staff and attorneys to investigate and prepare referrals for criminal enforcement than it uses for administrative and civil judicial enforcement. EPA staff and attorneys handle administrative enforcement actions from start to finish, while civil and criminal enforcement requires the preparation of a referral to DOJ.[9] If EPA concludes that it will pursue judicial enforcement, the agency normally follows its "parallel proceedings policy," which provides that "if a criminal proceeding can accomplish complete relief the matter should go forward criminally" before civil enforcement, except in certain circumstances.[10]

Thus, if EPA has commenced a civil enforcement (such as issuing a notice of violation) or if DOJ has filed a civil enforcement action without commencing a criminal investigation, the presumption exists that there likely will be no criminal enforcement. Put differently, EPA generally either brings a civil or only a criminal action to resolve a particular environmental violation, but not both, unless the violation is so egregious that both civil and criminal enforcement are warranted.[11] In such cases, EPA generally brings the criminal enforcement action first before any civil enforcement, but it can legally proceed with parallel civil and criminal proceedings.[12]

The same cannot be said of the commencement of civil enforcement by a state environmental agency. State environmental regulatory agencies may or may not have the analog to EPA's parallel proceedings policy in which criminal enforcement generally precedes civil enforcement. Moreover, depending on a state agency's relationship with the EPA regional office and whether the state has delegated authority for the regulatory program that has allegedly been violated, there may be little or no coordination of enforcement efforts between the federal and state authorities.[13] Accordingly, if a state agency has commenced enforcement, the company may be well-served by

7. Generally, civil enforcement lawyers are not authorized to receive information provided to a grand jury, although information obtained by criminal investigators outside the grand jury process may generally be shared with EPA civil enforcement personnel. However, EPA takes the position that any information learned by civil investigators that they obtained for a legitimate purpose may be shared with criminal investigators. *See* United States v. Kordel, 397 U.S. 1 (1970); U.S. EPA, Parallel Proceedings Policy, at 6 (2007):

> Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosure of any matter occurring before a grand jury or information that is part of a grand jury's record except in very limited circumstances, usually involving an authorizing order from the court. EPA personnel must take utmost care not to violate this secrecy rule; violators may be subject to civil and/or criminal sanctions.

available at http://www2.epa.gov/sites/production/files/documents/parallel-proceedings-policy-09-24-07.pdf.

8. At the federal level, EPA's Office of Enforcement and Compliance Assurance (OECA) in the 10 EPA regional offices establishes enforcement priorities and coordinates federal enforcement with state agencies, tribes, DOJ, and other federal agencies. OECA also develops and implements national compliance and enforcement policy, and issues guidance. DOJ's Environmental and Natural Resources Division contains an Environmental Enforcement Section, which handles environmental civil enforcement (except under CWA §404, which historically has been handled by the Environmental Defense Section) and the Environmental Crimes Section. DOJ attorneys at the Offices of the U.S. Attorney may also play a significant role in both civil and criminal cases, depending on the office and case.
9. *See* 28 U.S.C. §516 (2013) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."). While certain environmental statutes give EPA theoretical authority to independently pursue civil enforcement using EPA attorneys in the event that DOJ declines a referral, this virtually never happens. Since 1977, DOJ and EPA have submitted to a referral process that gives DOJ primacy over judicial enforcement decisions. *See* U.S. DOJ, Memorandum of Understanding Between Department of Justice and Environmental Protection Agency, 42 Fed. Reg. 48942, 48943 (Sept. 26, 1977).
10. *See generally* U.S. EPA, Parallel Proceedings Policy, *supra* note 7, at 4 n.3. Factors EPA normally considers that favor commencing and concluding a criminal enforcement action any civil enforcement include: (a) the need for deterrent and punitive effects of criminal sanctions; (b) the ability to use a criminal conviction as collateral estoppel in a subsequent civil case; (c) the risk that imposing civil penalties first might undermine the severity of subsequent criminal sanctions; (d) confidentiality and evidentiary considerations; (e) prevention of a defendant's premature discovery of evidence to be used in the criminal case; (f) avoidance of unnecessary litigation issues and costs, and duplication of witness interviews. *Id*. at 4. Factors favoring proceeding with civil enforcement prior to criminal prosecution include: (a) threat to human health or the environment requiring immediate injunctive relief or response action; (b) potential loss of the defendant's assets; (c) statute of limitations considerations; (d) only a marginal relationship exists between the civil and criminal actions; (e) the civil case is in an advanced stage of negotiation or litigation at the time EPA discovers the criminal liability; and (f) the civil case is part of a national priority enforcement initiative and postponement of the civil case could adversely affect implementation of the national enforcement strategy. *Id*. at 4-5.
11. Notably, most administrative settlements with EPA contain boilerplate reservations of right to assert criminal enforcement actions for the same violations. Companies can eliminate this provision by negotiating a separate criminal plea agreement. A company normally would not pursue a plea unless the government was also pursuing criminal enforcement consistent with the parallel proceedings policy.
12. EPA takes the position that parallel civil and criminal proceedings do not violate the double jeopardy prohibition against trying a defendant twice for the same crime because the Fifth Amendment to the U.S. Constitution only protects against the imposition of multiple criminal punishments of the same person for the same offense. *See* U.S. EPA, Parallel Proceedings Policy, *supra* note 7, at 8 n.6 (*citing* Hudson v. United States, 522 U.S. 93 (1997)).
13. EPA and state environmental agencies sometimes have in place "enforcement agreements" to encourage coordination and cooperation. In the author's experience, coordination is at best spotty and largely depends on the personal relationships of EPA regional and state agency managers. EPA guidance recognizes that "[c]riminal enforcement also is often decentralized and involves multiple federal, state, and local law enforcement agencies. The traditional requirements for grand jury secrecy and limiting information on a 'need to know' basis historically have limited interaction between federal, state and local law enforcement personnel." U.S. EPA, Criminal Enforcement Addendum to the Policy Framework for State/EPA Enforcement Agreements, at 2 (Feb. 1, 1993), *available at* http://cfpub.epa.gov/compliance/resources/policies/state/relationships/index.cfm?CAT_ID=&SUB_ID=209&templatePage=6&title=Relationship%20with%20States.

ensuring that EPA is at least aware of the state's enforcement efforts and is not planning to "over-file" with civil or criminal enforcement.[14]

The bottom line for company management is that internal investigations may be warranted for certain purely civil enforcement matters due to the risks of future criminal enforcement. Companies must be attentive to even routine civil enforcement matters that appear headed toward administrative resolution to ensure that new facts do not arise that change the government's inclination to pursue only civil remedies. Managing the risk of potential future criminal enforcement through the use of internal investigations must be considered on a case-by-case basis.

D. Significant Violations Not Yet Known to Regulatory Authorities

The decision to open an internal investigation is more complex when no government enforcement has commenced and the government appears to lack knowledge of any violation. Four circumstances or categories of violations normally warrant an internal investigation even though the government lacks knowledge of the facts giving rise to the violation. First, counsel concludes based on preliminary facts that if the government had the information, the risk is high that the government would pursue criminal enforcement. Put differently, the nature of the violation is sufficiently serious that the company must investigate and immediately address the compliance issue, which, if not properly managed, could result in substantial exposure. Second, the company concludes that it is likely that information regarding the violation will be communicated to regulators in light of the source of the information. Third, the company may wish to (or must) self-report the violation. Fourth, the findings of environmental audits should also be considered. Each is discussed below.

1. Potential Criminal Exposure

As to the first circumstance, a serious knowing violation causing harm to the environment or a false statement submitted to regulators commonly gives rise to criminal enforcement actions. But under some statutes, such as the Clean Water Act (CWA) and Clean Air Act (CAA), mere negligent behavior can result in criminal exposure. Under the CWA, a "responsible corporate officer" can be prosecuted if such person has knowledge of the facts and circumstances of the violation, had the authority and capacity to prevent the violation, and failed to prevent it.[15] Even certain violations caused by honest mistakes or ordinary negligence can trigger criminal environmental liability. The CWA broadly imposes criminal negligence for "any person who negligently violates" the CWA's prohibition on unpermitted discharges.[16]

The leading case on the CWA negligence standard is the U.S. Court of Appeals for the Ninth Circuit's decision in *United States v. Hanousek*.[17] That case is generally cited for its support of a "simple negligence" standard for CWA criminal misdemeanor cases whereby the government need not show "gross" or "criminal" negligence, or reckless disregard, in order to sustain a criminal charge.[18] Rather, the government need only prove that there was a failure to do what a reasonably prudent and careful person would do under similar circumstances.

In the environmental law context, this means that the failure to take reasonable precautions to prevent a violation from occurring could be a basis for a CWA criminal negligence prosecution. Under this broad standard, it is not difficult for the government to piece together criminal negligence claims arising from industrial accidents whose root cause can be traced to operator error or equipment failure due to faulty inspection or maintenance. An internal investigation can be used to identify corrective measures to attain compliance and prevent additional violations; and to marshal facts to proactively demonstrate to regulatory authorities or prosecutors that no negligence (and certainly no willful conduct) underlies the violation, and that the company expeditiously investigated and corrected the compliance issue.[19]

2. Whistleblowers

In the second scenario, the company considers the source of the information—especially when the source involves a whistleblower—and whether the company should assume that it will be disclosed to regulators. If the company learns of serious noncompliance from an annoyed

14. States with delegated authority from EPA generally take the enforcement lead under the CAA, the CWA, and RCRA with respect to inspections and enforcement, while EPA retains significant "over-filing" enforcement authority to bring both civil and criminal enforcement with regard to violations of these statutes. In contrast, EPA generally takes the enforcement lead under other statutes, including TSCA, FIFRA, and EPCRA, under which states do not have the same opportunity to receive delegated authority. *See generally* Robert Esworthy, Cong. Research Serv., RL34384, Federal Pollution Control Laws: How Are They Enforced? (2013), *available at* https://www.fas.org/sgp/crs/misc/RL34384.pdf.

15. CWA §309(c)(6), 33 U.S.C. §1319(c)(6) (2014). The CAA includes a similar provision. CAA §113(c)(6), 42 U.S.C. §7413(c)(6). *See generally* Kirk F. Marty, *Criminal Prosecution of Responsible Corporate Officers and Negligent Conduct Under Environmental Law*, 23 Nat. Resources & Env't 3 (Winter 2009).

16. CWA §309(c)(1)(A), 33 U.S.C. §1319(c)(1)(A).

17. 176 F.3d 1116, 29 ELR 21049 (9th Cir. 1999). In *Hanousek*, a backhoe operator accidentally ruptured an oil pipeline, although the defendant who had responsibility for supervising the backhoe operator and was responsible for railroad maintenance was off duty and at home when the accident occurred. The court relied on the fact that the defendant was aware that a high-pressure petroleum products pipeline ran close to the surface next to the railroad tracks, was aware of the dangers a break or puncture of the pipeline by a piece of heavy machinery would pose, but failed to take precautions against such risks. *Id.* at1122.

18. *See*, *e.g.*, Bruce Pasfield & Sarah Babcock, *Simple Negligence and Clean Water Act Criminal Liability: A Troublesome Mix*, 41 Env't Rep. (BNA) 2276 (Oct. 8, 2010); Steven P. Solow & Ronald A. Sarachan, *Criminal Negligence Prosecutions Under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of* Hanousek *and* Hong, 32 ELR 11153 (Jan. 2002).

19. Notwithstanding the criminal negligence standard, in the author's experience the government bases most criminal enforcement actions on willful or reckless conduct.

adjacent landowner, environmental group, or anonymous source (perhaps through a compliance hotline), the company should assume that the regulators know or will know of the violation, and should act accordingly to investigate and prepare for an enforcement action or inquiry. Even more serious and potentially likely to be the subject of criminal enforcement is a violation reported by an internal whistleblower who is also a disgruntled employee. In the author's experience, the majority of criminal enforcement actions originate from internal whistleblowers. It is therefore critical to understand the importance of properly managing whistleblowers.

Six federal environmental laws have special provisions protecting corporate whistleblowers.[20] Whistleblower protection provisions carry the danger of encouraging an employee to fabricate allegations that serve his monetary or other interests; other employees, however, may sincerely believe that the company may be causing harm to human health and the environment, but their earlier verbal protests went unheeded by the company. Sometimes, the existence of whistleblower allegations come to the company's attention long before the government brings any enforcement action (for example, when an employee discloses the whistleblowing activity to co-workers who then inform company management). In the face of any credible whistleblower allegation, prudent companies generally take the matter seriously and investigate.

Statutory whistleblower provisions prohibit an employer from retaliating against an employee for reporting alleged violations. Retaliation can include a variety of unfavorable personnel actions, such as reprimand, demotion, reassignment, and termination. An employee generally can recover damages (such as reinstatement, backpay, and/or compensatory and punitive damages) in a U.S. Department of Labor administrative proceeding by showing that: (a) the employee engaged in "protected activity," such as reporting violations to the government; (b) the employer knew of the employee's protected activity; and (c) the employee suffered some unfavorable personnel action motivated at least in part by his protected activity.[21]

While the risk of damages can be substantial, perhaps an even greater risk posed by whistleblowers is that they will report the alleged violation to regulators. Whistleblowers provide government investigators and prosecutors a number of advantages. First, internal whistleblowers provide valuable inside information that the government likely would not otherwise be able to obtain. Second, whistleblowers enable government criminal investigators to use the element of surprise when they arrive with a search warrant. Generally, whistleblowers will be able to pass on to criminal investigators exactly what evidence to seize and which witnesses to interrogate, with no warning to the company. Third, whistleblowers provide the government an opportunity to obtain concealed recordings of discussions with targeted company managers and officers.

3. Self-Reporting Violations

In the third scenario, the nature of the violation is sufficiently serious that the company likely will want to self-report the violation to regulatory authorities. The risk of self-reporting inaccurate information is so high that an internal investigation often is the best way to expeditiously investigate and obtain accurate information needed for disclosure. Other considerations may warrant conducting an internal investigation even though no risk of criminal enforcement exists. For example, the nature and number of the violations could result in civil enforcement with penalties or injunctive relief having a material effect on the company's operations. For publicly held companies, conducting an internal investigation in the face of government enforcement may be mandated by Sarbanes-Oxley requirements[22] and the company's duties to its shareholders. Moreover, the nature of the compliance problem could result in separate litigation with third parties such as adjacent property owners, contractors, or citizen groups.[23]

4. Environmental Compliance Audits

Corporate compliance audits or other compliance mechanisms that identify a pattern of the same types of violations may warrant an internal investigation because they evidence conduct or business decisions that can result in criminal prosecution. For example, if an industrial wastewater treatment plant experiences repeated or ongoing violations of the same effluent limits, it may indicate that the design of the treatment system is no longer sufficient to manage increased process flows or that wastewater treatment personnel are poorly trained or otherwise not doing their jobs.

Not every routine environmental compliance audit that results in multiple findings warrants opening an internal investigation. In fact, most sophisticated companies avoid conducting an internal investigation based on findings from a compliance audit. If routine compli-

20. CAA §322, 42 U.S.C. §7622; CERCLA §110, 42 U.S.C. §9610; CWA §507, 33 U.S.C. §1367; SDWA §1450, 42 U.S.C. §300j-9(i); Solid Waste Disposal Act, 42 U.S.C. §6971; TSCA §23, 15 U.S.C. §2622.

21. William Dorsey, *An Overview of Whistleblower Protection Claims at the United States Department of Labor*, 26 J. Nat'l Ass'n Admin. L. Judiciary 43 (2006).

22. For example, Sarbanes-Oxley imposes certain "up-the-ladder" reporting obligations and implied duties to investigate a publicly traded company's chief legal officer. *See generally* E. Norman Veasey & Christine T. Di Guglielmo, Indispensable Counsel: The Chief Legal Officer in the New Reality at 111, 153-54 (2012) (explaining application of 17 C.F.R. §205.3(b)).

23. Federal environmental statutes generally preclude citizen suits if a federal or state agency has already commenced and is diligently prosecuting an action for the same alleged violation. *See* RCRA §§7002(b)(1)(B) & (b)(2)(B)(i), 42 U.S.C. §§6972(b)(1)(B) & (b)(2)(B)(i); CWA §505(b)(1)(B), 33 U.S.C. §1365(b)(1)(B); CAA §304(b)(1)(B), 42 U.S.C. §7604(b)(1)(B); and CERCLA §310(d)(2), 42 U.S.C. §9659(d)(2). However, citizen groups can sometimes avoid the citizen suit bar by alleging that the government enforcement action and citizen suit did not address the same alleged violations, or that the technical requirements of the bar were not satisfied. *See*, *e.g.*, Adkins v. VIM Recycling, Inc., 644 F.3d 483, 493-94, 41 ELR 20171 (7th Cir. 2011).

ance audits too frequently trigger internal investigations or employee discipline, employees may be less apt to cooperate with the company's outside consultants or in-house personnel who perform the audit. Companies with the strongest audit programs are those in which a strong corporate culture encourages voluntary identification and prompt self-correction of compliance problems and continuous improvement of environmental management programs. Internal investigations triggered by internal compliance audits where no government enforcement exists must be surgically and sparingly used where the normal audit process will not likely or adequately address a serious compliance issue that poses an unusually high risk to the company.

III. Who Conducts the Internal Investigation

Once company management decides to conduct an internal investigation, a threshold question is whether the company should use legal counsel (in-house or outside counsel) or the company compliance officer or other trusted nonattorney officer. For the types of events triggering an internal investigation discussed above, counsel normally should be used in order to maximize the ability to maintain the confidentiality of the results of the internal investigation by means of the attorney-client privilege and attorney work-product doctrine. Courts might not view internal investigations conducted by nonattorney compliance personnel as privileged, particularly if the investigation is required by law or is a necessary part of day-to-day operations.[24]

The next question is whether the internal investigation should be conducted by in-house or outside counsel, or a team including both. Generally, in-house counsel will have greater familiarity with the issues and personnel involved; however, their real or perceived objectivity may be called into question, especially if they report to, or have close personal ties with, personnel who are subject to the investigation, or have had extensive involvement or responsibility for the subject of the investigation, or work closely with personnel being interviewed. Note that the same objectivity concerns may apply to outside counsel who work closely with the company personnel being interviewed. Similarly, if outside counsel provided specific legal advice that may have contributed to the noncompliance, then both outside counsel and the corporate client may conclude that a conflict of interest exists if the attorney who rendered the advice now under review participates in the internal investigation. Company management should avoid the temptation to engage their preferred outside counsel if that counsel provided legal advice on the very issues under investigation.

Outside counsel generally can more effectively establish and maintain attorney-client privilege and the attorney work-product protections, and are less likely to be viewed by a court or government agency as providing routine business advice.[25] Use of outside counsel may also reduce the distractions and disruptions of using internal legal resources to conduct the internal investigation. These factors must be balanced against the higher price of outside legal counsel.

Where the magnitude of the risk and complexity of the issues warrant, sophisticated companies often engage an internal investigation team headed by specialized outside environmental counsel who may have knowledge of the underlying issues, working as a team with in-house counsel to improve efficiency and identify documents and witnesses, and further supported by outside counsel with substantial white-collar crime expertise to ensure that the internal investigation follows accepted practice so as not to inadvertently increase company exposure.

IV. Managing the Surprise Government Inspection

One of the most challenging tasks even for experienced counsel is to conduct an internal investigation in parallel with representing the corporate client following a surprise government inspection or execution of a search warrant. Counsel must react quickly, usually without warning or prior preparation, to advise the client on how to manage the government inspection at the same time as undertaking her own investigation of the facts. Below we describe the tasks and challenges of managing the surprise inspection.

24. Authority exists to protect internal technical reviews as protected work product. In *Transocean Deepwater, Inc. v. Ingersoll-Rand Co.*, 2010 WL 5374744, *3 (E.D. La. Dec. 21, 2010), the court held that a root-cause analysis prepared by a company after an accident in which an employee on an off-shore rig suffered a partial amputation of his foot was protected work product because "[t]he severity of the injury—the amputation of three toes through a steel boot—rendered litigation imminent." Although an attorney was involved in this investigation, the court noted that "[t]he involvement of an attorney is not dispositive of the 'in anticipation of litigation' issue." *Id.* Similarly, in *ECDC Envtl., L.C. v. New York Marine & Gen. Ins. Co.*, 1998 WL 614478 (S.D.N.Y. June 4, 1998), the court held that documents prepared after a ship carrying dredged spoils ran aground and dumped the dredged spoils into New York Harbor were work-product protected because "the documents, for the most part, relate to the issues that would be at the core of the anticipated litigation, I find that they were prepared because of the anticipation of litigation." *See id.* at *14:

> The documents in issue were all prepared after the [ship] had run aground and after she had accidentally discharged approximately 3,000 tons of spoils dredged . . . . Given the magnitude of the spill and the fact that the spoils originated from a major urban harbor . . . litigation would be a certainty unless cleanup efforts were properly managed.

25. However, the U.S. Court of Appeals for the District of Columbia Circuit recently upheld application of the attorney-client privilege to an internal investigation conducted under the direction of in-house counsel even though government regulations required the investigation and nonattorneys conducted the employee interviews. In re Kellogg, Brown & Root, Inc., 756 F.3d 754, 758-60 (D.C. Cir. 2014) (holding that (a) "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege," (b) even though the confidentiality agreement signed by the employee assisting with the investigation did not mention the attorney-client privilege, companies need not "use magic words to its employees in order to gain the benefit of the privilege for an internal investigation," and (c) rejecting the soul causation test in favor of the more "sensible and proper" inquiry of "whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication").

A. Initial Company Response

At times, the first a company learns of the government's criminal investigation is the frantic call from a plant manager that government investigators have arrived without prior notice, shown their credentials or presented a search warrant at the plant gate or reception area, and demanded entry. Hopefully, the plant manager has been trained to immediately call the company's office of general counsel, who can mobilize specialized outside counsel to assist. In the case of surprise inspections, companies routinely request that the government investigators momentarily wait to commence their inspection until after company management consults their attorney and locates an appropriate company escort to accompany the inspectors. Some companies have written protocols that govern routine and surprise government regulatory inspections, and keep current contact sheets of whom to immediately contact in the event of an unscheduled inspection. Companies that rely heavily on contract operations should ensure that their contractors and security personnel know how to appropriately respond with professionalism and courtesy.

B. Determining the Nature and Scope of the Government Inspection

While the company and its attorneys should normally cooperate with government investigators, it is critical to quickly ascertain, if possible, whether the inspection or investigation is being conducted under civil or criminal enforcement authority; and if civil, whether it is a routine inspection.[26] The first order of business for the company is to obtain copies of the credentials, business cards, and any search warrant prior to the commencement of the inspection. A federal search warrant obviously indicates a criminal investigation and that the matter may already have been referred to DOJ or the U.S. Attorney's Office. It certainly confirms that a judge has made a probable cause determination that evidence of criminal activity exists at the site. Government investigators carrying weapons also suggest criminal enforcement authority, although not all criminal investigators carry weapons.

In some instances, it may not be easy to determine whether a government investigation is being conducted as part of a potential civil or criminal enforcement action simply based on credentials and business cards, and not all criminal investigators arrive with a search warrant. Government investigators are not required to volunteer the information as to whether they are acting in a civil or criminal investigative capacity. Accordingly, the best practice upon presentation of credentials during an investigation is to request clarification from government personnel regarding the scope and purpose of their investigation and the authority on which it is based.

Once counsel has determined the nature and scope of the government's investigation, counsel can begin to understand the scope of the internal investigation and the resources needed. It may be difficult to ascertain what evidence the government has already gathered prior to the surprise inspection. That information may not be known for months, after the enforcement action is well underway.

C. Consenting to Access

A search warrant constitutes a court order that must be followed, albeit the lawfulness of the search warrant and any challenges to admissibility of evidence seized can be raised in future judicial proceedings. The search warrant limits the duration and location of the search, and must describe with particularity the information or evidence sought. Counsel must balance circumscribing the investigators to the limits of the search warrant with wanting the company to appear as cooperative and transparent as possible. A company's denial of access to government regulators who lack a search warrant is legally permissible, but generally not advisable,[27] although restricted access to particular facility areas may be appropriate in certain circumstances.[28] Companies have the right, and are normally required, to provide government inspectors the same basic safety orientation that they provide other visitors to the facility prior to entrance. Company management should always exercise their right to accompany the inspectors, whether civil or criminal, and normally, government inspectors expect as much. Care should be taken that those who accompany the inspectors not do anything that would interfere with the investigation, which can trigger additional exposure to the company and its employees.

26. Numerous federal environmental statutes authorize regulatory authorities to: (1) enter the facility upon presentation of credentials; (2) access compliance records; and (3) take samples. *See* CWA §1318(a), 33 U.S.C. §1318(a); CAA §114(a), 42 U.S.C. §7414(a); RCRA §3007(a), 42 U.S.C. §6927(a); CERCLA §104(a)(4), 42 U.S.C. §9604(a)(4);TSCA §11, 15 U.S.C. §2610; U.S. Dep't of Transp. (DOT) Pipeline Safety Act, 49 U.S.C. §60117(c); Occupational Safety and Hazards Act §(8)(a), 29 U.S.C. §657(a). Even where authority to issue administrative subpoenas or obtain judicially enforceable search warrants is not expressly set forth by statute, courts generally conclude that broad regulatory or enforcement authority vested by Congress in an agency generally encompasses all "modes of inquiry and investigation traditionally employed or useful to execute the authority granted." *See* United States v. M/V Sanctuary, 540 F.3d 295, 299 (4th Cir. 2008).

27. As a legal matter, access to government inspectors can be denied without incurring a penalty if the basis for the denial is failure by the agency to first obtain a warrant. *See* U.S. EPA, Conduct of Inspections After the *Barlow* Decision (1979) ("The [*Barlow*] decision protects the owner against any penalty or other punishment for insisting upon a warrant"), *available at* http://envinfo.com/caain/enforcement/caad49.html. As a practical matter, denying access to government inspectors likely will result in a referral of the enforcement matter to DOJ to obtain a search warrant. In addition, the agency may open a criminal investigation based on the company's recalcitrant response.

28. Several legitimate bases exist to deny access to certain areas: (a) the inspectors have requested access to areas requiring special training (e.g., OSHA hazmat training); (b) the inspectors have requested access to areas requiring special personal protective equipment that they do not have on hand; or (c) the inspectors have requested photographs, drawings, or other information or documentation that constitute confidential business information and time is needed to seek advice from counsel regarding how the information can be protected. *See*, *e.g.*, 40 C.F.R. §§2.202, 2.203, 2.208 (EPA regulations governing assertion of confidentiality of business information).

D. Role of Counsel During the Government Inspection

If the investigation is conducted as part of a criminal investigation or a non-routine civil inspection, and if logistics permit, counsel should immediately go to the facility and request to meet with the lead investigator in order to determine the scope of the investigation and how counsel can assist to ensure order and cooperation. When a search warrant has been issued, counsel should normally contact the Assistant U.S. Attorney who obtained the warrant to discuss the scope and goals of the search, and to negotiate the process for seizing documents and other evidence, while ensuring that critical documentation and computers necessary for company operations and worker safety can be left in place while copies are made.

Most civil inspections commence with an "opening conference" during which introductions are made, logistics discussed, and the investigation objectives described.[29] In the author's experience, criminal investigations sometimes dispense with the opening conference formality and instead have investigators quickly proceed to the personnel or facility location where they hope to gather evidence, leaving company personnel with the challenge of intuiting the nature and scope of the investigation. In one situation, EPA criminal investigators arrived with a search warrant and backhoe. By the time the author had arrived at the client's facility, EPA had already commenced excavating in a location where they believed drums of hazardous waste had been buried, as company personnel stood by watching.

If documents and equipment are seized pursuant to a search warrant, counsel can request that boxes of seized materials be labeled and indexed, and a copy of the index provided to the company before the documents leave the facility. Counsel also works with government investigators and prosecutors to ensure that privileged materials remain segregated and properly marked, and that investigators do not inadvertently seize privileged documents.[30] Care should also be taken to ensure that company personnel do not give investigators access to privileged files, as that could result in a waiver of privilege.

If samples are taken, counsel can request split samples. Even though required to do so, EPA investigators are sometimes reluctant to provide split samples until pressed.[31] If possible, counsel should arrange to allow the company's technical personnel or environmental engineering consultant to observe and photograph the sampling process. Care should be taken not to interfere with the sampling event or other aspects of the investigation, as that could lead to allegations of obstruction of justice.[32]

E. Defending Witness Interviews

Perhaps the most important evidence the government collects during a search warrant or inspection are statements by company employees during interviews with government agents. Sometimes a company receives notice of an imminent investigation, in which case the company has the chance to engage counsel experienced in environmental criminal investigations to prepare witnesses in advance of interviews by government investigators. After delivering the appropriate *Upjohn* warning,[33] discussed in detail below, counsel can explain to the employee that he or she has the right to refuse to be interviewed by the government investigators, but the company requests that the employee submit to the interview and truthfully answer questions—not speculate and not answer questions that are not asked.[34] If pressed by the government investigator to speculate, the witness should simply say, "I would be speculating," and the investigator should move to the next question.

Counsel should further explain to the employee that providing false information to government investigators can result in increased legal exposure for the company and its employees[35]; and that attempting to inject frivolity or humor into the interview should be avoided. Counsel should further inform the employee that he has the right to ask the investigator about the nature of the investigation and whether the employee him- or herself is a target of the investigation or simply a witness. After the interview, the employee has the right to speak to anyone, including management or the company's counsel, about the substance of the interview, despite any representations by government investigators to the contrary.

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29. *See generally* U.S. EPA, Multi-Media Investigation Manual, at 30-31 (1992), *available at* http://www.inece.org/mmcourse/EPAMultimediaInvestigationManual.pdf.
30. In the author's experience, most government investigators will agree not to seize clearly marked and separately filed privileged documentation even though it may fall within the scope of the search warrant. However, the government investigators may have come prepared with a "privilege prosecutor" to make sure access to confidential material is limited but that the documentation is still seized and separately examined. The privilege prosecutor has no previous knowledge of, or involvement in, the investigation.
31. Under RCRA, EPA must provide split samples, if requested, and promptly disclose the analytical results. *See, e.g.*, RCRA §3007(a), 42 U.S.C. §6927(a). Under the CWA and the CAA, EPA is not expressly required to provide split samples or the analytical results. However, EPA guidance and general practice recognize such a duty. *See* U.S. EPA, NPDES Compliance Inspection Manual, at 2-17 (2004), *available at* http://www2.epa.gov/sites/production/files/2013-09/documents/npdesinspect_0.pdf; U.S. EPA, Multi-Media Investigation Manual, *supra* note 29, at app. M-8.
32. *See* 18 U.S.C. §§1501 et seq.
33. Upjohn Co. v. United States, 449 U.S. 383 (1981). As discussed below in the text, the advisement that counsel should provide is that: Counsel represents the company, not the interviewee personally; the interview is taking place to gather facts in order to provide legal advice to the company and how best to proceed; the communications with the attorney are protected by the attorney-client privilege; the privilege belongs solely to the company, not the employee, meaning the company alone may elect to waive the attorney-client privilege and disclose the communication to third parties, including the government, without notifying the employee; and the employee is requested and expected to maintain the information discussed confidential.
34. However, seeking to refresh a witness' recollection or suggesting alternative explanations of events could be construed by criminal prosecutors as "misleading conduct" under 18 U.S.C. §1512 with the intent to influence the testimony of a witness in an official proceeding. Thus, during a witness interview as part of an internal investigation, a "lawyer should avoid conduct that has the appearance of suggesting facts or other testimony to the witness." McNeil & Brian, *supra* note 1, at 113-14.
35. Criminal prosecutors can assert claims for false statements under the authority of the federal criminal code, 18 U.S.C. §1001.

During surprise inspections, witness preparation rarely occurs in a meaningful way. In this situation, some lawyers recommend against allowing the interviews to proceed without counsel being present. This approach may prove risky. Government investigators might assert that the company's lawyer does not have a right to sit in the interviews and insist on proceeding without the company's counsel, which (given the paucity of case law) is not necessarily preventable. Unless counsel represents the individual employee rather than the corporate counsel, the government investigator may have an argument for excluding company counsel from employee witness interviews given the paucity of case law on this issue. On the other hand, corporate counsel can and should assert that the employee has the right to request to be interviewed in the presence of the company's counsel.

In the author's experience, there is a better way to handle employee witness interviews. Counsel can request that the company's attorney be present during the interviews in order to facilitate the interview process and ensure that the investigator receives requested information, including follow-up questions and documentation that the government is entitled to in any event. Counsel can even offer to arrange for the witness interviews. Conducting witness interviews in this manner is in the best interests of both the company and the government, ensuring that the government receives accurate and timely information and documentation. Approaching government inspectors in this manner usually results in a mutual accommodation, and avoids the showdown of whether the company attorney has a right to be present in the witness interviews or whether the government has the right to interview the witness without any counsel present.

During the witness interview, counsel should not treat their involvement as defending a deposition, aggressively interposing objections. This approach runs counter to the goal of ensuring that the company obtains credit for cooperating with the investigation, and provides the government investigator a legitimate reason to remove company counsel from the interview. Where criminal investigators do not have the cooperation of the company, they can resort to the standard tools of criminal prosecution. Grand jury subpoenas can require officers, employees, and staff to testify regarding the company's operations and to explain the documents and evidence that may have been seized. Subpoenaed employees may not be the best-qualified to address technical aspects of the alleged noncompliance, resulting in confusion, prolonging the investigation, and complicating settlement. Therefore, it is normally in the company's best interest to cooperate with witness interviews, including offering to present the most knowledgeable employees for examination.

Cooperating with a government investigation can reduce penalties and avoid prosecution.[36] In one case, the agency's referral to DOJ noted that the company, through counsel, had cooperated by arranging numerous witness interviews, producing documents, and taking measures to quickly restore compliance. Notwithstanding 100 counts of alleged knowing violations, federal prosecutors exercised their discretion to decline the referral for criminal or civil enforcement, after which the case was settled administratively.

At the conclusion of the first day of a surprise inspection, the company (often although not always through counsel) should advise company employees to respect corporate confidentiality by refraining from discussing the government investigation with the press, friends, family members, or other employees. Employees should also be asked to refer any inquiries about the compliance issue and investigation to designated company officials, who are authorized to speak for the company to the press or to the company's customers.

Once government investigators have departed the company facilities (or perhaps while they are still onsite), counsel should begin to conduct an orderly objective internal investigation to ensure preservation of relevant materials, better understand the facts, develop defenses, assess the potential liability, and provide informed legal advice to the company. The substance of the government's inquiry generally becomes clear to experienced counsel who can then quickly structure the scope of the internal investigation.

V. Practical Tips for Conducting Internal Investigations

A. Defining the Scope of the Internal Investigation

The scope of an internal investigation should reasonably and fairly reflect the breadth and depth of the allegation(s) at issue. An investigation that is too narrow runs the risk of missing relevant facts and providing erroneous legal advice to the client; an investigation that is too broad is inefficient, wasteful, and costly. Where a government investigation is already underway, the company's internal investigation should be at least as broad as the issues analyzed by the government.

Defining the scope of the investigation where no government investigation or enforcement action is underway is more complicated. Sometimes the scope of an internal investigation can be narrowly defined to respond to a whistleblower's allegations, or to evaluate compliance with specific company policies, procedures, or legal requirements in order to enhance environmental compliance. In other instances, the scope should include gathering facts and developing legal arguments necessary to defend against potential future enforcement actions. Care must be taken in defining the scope of work to avoid both an open-ended fishing expedition and the appearance or implication that the internal investigation was designed to achieve a predetermined outcome or avoid issues.

36. *See generally* U.S. DOJ, Factors in Decisions on Criminal Prosecutions for Environmental Violations, *supra* note 4; *see also* U.S. DOJ, U.S. Attorneys Manual §9-28.700 (discussing the value of cooperation), *supra* note 4.

Regardless of the scope, company management and counsel should define the parameters of the internal investigation in writing in order to: (a) document that the internal investigation is being undertaken by legal counsel for the purpose of providing legal advice and representing the corporate client; (b) memorialize the directive to preserve relevant materials; (c) determine who within the company or on behalf of the company is the primary contact and "in charge" of the investigation[37]; (d) clearly describe the tasks to be undertaken by counsel during the internal investigation (for example, document preservation, collection, and review; witness interviews; factual development and legal research; and coordination with auditors and technical consultants); (e) set forth the expectation that relevant privileges will be protected; (f) articulate the objectives of the internal investigation (for example, enhance compliance, prepare for settlement or litigation, or self-report to regulators); and (g) indicate whether the company and counsel expect the final report to be written or oral.

In defining the scope of the internal investigation, counsel should include a detailed work plan, set forth the division of duties among in-house counsel, outside counsel, and other company personnel, and provide a schedule and briefing procedures (usually periodic oral briefings). If it becomes apparent that company employees are or likely will become targets of the government's investigation, the scope of work should describe the use of and coordination with separate counsel, use of joint defense agreements, and compliance with ethical obligations.[38] Additionally, before any employees are interviewed, counsel must determine which company employees may be entitled to independent counsel either contractually or legally.

B. Preserving Evidence and Privileges

Preserving applicable privileges, including the attorney-client privilege and attorney work-product doctrine, requires careful management of existing documents and documents created during the internal investigation.[39] Normally, counsel and the client should not alter, place legends or labels, or otherwise write on documents or materials compiled during the investigation.

A company normally has a duty to preserve relevant documentation when it knows, or reasonably should have known, of pending or threatened litigation or regulatory investigation.[40] To comply with this preservation duty, the company must inform its records custodians of their duty to preserve documents and electronic data, and provide instructions for them to do so. Sophisticated companies often automate this process to ensure that the relevant custodians receive a formal notice and agree to its terms. The company should distribute periodic reminders to specific custodians to confirm receipt of preservation notification and compliance with preservation procedures. Counsel should periodically remind the client of the ongoing duty to preserve.

Because companies often use contractors, care must be taken to ensure document preservation by outside consultants and contractors. Overlooking the need to carefully coordinate document preservation with contractors and consultants can prove disastrous if documents essential to asserting defenses cannot be located—sometimes years later if an enforcement action materializes. It is critical to maintain the chain of custody of samples and other materials collected as part of the internal investigation, in order to ensure the future admissibility of the evidence in court and accordingly its use in supporting legal defenses. Care should be taken to ensure that original copies of privileged documents are segregated and maintained in a secure location to avoid inadvertent production or disclosure to others without a need to know, which might be deemed a waiver of the privilege.

At the commencement of an internal investigation, counsel also should advise senior management and other relevant employees to limit e-mail communications regarding the substance or process of the internal investigation. In addition, depending on the volume of relevant documents compiled during an internal investigation, documents

37. If corporate officers or directors are substantively involved in the issues under investigation, they should be excluded from overseeing or decisionmaking regarding the investigation. For example, it may be necessary for the board of directors to form an independent committee consisting of independent board members to oversee the internal investigation. *See* American Coll. of Trial Lawyers, Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations 23 (2008).

38. *See generally* Rebecca J. Wilson & Elizabeth A. Houlding, *Using Joint Defense Privilege Agreements in Parallel Civil and Criminal Proceedings*, 68 Def. Counsel J. 449 (Oct. 2001).

39. The seminal U.S. Supreme Court decision, *Upjohn Co. v. United States*, 449 U.S. 383 (1981), recognized that both the attorney-client privilege and the attorney work-product doctrine can apply to communications between a company lawyer and company employees in the context of an internal investigation, provided that the requirements of each privilege are satisfied. Even though *Upjohn* involved an investigation handled by outside counsel, the same considerations should normally apply to internal investigations carried out by in-house counsel. *See* In re Kellogg, Brown & Root, Inc., 756 F.3d 754, 758 (D.C. Cir. 2014) ("a lawyer's status as in-house counsel does not dilute the privilege") (citations omitted). If a government investigation triggers an internal investigation, normally the attorney work-product doctrine applies because of the potential for litigation arising from the government's investigation. *See* United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998). The attorney work-product doctrine, as codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, protects from disclosure the results of an internal investigation, including the attorney's factual investigations, legal research, mental impressions, and opinions and conclusions formulated if prepared in anticipation of litigation. However, reliance on the attorney work-product doctrine likely will fail if the internal investigation appears to be part of the company's routine compliance program.

40. Determining the point at which the preservation duty arises in the context of a potential government investigation or enforcement action where the company has received no action notice is difficult. Given that courts generally apply a "reasonableness" and "good faith" standard in determining spoliation claims after the fact, a cautious approach would be for a company to place a litigation hold when it becomes aware of conduct that, based on the company's prior experience (or knowledge of enforcement against other similarly positioned companies), the company knows or believes will be the subject of a government investigation, even before it receives a request for information or other actual notice from the government. *See* Robert Hoff & Natalie Shonka, *When to "Reasonably Anticipate" a Government Investigation*, 11 ABA Crim. Litig., at 2 (Spring 2011) ("[A]s soon as a company becomes aware of conduct that, based on the company's prior experience, it knows or believes will be the subject of a government investigation, the company should consider issuing a litigation hold—even before it receives a request for information from the government.").

can be scanned into a document management database to more readily tag key issues, search documents, and identify "hot" documents. To increase data security and reduce the risk of inadvertent disclosure, outside counsel rather than the client normally maintains such a database.

C. Conducting Witness Interviews

Interviews of employees may be the most valuable tool available to legal counsel during an internal investigation. Mistakes in conducting interviews can lead to ethical issues, waiver of a privilege, and liability for the company and its counsel. Counsel's conduct in interviewing employees is governed by statute, case law, and ethics rules and opinions. Several aspects of employee interviews merit mention.

First, never interview a witness alone. An additional person (usually another outside counsel, in-house counsel, or paralegal) should assist counsel by carefully memorializing the interview in a memo, managing interview exhibits, asking follow-up questions where the record is not clear, and acting as a witness to the statements of the interviewee.

Second, prior to any interview of an employee as part of an internal investigation, counsel must provide the appropriate advisement under *Upjohn*, explaining to the employee that:

- Counsel represents the company, not the interviewee personally;
- The purpose of the interview is to gather facts in order to provide legal advice to the company as to how best it should proceed;
- The employee's communications with the attorney are protected by the attorney-client privilege;
- The privilege belongs solely to the company, not the employee, meaning that the company alone may elect to waive the attorney-client privilege and disclose the communication to third parties, including the government, without notifying the employee; and
- The employee is requested and expected to keep confidential the information discussed in the interview.

Failure to provide and memorialize an adequate *Upjohn* warning can result in loss of the privilege, exposure for the company, and discipline of counsel.[41] Prior to or at the same time as the *Upjohn* warning, it may be necessary for a company officer or manager to explain to the employee being interviewed that the company expects all employees to cooperate fully with the internal investigation. Full cooperation includes providing truthful responses and responsive documents, and assisting in any other way requested during the investigation process. Employees should be informed that if they withhold information, do not provide truthful responses, and otherwise fail to cooperate in an internal investigation, they could be subject to company discipline or termination.[42] Similarly, any employee who interferes with an internal investigation is subject to company discipline or termination.

Third, counsel must consider the right timing for interviewing an employee suspected of wrongdoing or negligence in the internal investigation process. Interviewing an employee who may suffer discipline or liability, or whose conduct may support liability against the company, requires careful preparation, a robust understanding of facts and key documents, and detailed questioning. Interviewing a key witness too early, without sufficient preparation or knowledge of the facts, can result in a lost opportunity to obtain crucial information. On the other hand, waiting too long can result in an inability to interview the witness (for example, if she leaves the company, retains counsel, becomes incapacitated or dies) or difficulty in collecting facts when memories have faded or cooperation lessened.

Fourth, some lawyers approach internal investigations the way they would depositions with carefully scripted interview outlines. This approach often puts the witness in a more defensive posture and can result in counsel's missing important details that are not specifically the focus of a question. A better approach is to first give the witness a preliminary overview of the subject matter and solicit narrative responses in a nonthreatening way: "What can you tell me about X, Y, and Z?" Later in the interview, counsel can segue to more probing lines of questions and use of documents.

Fifth, an employee being interviewed often feels intimidated or threatened. This is particularly the case with employees who have compliance or supervisory responsibility. A proper *Upjohn* advisement, unfortunately, can cause increased anxiety. Counsel must exercise judgment and respect in setting the witness at ease, including by expressing appreciation for the witness' cooperation and acknowledging the unease or anxiety of the situation. The lawyer can explain that he has been asked by the company to gather all the relevant facts, and that the company values the opinions and information the employee may provide. When interviewing an employee whose job may be at risk, the attorney should consult with employment counsel to understand applicable legal standards or requirements.

Sixth, counsel should memorialize the interview consistent with the attorney work-product doctrine and the purposes of the investigation. The interview memorandum should include the attorney's mental impressions, not just a transcript of the questions asked and answers given. Notwithstanding the availability of privileges, experienced

41. Difference of opinion exists on whether counsel should provide employees a formal written *Upjohn* warning as a best practice. At a minimum, counsel should prepare a contemporaneous record of the witness interview and substance of the *Upjohn* advisement. Failure to do so results in risks to both counsel and the client. *See generally* United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009). Moreover, interviewing union members, miners, or employees in certain specified industries often requires additional advisements, which are beyond the scope of this article but should be considered by counsel.

42. Employment law counsel can assist management in determining whether refusing to answer questions or otherwise cooperate constitutes a breach of the employee's duty of loyalty to the corporation and provides sufficient grounds for termination.

counsel prepare the interview notes in a highly professional and objective manner, assuming that the interview memorandum may at some point become discoverable or voluntarily produced to regulators. The interview memorandum should also reference the *Upjohn* warning provided at the beginning of the interview.

D. Effective Use of Technical Consultants

Counsel conducting internal investigations of environmental crimes or serious compliance matters frequently engage technical experts, including analytical chemists, engineers, forensics specialists, industrial hygienists, operations experts, and other subject matter experts.[43] Even though the client company is directly billed for the technical experts' services, counsel should be the one who engages them in order to preserve the attorney-client privilege and work-product protection. A good practice is for counsel to instruct the consultant to bill counsel with a copy to the client that actually pays the invoice. The engagement agreement should explain that the consultant is engaged to assist counsel in the evaluation and interpretation of technical information in order to provide legal advice to the client. The agreement should also include a confidentiality clause, and a requirement that the expert's work product and communications with counsel be marked as "attorney-client privilege, attorney work product." In-house technical experts should execute a written contract with counsel that includes similar information. Case law supports extending the protection of these privileges to an expert consultant's factual analysis as part of an internal investigation, not simply the attorney's mental impressions and legal analysis.[44]

E. Reporting to the Corporate Client

Where an internal investigation occurs over the course of weeks or months, counsel should update the company regularly. Given the preliminary nature of the findings in interim reports or updates, such an update typically is provided orally or using a web-based PowerPoint or other presentation that remains in the possession of outside counsel. At the conclusion of the investigation, counsel should provide a detailed report to the client, including an assessment of the facts, applicable law, and legal counseling.

Whether the final report is written or oral is a question of strategy, risk, and client preference.[45] Typically, an oral report minimizes the risk of disclosure and associated damage. On the other hand, a written report may better satisfy the requirements of Sarbanes-Oxley to show that company management, the board of directors, audit committee, or others have undertaken a full review of the issues, been advised of legal considerations, and directed corrective measures to achieve compliance. Written reports provide greater clarity regarding findings and legal conclusions, especially in connection with complex alleged violations. But a written report carries risks, such as inadvertent or malicious disclosure. Counsel should consider and weigh the risks and benefits before deciding on the form of the final report (as well as who receives a copy, if it is written), based on the particular circumstances of the compliance issue and associated risks. No matter what the form of the final report, experienced counsel generally prepare it in a highly professional and measured manner in the event it does see the light of day.

Whether the final report (oral or written) should include recommended corrective actions to achieve compliance should be a point of discussion with the client at the outset or early during the investigation. Some companies may decide that the final report should only include factual findings without recommendations regarding remedial measures.[46] A better practice is to include recommendations that have been orally vetted in a draft final report, and for the final report to document corrective measures already agreed to by senior management. Failure to include recommendations from counsel in the final report limits the ultimate usefulness of the internal investigation and the final report. It could also be construed by others after the fact as an unnecessary but intentional limitation of the thoroughness and scope of the investigation. In the event that noncompliance recurs and senior management and corporate officers become the targets of a criminal investigation, having recommendations in the final report that were implemented in good faith often

43. Another type of expert that has not traditionally been used by legal counsel as part of internal investigations—but probably should be used more frequently—is an organizational psychologist when the noncompliance or unethical behavior appears to be more a product of a diseased corporate culture than the actions of a single rogue employee. *See generally* David M. Mayer, *A Review of the Literature on Ethical Climate and Culture*, *in* The Oxford Handbook of Organizational Climate and Culture 415 (Benjamin Schneider & Karen Barbera eds., 2014) ("There is mounting support that wrongdoing in organizations is more than the work of a 'few bad apples,' but rather that the organizational environment plays a critical role in encouraging or discouraging unethical acts."). Experts in organizational behavior can sometimes assist with assessing the corporate culture and developing recommendations to improve the same.

44. For example, in *ARCO v. Current Controls, Inc.*, 1997 WL 538876, *3 (W.D.N.Y. Aug. 21, 1997), the court held that documents relating to contaminated properties prepared by nonattorney consultants and employees of ARCO containing mostly factual data, such as testing results and remediation cost data, were work-product protected. The court justified this decision because "[i]n light of the surrounding circumstances—including the EPA's activities and the nature of environmental law, which often leads to litigation involving numerous parties with past or present associations with contaminated property—[ARCO's anticipation of litigation] was objectively reasonable." *Id.* The court also recognized that "it is of no consequence that most of the subject documents were prepared by non-attorneys" and that "it is equally inconsequential that the information contained in the subject documents . . . is primarily factual." *Id.*

45. Even where the client decides that it does not want to receive a written report of the internal investigation, experienced counsel maintain a database of all documents reviewed and interviews taken. At the conclusion of the internal investigation, counsel should maintain a record of the results of the internal investigation and the advice provided to the corporate client.

46. Some companies prefer not to receive legal conclusions while other view legal conclusions as important as the factual findings. Most experienced counsel couch any legal conclusions as "preliminary" or "potential," and avoid definitive statements that could be construed as admissions. Most internal investigations must necessarily occur in an expedited manner and be reported quickly. Conclusions will necessarily be somewhat tentative, with additional facts surfacing that may not change conclusions but which add additional context that modulates the severity of the conclusions.

will provide the best exculpatory evidence for the company and its senior management.[47]

F. Effective Use of Analytical Tools

Sophisticated companies increasingly use a variety of analytical tools in connection with internal investigations such as root cause analysis and decision trees. A "root cause analysis" is a post-incident analytical approach to identifying the underlying causes and contributory factors that resulted in the incident or noncompliance event in order to answer three questions: "What happened, why did it happen, and how can we prevent it from happening again." This analytical tool is particularly useful to evaluate system and process failures using an interdisciplinary team of technical experts.

When the analysis is undertaken as part of an internal investigation, the attorney's role is to ensure the credibility and thoroughness of the process so that the legal opinions arising from the analysis are based on accurate facts and analysis, as well as protect to the extent possible the confidentiality of the investigation results. For example, where appropriate, the attorney should ensure that the team undertakes a thorough literature review of similar events outside the company, and that personnel evaluate lessons learned from similar prior events within the company. Technical investigation teams sometimes jump to conclusions or gloss over sensitive or embarrassing facts that may limit the usefulness and defensibility of the analysis.

A "decision tree" analysis likewise can prove helpful in counseling a company's response to an internal investigation: whether to self-report, settle, or defend an enforcement action, and whether and to what extent to modify internal controls. Counsel and the client can use a decision tree to foresee, assess, and understand the consequences and costs of potential responses and options, particularly in the face of complex factual, regulatory, legal, or liability circumstances. A decision tree provides an analytical framework for identifying and monetizing each option, and estimating the probability of success of each option, with the objective of making the best decision.

When done right, the step-by-step approach required by a decision tree analysis gives the client maximum input into, and understanding of, each strategic option. But as in the root cause analysis, the rule of "garbage in, garbage out" applies here, requiring that counsel bring rigor, objectivity, thoroughness, and integrity to the process to avoid a predetermined outcome of the analysis. Decision tree analyses may be particularly useful at the conclusion of the internal investigation in order to thoroughly vet the company's responses to the incident or noncompliant condition.

47. When exercising prosecutorial discretion, government criminal investigators and prosecutors invariably look for patterns of noncompliance and management's response to prior noncompliance and incidents. Accordingly, directors and officers should be familiar with past compliance problems and corrective measures, which investigation reports can provide.

G. Making Difficult Decisions

The best evidence of a company's compliance culture is its willingness to terminate highly skilled and valuable employees who have nonetheless engaged in wrongful, reckless, or negligent conduct resulting in significant environmental harm, risk to human health and safety, or risk to the company. Conversely, an unwillingness to terminate such an employee telegraphs to the government that the company places a lower value on compliance than it does on matters such as profit. Once the government learns of an employee's significant misconduct, the mere fact that the employee still works for the company can damage a company's efforts to demonstrate its commitment to compliance and can undermine its request for leniency.

Making the difficult decision to terminate a valuable but problematic employee may be the single most convincing way to demonstrate to the government the seriousness with which the company takes its compliance obligations. This does not mean that every employee who is responsible for a compliance issue should be terminated in order to placate the government. Even violations that were "knowing" (that is, intentional) could have been done in good faith and without mens rea. Making the hard decisions regarding employees accused of wrongdoing often requires careful consideration and involvement of employment law counsel.[48]

Other difficult decisions may involve identifying and replacing faulty or under-capacity equipment, changing operational or maintenance practices, or hiring additional staff, which can have a substantial monetary impact on the company. But doing so can substantially decrease legal exposure for the company and its management.

H. Self-Reporting the Results of the Internal Investigation

Whether or not a company self-reports, identified instances of ongoing noncompliance revealed by the internal investigation must be promptly addressed and remedied by the company. Failure to do so raises the risk that any future violations will be deemed "knowing" and "continuing," with a commensurate risk of corporate or individual criminal exposure. In some cases, the results of the internal investigation must be reported to regulatory authorities as a matter of law based on various statutes, regulations, or permit provisions that dictate the manner and timing of mandatory compliance reports and certification.[49] How-

48. Employment law counsel can provide advice on whether and how an employee can be involuntarily transferred, placed on leave, or otherwise disciplined to avoid the appearance that these measures constitute unlawful retaliation. Employment counsel can also assist with properly implementing measures to constrain an employee suspected of malfeasance from accessing and altering or destroying potential evidence.

49. For example, the CAA requires operators of major stationary sources to certify compliance with terms and conditions specified in the Title V permit, identify continuous or intermittent noncompliance, describe the emission unit for which the discrepancy took place and the applicable requirement

ever, in most cases, the decision whether, how, when, and to whom to voluntarily self-report a noncompliance event or condition requires a careful balancing of risks and consideration of competing interests. The following describes the calculus that companies and their counsel commonly undertake to make such determinations.

1. Whether to Self-Report

A variety of federal and state government policies and guidance promote self-reporting of environmental (and other regulatory) noncompliance.[50] It is critical that counsel be familiar with applicable guidance issued by federal and state regulatory authorities that sets forth conditions and limitations regarding whether a self-report will reduce penalties. Importantly, EPA's Audit Policy of incentives for self-policing applies to noncompliance identified during an internal investigation or in other ways, not only from a routine environmental compliance audit.[51]

Normally, the objective of a self-report is to reduce the risk of criminal prosecution and avoid having to pay large penalties. Depending on the nature and number of violations, avoiding criminal prosecution or large penalties may not be possible.[52] Companies with compliance issues generally consider whether regulatory authorities likely would learn of the noncompliance absent the self-report. For most companies in most industries, the vast majority of noncompliance is detected and corrected without any internal investigation, self-report, or detection by regulatory authorities.

If a violation cannot qualify for penalty reduction, self-reporting may serve little purpose. For example, EPA's Audit Policy provides various "conditions" for a reduction in gravity-based penalties for violations of federal environmental requirements that are discovered and disclosed to EPA, including that "repeat violations are ineligible."[53] Thus, disclosing a repeat violation that otherwise is not subject to a mandatory reporting obligation may trigger enforcement that might not otherwise occur if undetected, and yet the company receives little benefit from the self-report.

Serious noncompliance disclosed to regulatory authorities by internal whistleblowers often results in criminal prosecution due to the ease with which the government can gather evidence and meet its burden of proof. Serious violations that are widely known within a company, are open and notorious, but not known to regulators, are often good candidates for self-reporting.

Another significant consideration is whether the company or its outside counsel have the personal relationships and credibility with regulatory authorities or prosecutors that could facilitate leniency in the face of a self-report. One large and highly regulated company discovered that certain monitoring equipment had been inexplicably but intentionally disabled, throwing into doubt an enormous data set of sampling results. The company's outside counsel immediately met with criminal prosecutors to self-report. Given the nature and seriousness of the violation, environmental regulators and prosecutors brought in local Federal Bureau of Investigation (FBI) personnel to assist with the investigation. The company's in-house and outside counsel worked closely with the FBI to jointly investigate the crime. The company's technical personnel worked with regulatory officials to develop a sophisticated methodology

against which the deviation occurred, and provide information regarding the duration of the deviation and any corrective actions. *See* 40 C.F.R. pt. 64. CWA National Pollutant Discharge Elimination System (NPDES) permits require discharge monitoring reports with a compliance certification. 40 C.F.R. §122.22. In addition, companies subject to TSCA must notify EPA within 30 days of information they receive that reasonably supports the conclusion that their substances or mixtures present a substantial risk of injury to health or the environment. *See generally* 79 Fed. Reg. 15329 (Mar. 19, 2014) (EPA guidance regarding TSCA §8(e) "notifications of substantial risk" submissions). Similarly, EPCRA imposes on certain facilities reporting requirements relating to Emergency Release Notification, Hazardous Chemical Storage Reporting, and Toxic Release Inventories. *See generally* EPCRA §§304, 311-313, 42 U.S.C. §§11004, 11021-23. During the course of an internal investigation, the investigation team may learn of information subject to these reporting requirements that must be reported in a timely fashion by the company, notwithstanding the intent that the internal investigation first be completed prior to any disclosure to regulatory authorities.

50. The U.S. Sentencing Guidelines (U.S.S.G.) reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. *See* U.S.S.G. §8C2.5(g); U.S. Attorney's Manual §9-27.230(B)(6) (discussing "Willingness to Cooperate" as a factor in "Initiating and Declining Charges" as a matter of prosecutorial discretion); U.S. EPA, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations [hereinafter EPA Audit Policy], 65 Fed. Reg. 19618, 19625 (Apr. 11, 2000); U.S. EPA, The Exercise of Investigative Discretion, *supra* note 6.

51. Under EPA's Audit Policy, if the company proves that it discovered the violation through an environmental audit or a compliance management system reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations, it receives a 100% reduction in gravity-based penalties. If it learned of the violation in some other fashion, it receives a 75% reduction. *See* EPA Audit Policy, *supra* note 50.

52. Under EPA's Audit Policy, provided that specified conditions are met:

> EPA will not recommend to the U.S. Department of Justice or other prosecuting authority that criminal charges be brought against the disclosing entity, as long as EPA determines that the violation is not part of a pattern or practice that demonstrates or involves: (i) A prevalent management philosophy or practice that conceals or condones environmental violations; or (ii) High-level corporate officials' or managers' conscious involvement in, or willful blindness to, violations of Federal environmental law.

See EPA Audit Policy, *supra* note 50. However, EPA may still "recommend for prosecution the criminal acts of individual managers or employees . . . ." *Id.*

53. By "repeat violation," EPA explains that "the specific (or closely related) violations have occurred at the same facility within the past 3 years or those that have occurred as part of a pattern at multiple facilities owned or operated by the same entity within the past 5 years; if the facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion." *Id.* Other conditions include: Systematic discovery of the violation through an environmental audit or the implementation of a compliance management system. Voluntary discovery of the violation was not detected as a result of a legally required monitoring, sampling or auditing procedure. Prompt disclosure in writing to EPA within 21 days of discovery or such shorter time as may be required by law. Independent discovery and disclosure before EPA or another regulator would likely have identified the violation through its own investigation or based on information provided by a third-party. Correction and remediation within 60 calendar days, in most cases, from the date of discovery. Prevent recurrence of the violation. Certain types of violations are ineligible such as those that result in serious actual harm, those that may have presented an imminent and substantial endangerment, and those that violate the specific terms of an administrative or judicial order or consent agreement. Cooperation by the disclosing entity is required. *Id.* at 19625-26.

to determine whether exceedances had occurred during the period while the monitoring equipment had been disabled. Despite best efforts, the government and company could never identify who had disabled the monitoring equipment or why. But at the end of the day, no civil or criminal enforcement occurred and the company voluntarily implemented expanded business ethics training. Relations and trust between the company and regulators actually improved as a result of the self-report.

Other considerations relate to the intangible but important issue of personal relationships and the credibility of those disclosing the corporate conduct or investigative findings. Can a company and its counsel approach regulators with confidence that the act of self-reporting will actually be viewed in a favorable light? Has a pattern of past violations already poisoned the well for any hope of a positive response and favorable exercise of prosecutorial discretion? Predicting the response of regulators and prosecutors may be difficult unless the company's counsel has a proven track record with the pertinent regulatory authorities or prosecutors.

Sometimes a self-report can decrease the risk of criminal prosecution, but increase collateral risks. Normally, information that is voluntarily disclosed to the government can be accessed by the public through Freedom of Information Act requests. Self-reported materials can be used against the company in litigation by adjacent landowners, shareholders, or environmental groups. While some agencies are willing to execute confidentiality agreements to protect self-reports from unwanted disclosure, in the author's experience, EPA has no such practice. Thus, a company should assume that any written self-report could easily and quickly become front-page news.

2. How to Self-Report

Given the risks of public disclosure, an oral presentation would constitute the preferred self-reporting approach. It may be possible to orally self-report violations to state regulators or prosecutors. Oral reports could be supplemented by witness lists and key documents submitted to regulators. However, EPA's Audit Policy requires extensive written disclosure beyond the initial self-report.[54] In cases involving potential environmental crimes, EPA requires even more detailed disclosure:

> Entities that disclose potential criminal violations may expect a more thorough review by the Agency. In criminal cases, entities will be expected to provide, at a minimum, the following: access to all requested documents; access to all employees of the disclosing entity; assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations; access to all information relevant to the violations disclosed, including that portion of the environmental audit report or documentation from the compliance management system that revealed the violation; and access to the individuals who conducted the audit or review.[55]

Notwithstanding the above, turning over actual attorney work product, which arguably waives applicable privileges, is rarely necessary. DOJ guidance expressly does not require a waiver of attorney work product—such as the internal investigation report itself—for a company to be considered cooperative.[56] However, even if the government might not view voluntary disclosure to it as waiving a privilege, a court might find a waiver as to third parties, especially in light of adverse case law regarding the selective waiver doctrine.[57] Thus, whether the pertinent regulator requires a written self-report rather than merely an oral one should factor into the decision whether to self-report.

3. When to Self-Report

The issue of when to report often raises some of the more complex self-reporting decisions. Prudence normally dictates that a company and counsel conclude the internal investigation in a thorough and thoughtful manner prior to any disclosure to regulatory authorities or prosecutors. This can require time and effort. Premature disclosure can have dire consequences. Underreporting the nature, number, or consequences of the noncompliance can result in a significant loss of credibility and cause a company to actually worsen its relative position, while overreporting can unnecessarily expose the company to regulatory scrutiny. For that reason, experienced counsel include a variety of caveats in self-reports, especially where data gaps exist, to allow for supplementation and amendment of the self-report in a timely manner.

54. The Self-Disclosure Questionnaire is available on EPA's website at http://www.epa.gov/compliance/resources/policies/incentives/auditing/sampleltr.pdf.

55. *See* EPA Audit Policy, *supra* note 50, at 19623.

56.
> Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government's investigation. However, a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.

U.S. DOJ, Principles of Federal Prosecution of Business Organizations, at 8 (2006) (the McNulty Memo) (also establishing that a prosecutor may only request waiver when there is a "legitimate need" and the request receives managerial approval for a request for waiver), *available at* http://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.

57. Despite a confidentiality agreement between the government and the disclosing entity, courts generally have held that the attorney-client privilege and work-product protection have been waived. *See, e.g.*, In re Pacific Pictures Corp., 679 F.3d 1121 (9th Cir. 2012); In re Quest Commc'ns Int'l, Inc., 450 F.3d 1179 (10th Cir. 2006); In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289 (6th Cir. 2002); Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414 (3d Cir. 1991). Nevertheless, if possible it is still advisable to negotiate a confidentiality agreement with the government that reserves the company's right to assert all applicable privileges at any time to any party in any proceeding; specifies that the privileges extend not only to the disclosed documents but also to the underlying notes and any other work product or communications relating to the disclosed materials; and states that the company is providing the information in reliance on the confidentiality agreement.

Unfortunately, EPA's Audit Policy requires that the violation be disclosed in writing within 21 days of "discovery," which "begins when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred."[58] Based on this requirement, if the lowest-level employee in the field learns of a violation but keeps the information to himself for 22 days, the company is out of luck. Similarly, in complex industrial operations, it may take weeks to conduct analysis to determine whether or not noncompliance actually occurred, but if technical personnel think it more likely than not, then the disclosure period may run unless the company chooses to disclose unverified information. In practice, EPA personnel often give companies the benefit of the doubt regarding when the company "discovers" the violation based on all of the circumstances, including working with companies that preliminarily self-report within 21 days, even though substantial time and effort will be required to identify the detailed information required in the Audit Policy.

4. To Whom to Self-Report

Many states have self-audit policies that may or may not follow EPA's Audit Policy or even apply to the violation at issue. If a state does not have delegated authority to administer the federal program applicable to the violation, self-disclosing to the state agency may accomplish nothing. Similarly, some federal programs, such as those under the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), cannot be delegated by EPA as a matter of law and thus should not normally be disclosed to a state agency. Similarly, if the noncompliance violates state law but not federal law, disclosing the violation to EPA accomplishes nothing.

Often a noncompliance event or condition violates both federal and state law. This does not mean, however, that it makes sense to self-report to both EPA and the state. If the state normally takes the enforcement lead and the risk of over-filing by EPA is low, reporting to the state may be a better strategy, especially where the state has a self-reporting policy that is more flexible than the EPA policy. For example, Wyoming law gives companies 60 days from the completion date of an environmental audit to voluntarily self-report violations discovered through an environmental audit. The environmental audit must be completed within 180 days from the date it commenced.[59]

A more complicated scenario arises when a noncompliance event or condition results in violations of both federal and state laws, but the state does not have delegated authority to administer and enforce some of the federal provisions. In such a case, if the violations are serious and likely to be discovered by regulatory authorities in any event, it may be prudent to self-report the overlapping violations to both EPA and state regulatory authorities.

Finally, the issue arises whether a company should self-report a violation even though the company does not qualify under the applicable federal or state policy. The answer depends on a variety of factors but, depending on the circumstances, it may be highly prudent to self-report given that regulatory authorities, DOJ, and state attorneys general still retain substantial prosecutorial discretion to reduce the amount of penalties or injunctive relief they might otherwise be entitled to seek, or to decline prosecution in favor of civil or administrative resolution of a case.[60]

I. Correcting Deficiencies and Closing Out the Internal Investigation

Nothing motivates a company to improve compliance more than a substantial government inspection or an enforcement action. Environmental compliance can suddenly become a company's top priority. Nothing is more important than correcting compliance problems discovered during an internal investigation before regulatory enforcement can ensue. The company's failure to correct violations after they have been reported to management could expose executives and others to personal liability. Yet, once the internal investigation concludes, there may be a temptation to breathe a collective corporate sigh of relief and promptly return to business as usual. This is especially true where the compliance issue has been previously settled with regulators. Management's attention tends to turn to other operational issues, even though additional work may still be needed to improve environmental management systems, implement enhanced training and monitoring, and put into place equipment upgrades and personnel changes.

Counsel should assist and encourage their corporate clients to resist the temptation to turn to other matters after the report is made, as it can lead to three risky errors. First, the company might fail to "close out" the internal investigation. Companies and their lawyers sometimes mistakenly assume that the internal investigation concludes at the time that counsel reports the findings and recommendations to senior management. If counsel have prepared and provided management with a written internal investigation report and recommendations, it is critical that there also be a subsequent follow-up report or corrective action plan report memorializing that the recommendations were in fact implemented or are being implemented.

58. EPA Audit Policy, *supra* note 50, at 19626. EPA's Audit Policy may undergo substantial revision in the near future. *See* U.S. EPA, FY 2013 Office of Enforcement and Compliance Assurance (OECA) National Program Manager Guidance, at 15 (2012) ("EPA is considering several options, including a modified Audit Policy program that is self-implementing"), *available at* http://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100F6FG.PDF.

59. Wyo. Stat. Ann. §§35-11-1106(a) & 35-11-1105(a)(1) (2014).

60. *See generally* David M. Uhlmann, *Prosecutorial Discretion and Environmental Crime*, 38 Harv. Envtl. L. Rev. 159 (Apr. 2013) (suggesting that criminal enforcement for violations should, and usually do, involve one or more of the following aggravating factors: (1) significant environmental harm or public health effects; (2) deceptive or misleading conduct; (3) operating outside the regulatory system; or (4) repetitive violations).

Second, for those recommendations or open compliance matters that cannot be immediately corrected and closed out, a supplemental report needs to include an action plan and time line for implementing the corrections or recommendations, or otherwise explain why it was not necessary. Once all open matters have been closed out, a final report should be prepared by counsel and presented to management. The final report normally contains factual information confirming the implementation of corrective measures consistent with prior findings and recommendations. Sometimes, counsel must be somewhat assertive to assist the client in understanding the importance of not leaving in limbo the final closeout of an internal investigation.

Third, despite best efforts to investigate alleged violations, at times, the results of an internal investigation are inconclusive. For example, a whistleblower might anonymously report that a particular worker in the wastewater treatment plant is illegally diluting the effluent stream to achieve compliance, which arguably invalidates the company's CWA monitoring reports and compliance certifications. Such an allegation may be difficult to investigate and prove or disprove. The worker may deny the allegations. To close out the investigation in the face of inconclusive evidence, it is important for the final report to clearly identify the nature and source of the allegations, the efforts taken to confirm the allegations, and further preventive measures undertaken such as training and enhanced inspections and monitoring. Moreover, a database should be maintained by the company, counsel, or both of all internal investigations. Reference to the report should be included in the employee's personnel file in the event that additional allegations or information regarding the same employee surface down the road, allowing the company or counsel to detect a pattern of questionable conduct.

J. Internal Investigations to Avoid the Risk of Debarment and Suspension

In recent years, federal agencies have stepped up debarment and suspension activities, including those agencies that traditionally did not have much experience suspending and debarring contractors and recipients of federal benefits.[61] The debarment and suspension procedures are intended to prevent waste, fraud, and abuse in federal procurement and nonprocurement actions (such as awarding grants), and are not intended to constitute a form of punishment.[62] Rather, debarment or suspension procedures are intended to ensure that federally funded business is conducted by responsible and ethical companies and individuals. Nevertheless, debarment and suspension can have a profound punitive impact on both traditional government contractors and companies that receive nonprocurement government benefits, such as oil and gas lessees.[63]

For example, after BP entered a plea agreement in the *Deepwater Horizon* case in 2012, EPA suspended 25 BP entities and disqualified BP Exploration and Production, Inc., from performing federal contract work or receiving any federal assistance or benefits.[64] While the notice of suspension only referenced the Gulf of Mexico spill and a pattern of "criminal and seriously improper conduct" and submission to the government of "false and misleading information" in the aftermath of the spill, BP had also suffered a series of high-visibility environmental disasters, including the 2006 pipeline spills in the Alaska North Slope and 2005 explosion at BP's Texas City Refinery.[65]

BP filed suit against EPA, claiming that the suspension was arbitrary and capricious, and highly punitive because it prohibited the company from obtaining new federal oil and gas leases in the United States.[66] Eventually, BP dropped its lawsuit after it entered into an administrative agreement with EPA that required the company to engage independent compliance monitors and auditors approved by EPA who report on BP's compliance, and multiple commitments to enhance the company's ethics compliance, corporate governance, and process safety practices.[67]

An internal investigation and the implementation of corrective measures can reduce the risk of debarment and suspension in two ways. First, after a company receives a suspension or debarment notice, the applicable regulations give the company the opportunity to contest the proposed debarment orally or in writing to be considered on the record.[68] While the debarment regulations do not require the debarring official to informally meet with the company, the regulations provide the debarring official authority to enter into settlements and, in practice, debarring

61. *See* U.S. Government Accountability Office (GAO), Agencies Have Taken Steps to Improve Suspension and Debarment Programs (2014), *available at* http://www.gao.gov/assets/670/663359.pdf. Debarment refers to the exclusion of an individual, business or other entity from participating in federal procurement and/or nonprocurement transactions. Suspension is the "temporary" exclusion of an individual, business, or other entity from participation in federal procurement and/or nonprocurement transactions pending the conclusion of an investigation, legal, debarment, or other proceeding. *See* 48 C.F.R. pt. 9, subpt. 9.4 (procurement suspension and debarment rules); 2 C.F.R. pt. 180 (nonprocurement suspension and debarment rules). Federal agencies may apply the suspension/debarment to all divisions of the company and to its affiliates nationwide. *Id.* §180.630(c).

62. *See* 2 C.F.R. §180.125.

63. In addition to the list of transactions subject to debarment in the general nonprocurement debarment regulations at 2 C.F.R. §80.970, the U.S. Department of the Interior (DOI) debarment regulations list includes: "(a) Federal acquisition of a leasehold interest or any other interest in real property; (b) Concession contracts; (c) Disposition of Federal real and personal property and natural resources; and (d) Any other nonprocurement transactions between the Department and a person." 2 C.F.R. §1400.970. DOI interprets these regulations to include oil and gas leases.

64. *See* U.S. EPA, Notice of Suspension, Nov. 28, 2012, *available at* http://www.corporatecrimereporter.com/wp-content/uploads/2012/11/bpdebar.pdf.

65. These other incidents were referenced in EPA's Administrative Agreement that lifted the suspension. *See* U.S. EPA, Administrative Agreement Lifting the Suspension and Debarment of BP From Federal Government Contracts, Mar. 13, 2014, *available at* http://www2.epa.gov/home/march-13-2014-administrative-agreement-lifting-suspension-and-debarment-bp-federal-government.

66. *See* Stanley Reed, *BP Sues U.S. Over Contract Suspensions*, N.Y. Times, Aug. 14, 2013, *available at* http://www.nytimes.com/2013/08/15/business/global/bp-sues-us-over-contract-suspensions.html?_r=0.

67. *See* U.S. EPA, Administrative Agreement, *supra* note 65.

68. 2 C.F.R. §180.815.

officials or agency counsel are willing to informally meet with all recipients of notices of suspension or debarments at any time.[69]

Debarment officials consider various "mitigating" and "aggravating" factors in determining whether to debar and, if so, the length of debarment. These factors cover many of the internal investigation topics discussed above, including whether the company fully investigated the circumstances surrounding the cause for debarment, fully cooperated with the government's investigation, took appropriate disciplinary action against the responsible individuals, and took other appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.[70] Even if the debarring official finds that cause for debarment exists, she may decide to reduce the scope of debarment or even not to debar.[71] Thus, companies that receive debarment notices and expeditiously undertake internal investigations and implement corrective measures can meet with debarment officials to demonstrate sufficient business integrity. Companies that use the results of internal investigations and corrective measures stand a better chance of avoiding or limiting debarment than outright contesting debarment.[72] Notably, this may require disclosing the results of the internal investigation.[73]

Second, if a company is under investigation or is negotiating a settlement relating to serious regulatory violations, the company may wish to consider contacting the agency suspension and debarment office to present information demonstrating that, notwithstanding the underlying allegations that may result in a criminal or civil settlement, the company has appropriately investigated the underlying causes of the noncompliance and has implemented corrective measures. The debarment officials will want to see evidence of "present responsibility"—that the company has a corporate culture that encourages ethical behavior along with strong ethics and whistleblower policies that assist senior management in identifying compliance problems.[74] Debarment officials are less likely to initiate a suspension or debarment action if the company has self-reported the noncompliance to both the regulatory officials within the agency and the debarment officials.

VI. Conclusion

The initiation of a government criminal investigation or the discovery of a serious compliance issue often triggers the need to conduct an internal investigation. While no chief corporate officer relishes this state of affairs, failure to engage counsel to conduct an effective internal investigation can compromise a company's ability to negotiate an amicable resolution or defend civil and/or criminal enforcement. The decision to conduct an internal investigation triggers complex issues regarding the scope of the investigation, who conducts the internal investigation, how to conduct the investigation in parallel with an ongoing government investigation, how to use experts to assist in the investigation, how to manage whistleblowers, when and how to disclose the results of the investigation to regulators and prosecutors, and many other issues. To avoid potential pitfalls in commencing, conducting, and completing a proper internal investigation, and implementing recommendations, senior management must work closely with counsel (normally both in-house and experienced outside counsel) to balance competing goals and risks of the internal investigation.

69. *Id.* §180.635 ("[A] Federal agency may settle a debarment or suspension action at any time if it is in the best interest of the Federal Government.").
70. *Id.* §180.860.
71. *Id.* §180.845(a).
72. Courts apply the deferential "arbitrary and capricious" standard in reviewing debarment decisions, but will require a rational relationship between the facts found, the protective purpose of the debarment proceeding, and the sanction imposed. *See, e.g.*, Shane Meat Co., Inc. v. U.S. Dep't of Def., 800 F.2d 334, 339 (3d Cir. 1986).
73. 2 C.F.R. §180.860(o) (including the factor of "whether you have fully investigated the circumstances surrounding the cause for debarment and, if so, *made the result of the investigation available to the debarring official*") (emphasis added).
74. To avoid debarment, the debarment officials may require that the company negotiate an administrative agreement that demonstrates that the company is "presently responsible," notwithstanding past misconduct. *Id.* §180.855(b).