Voluntary Disclosures to Federal Agencies – Their Impact on the Ability of Corporations to Protect From Discovery Materials Developed During the Course of Internal Investigations

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VOLUNTARY DISCLOSURES TO FEDERAL AGENCIES—THEIR IMPACT ON THE ABILITY OF CORPORATIONS TO PROTECT FROM DISCOVERY MATERIALS DEVELOPED DURING THE COURSE OF INTERNAL INVESTIGATIONS

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In many American corporations, internal investigations are becoming commonplace. Responsible corporate executives are recognizing that internal investigations are an essential element in a program of responsible self-governance. At the same time, some federal agencies have created additional incentives to conduct internal investigations by encouraging voluntary disclosures of wrongdoing. At least two agencies have established formal "voluntary disclosure" programs promising leniency or other benefits if a corporation discloses irregularities discovered during an internal investigation.1

This Article focuses on an important, contemporary legal issue: The ability of corporations to protect reports and other materials produced during internal investigations from discovery by third parties when voluntary disclosures are made to government agencies. This issue is of increasing concern because other government agencies, former employees, or competitors intent on suing the corporation may attempt to obtain copies of materials generated during internal corporate investigations for their own purposes.

Parts I and II of this Article discuss who should conduct an internal corporate investigation and the applicability of the attorney-client privilege and the work product doctrine to the investigation. In Parts III and IV, this Article focuses on structuring the investigation so that the attorney-client privilege and the work product doctrines apply, and examines various voluntary disclosure programs. In Parts V and VI, this Article analyzes the con-

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1. See infra Part IV for discussion of voluntary disclosure programs established by the Securities and Exchange Commission (SEC) and the Department of Defense (DOD). Guidelines currently being considered by the United States Sentencing Commission recognize as "mitigating factors" disclosures of wrongdoing to government authorities prior to the commencement of a government investigation. Preliminary Draft Sentencing Guidelines for Organizational Defendants, Nov. 1, 1989, at 7.
sequences of voluntary disclosures to agencies, and the impact of such disclosures on the ability of third parties to gain access to documents generated during internal corporate investigations.

For analytical purposes, assume the following: You are the president and chief executive officer of a major corporation returning from a long weekend on Martha's Vineyard. Life is wonderful. Business is good. You broke 70 for the first time on a very tough golf course. Your daughter finished first in a horse show and your son placed a very respectable second at the club's annual 14 and under tennis tournament.

On the plane ride home, the following headline in the morning paper catches your eye: "Agency Official Indicted by Grand Jury." Reading further, you find that the branch chief of a federal agency responsible for awarding government contracts has been indicted for allegedly accepting gratuities and kickbacks and otherwise subverting the agency's procurement processes for personal gain. Interesting but not unusual—at least until it dawns on you that your corporation owns a subsidiary that, over the years, has received a number of contracts from the federal agency mentioned in the article. You make a mental note to obtain additional information concerning your subsidiary's dealings with the agency when you return to the office. Suddenly, Martha's Vineyard seems and feels a long way away.

When you finally reach your office, your worries intensify. You find that the subsidiary has been surprisingly successful in obtaining contracts from the agency identified in the newspaper article. In addition, you learn that the subsidiary's annual billings to the agency are in excess of $1 million. To complete the good news, your executive assistant notifies you of an anonymous note placed in the subsidiary's "suggestion box" several weeks ago. The note alleges that certain managers and employees of the subsidiary have engaged in a variety of illegal activities involving the subsidiary's government contracts.

The need for some sort of an internal investigation is apparent. Taking no action and waiting to see what, if anything, will develop is an option, but contemporary notions of corporate and managerial responsibility counsel against either an ostrich-like, "head-in-the-sand" approach or a "catch us if you can" philosophy. Failure on your part to conduct a reasonable inquiry and to take any necessary corrective action can lead to shareholder derivative suits. In addition, the corporation may soon find itself embroiled in federal civil and criminal litigation triggered by further investigations con-

2. See, e.g., In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235 (5th Cir. 1982); Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970); In re LTV Sec. Litig., 89 F.R.D. 595 (N.D. Tex. 1981).
Voluntary Disclosures

Conducted by the affected agency, the Department of Justice (DOJ), or the Securities and Exchange Commission (SEC or Commission). You may also find yourself with significant public relations problems if you are unprepared to respond to press inquiries concerning your subsidiary's involvement with the federal agency or the indicted official. These compelling considerations are likely to reinforce your natural inclination to want to find out what, if anything, happened, and to control future events relating to the problem that has surfaced.

Let's assume you conclude that an internal investigation must be conducted. The path of self-investigation is not an easy one, and a number of critical decisions will have to be made fairly quickly. These decisions include selecting someone to conduct the investigation, determining how to structure the investigation, clarifying the corporation's intentions with regard to disclosure, and assessing the legal and business implications of making a voluntary disclosure. These are difficult decisions which should be addressed before you start down the internal investigation/voluntary disclosure path. Failure to address these issues and to take appropriate precautions before an investigation is commenced can create circumstances benefitting potential litigation adversaries and can harm both your corporation's reputation and its financial interests.

I. Who Should Conduct the Investigation?

After concluding that an internal investigation is necessary or prudent, the first step is to select an investigator. Undoubtedly, there are senior management personnel who know the subsidiary, are familiar with its government contracting, and are capable of finding out what happened. Auditors from your corporate audit department might also be considered for the task. Nevertheless, if the alleged or suspected conduct is likely to raise significant legal issues, you should ask your law department or outside counsel to conduct the investigation.

Attorneys are best suited to conduct the investigation because they are likely to be more sensitive to obscure but significant legal issues which can arise during an internal investigation. Furthermore, there is a compelling

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3. A number of difficult ancillary problems requiring legal judgments can arise during an internal investigation. For example, if individual employees appear to be acting illegally and in a manner inconsistent with established corporate policies, the employees may require separate counsel, thus complicating the investigation. Document preservation obligations may arise requiring modification of the corporation's "records retention" policies. And, as discussed in this Article, insensitivity to confidentiality and other requirements can lead to the waiver of legal privileges that might otherwise serve to protect documents developed during the investigation from discovery by third parties.
practical reason why the investigation should not be conducted by management personnel: It is highly unlikely that documents generated during an investigation conducted by managerial personnel can be shielded from discovery by third parties.4

The general rule in federal civil litigation is that a party may obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."5 Typically, the discovery rule is applied broadly.6 Privileges that might be asserted to block discovery are few in number and are narrowly construed.7 Unfortunately, there is no generally recognized privilege that will protect the fruits of an internal investigation conducted by management. Commentators have argued for the creation of a privilege to protect self-critical corporate analyses,8 and some courts have denied discovery requests for reports of internal investigations, partly to avoid discouraging such investigations.9 Notwithstanding the praise some courts have bestowed on corporations that have conducted internal investigations, however, it is unlikely that a corporation will be able to resist successfully the discovery of materials generated during the course of

4. See In re Grand Jury Subpoena, 599 F.2d 504, 510-11 (2d Cir. 1979) (materials prepared during an internal investigation conducted by management not protected); cf. In re LTV Sec. Litig., 89 F.R.D. 595 (N.D. Tex. 1981) (protection afforded to documents submitted to or prepared by a special officer that had been retained by the corporation to implement an SEC consent decree).

5. FED. R. CIV. P. 26(b)(1) (emphasis added).


7. Privileges are narrowly construed because they are viewed as impeding the "full and free discovery of the truth." Weil v. Investment/Indicators, Research & Management, 647 F.2d 18, 24 (9th Cir. 1981). As a consequence, they are "strictly confined within the narrowest possible limits." In re Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979) (citing VIII J. WIGMORE, EVIDENCE § 2291, at 554 (McNaughton rev. 1961)); accord United States v. Nixon, 418 U.S. 683, 710 (1974); In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984); Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977).


an internal investigation, unless the attorney-client privilege or the attorney work product doctrine applies. Neither will apply unless the investigation is conducted or supervised by attorneys.

II. THE APPLICABILITY OF THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE TO INTERNAL CORPORATE INVESTIGATIONS

The discussion below addresses the practical and other implications of voluntary disclosures, including the extent to which such disclosures may "waive" the attorney-client privilege and the work product doctrine. The elements of the attorney-client and work product privileges have been exhaustively discussed in various articles and monographs. Therefore, for present purposes, a brief review of the character and elements of each privilege should suffice.

The attorney-client privilege serves an important public purpose. It encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice." The protection provided by the privilege is "absolute." No showing of need or hardship by parties seeking discovery of documents protected by the privilege will be sufficient to compel disclosure.

The elements of the attorney-client privilege were summarized by Judge Wyzanski in United States v. United Shoe Machinery Corp.:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or

10. See infra discussion in Part V.
11. An excellent general discussion of both privileges and the relevant case law is found in Epstein & Martin, The Attorney-Client Privilege and the Work Product Doctrine, a Project of the Trial Evidence Committee of the Section of Litigation of the American Bar Association (2d ed. 1989) [hereinafter ABA Privilege Monograph].
13. See Meredith, 572 F.2d at 601-02; cf. Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 547 (D.D.C. 1970) ("[A]ttorney-client privilege has such an effect on the full disclosure of the truth that it must be narrowly construed.").
tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.\(^{14}\)

The work product doctrine, first articulated by the United States Supreme Court in *Hickman v. Taylor*,\(^ {15}\) serves a different but equally important purpose. It is designed to balance the needs of the adversary system by preserving the privacy that an attorney needs to prepare for trial. As the Court noted in *Hickman*, an attorney's work product should be protected from discovery by third parties because:

[M]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.\(^ {16}\)

The work product doctrine is now codified in Rule 26 of the Federal Rules of Civil Procedure. Subsection (b)(3) of the rule provides in part:

[A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by any other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.\(^ {17}\)

There is no longer any question as to the availability of these privileges to corporations. That issue was conclusively resolved by the Supreme Court in *Upjohn Co. v. United States*.\(^ {18}\) Complications can arise, however, when a

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15. 329 U.S. 495, 500 (1947).
16. Id. at 511; accord *Upjohn Co.*, 449 U.S. at 398; United States v. Nobles, 422 U.S. 225, 236-40 (1975); *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (“work product privilege protects both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share”); *Handgards, Inc.*, 413 F. Supp. at 930 (doctrine “is aimed at protecting the effectiveness of a lawyer's trial preparations”).
Voluntary Disclosures

corporation attempts to invoke the privileges. As noted previously, neither privilege will apply if managerial personnel conduct the investigation. Similarly, materials generated during an investigation conducted by house counsel will not be protected if the record reveals that the investigation was conducted primarily for "business" reasons. As the United States Court of Appeals for the Second Circuit succinctly stated in In Re Grand Jury Subpoena, the participation of a corporation's general counsel in an investigation "does not automatically cloak the investigation with legal garb." This case and others recognize that house counsel are frequently called upon to provide business as well as legal advice. While courts will protect materials prepared by house counsel for the purpose of providing legal advice to management, special care is required in structuring investigations and in determining how and with whom the results of the investigation will be shared.

To avoid complications that may be encountered when house counsel conduct an internal investigation, and to increase the likelihood that the attorney-client and work product privileges will apply, you may wish to retain outside counsel to conduct the investigation. Apart from privilege considerations, there are several other reasons why a corporation may want to turn to outside counsel. Many large law firms have had considerable experience in conducting such investigations. In addition, outside counsel may also be more familiar with the requirements and expectations of the federal agency to which any disclosure will have to be made. The credibility of the internal investigation may also be enhanced if the agency is concerned with the ability of house counsel to conduct an impartial, objective investigation, particularly one which may focus on the conduct of corporate officers or senior managers.

19. See supra notes 3-4 and accompanying text.
21. 599 F.2d 504, 511 (2d Cir. 1979)
22. In Upjohn Co., the Court protected documents generated during an internal investigation conducted by the corporation's General Counsel from discovery by the Internal Revenue Service even though the corporation had filed a report with the SEC disclosing questionable payments to foreign officials. The record established that Upjohn's management asked its General Counsel to conduct the investigation to provide legal advice to management. Upjohn, 449 U.S. at 394. Equally important, strict confidentiality requirements consistent with maintenance of the privilege were maintained throughout the investigation. Id. at 395.
23. In In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982), the court rejected a corporation's claim of privilege because the court found that the internal investigation conducted by the corporation's legal department had been intended, in part, to influence the opinion of underwriters and auditors with respect to a public offering. Id. at 488-89.
Although retaining outside counsel may increase the likelihood that the attorney-client and work product privileges will apply, there is no iron-clad guarantee that documents prepared by an attorney who is not employed by the corporation will be protected from discovery by third parties. In Osterneck v. E. T. Barwick Industries, for example, the court permitted discovery of an internal investigation report prepared for Barwick Industries and the SEC by outside counsel because the attorneys who conducted the investigation and created the report “were employed not for their legal acumen but for their skill as investigators.”

Further, in In re Sealed Case, the United States Court of Appeals for the District of Columbia Circuit found an implied waiver of the attorney-client and work product privileges when the court became convinced that the investigation report, although prepared by attorneys, did not constitute a full and complete disclosure by the corporation.

III. STRUCTURING THE INVESTIGATION TO MAKE THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES APPLICABLE

Privilege issues tend to be fact specific and, as a consequence, are generally decided on a case-by-case basis. As a practical matter, this means that considerable care should be exercised in structuring the investigation to increase the probability that a court, if confronted with the issue, will conclude that one or both privileges apply.

For the reasons mentioned above, a corporation may enhance its chances of invoking successfully the attorney-client and work product privileges if outside counsel conduct the investigation. Regardless of whether outside counsel or house counsel conduct the investigation, management's authorization to proceed with the investigation should be reduced to writing. The authorization should emphasize that management is seeking legal advice and that attorneys have been asked to conduct the investigation to provide such advice. All communications between counsel and management relating to

24. 82 F.R.D. 81, 85 (N.D. Ga. 1979). In reaching its conclusion, the court noted that the two hundred plus page report prepared by counsel contained only one "legal recommendation." Id. at 86.


the investigation should be labeled "Attorney-Client Communication" and should be closely held to avoid inadvertent waiver of the privilege.\textsuperscript{27} To reinforce the privilege, attorneys interviewing corporate employees should advise each employee that the investigation is being conducted to enable counsel to provide legal advice to management. All interview memoranda should reflect this advice. Similarly, questionnaires or written requests for information or data directed to corporate personnel should indicate that the investigation is being conducted so that counsel can provide legal advice to management. The bottom line is clear. Counsel conducting the investigation should take advantage of every opportunity to create a paper trail supporting applicability of the privileges.

Increasingly, lawyers conducting internal investigations need the help of non-attorneys. Paralegals may assist attorneys in fact gathering and document collection. Auditors, accountants, or other professionals with financial expertise are frequently needed to conduct a full and complete investigation. Anyone other than an attorney who will be assisting counsel, particularly non-legal corporate personnel, should be required to sign a confidentiality agreement. Among other things, the agreement should explicitly state that the person signing the agreement has been recruited to assist the attorneys charged with responsibility for conducting the investigation.\textsuperscript{28} The agreement should also impose confidentiality restrictions consistent with maintenance of the privilege.

As long as the record clearly shows that non-attorneys were not conducting an independent inquiry, the involvement of non-attorneys should not jeopardize application of the work product doctrine to materials generated during the internal investigation. Most courts have been willing to protect documents authored by non-attorneys working under the supervision of attorneys conducting an investigation.\textsuperscript{29}

\textsuperscript{27} Confidentiality must be maintained to avoid a waiver of the attorney-client privilege. \textit{See, e.g., In re Sealed Case}, 676 F.2d 793, 818 (D.C. Cir. 1982) ("voluntary breach of confidence or selective disclosure" to obtain tactical advantage will waive the privilege); United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982); \textit{see also} United States v. Cote, 456 F.2d 142, 145 (8th Cir. 1972); Teachers Ins. and Annuity Ass'n v. Shamrock Broadcasting Co., 521 F. Supp. 638, 641 (S.D.N.Y. 1981).

\textsuperscript{28} \textit{See, e.g., In re Horowitz}, 482 F.2d 72, 81 (2d Cir.), \textit{cert. denied}, 414 U.S. 867 (1973) ("statements to the accountant . . . unrelated to the seeking of legal advice" held not privileged); \textit{Cote}, 456 F.2d at 144; United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 794 (D. Del. 1954).

The key to successful invocation of the work product doctrine is the ability of the corporation to demonstrate that counsel or persons assisting counsel prepared the documents "with an eye toward litigation." Litigation need not have commenced, but it must be clear that the investigation was initiated in contemplation of litigation. Clearly the most effective way to guard against inadvertent loss of the protection offered by the work product doctrine is to ensure that management's written authorization to proceed with the investigation identifies, as specifically as possible, the nature of the litigation that is anticipated. The authorization should also state management's expectation that attorneys conducting the investigation should begin identifying defenses to issues that may be raised if litigation does result.

Unlike the attorney-client privilege, the work product doctrine provides only "qualified" protection against discovery initiatives. Thus, a litigation opponent may be able to discover certain documents prepared by or for attorneys if the opponent can demonstrate a substantial need for the documents and an inability to obtain equivalent materials by other means. As a consequence, all documents prepared during an internal investigation should be drafted with a view toward minimizing this risk.

The work product doctrine has been invoked frequently and successfully to shield from discovery "opinion work product," interview notes, and other documents that might reveal an attorney's mental processes. Judicial deci-

30. Hickman v. Taylor, 329 U.S. 495, 511 (1947). Courts have interpreted "litigation" as including various types of adversarial proceedings. See, e.g., Natta v. Zletz, 418 F.2d 633, 635 (7th Cir. 1969) (administrative proceedings considered to be litigation); In re Conticommodity Servs., Inc., Sec. Litig., 123 F.R.D. 574, 576-77 (N.D. Ill. 1988) (The court rejected the argument that "on a general proposition . . . claims for refund are prepared in anticipation of litigation" but accepted the refund claim as litigation because "the customers have provided evidence, unrebuted by Conti, that their claims were filed for the purpose of moving their cases from the Tax Court to this court."); Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1051 (D. Del. 1985) (proceedings before the Board of Patent Interferences considered to be litigation).


32. Because the corporation, in support of a voluntary disclosure, may have to provide to the government agency the report prepared by counsel, the report should not discuss issues pertaining to possible future litigation.

33. In re International Systems & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982); Grand Jury Investigation, 599 F.2d at 1231-32; Xerox Corp. v. IBM Corp., 64 F.R.D. 367, 382 (S.D.N.Y. 1974).

34. See, e.g., Grand Jury Investigation, 599 F.2d at 1231; In re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973); In re Grand Jury Investigation, 412 F. Supp. 943, 949 (E.D. Pa. 1976).
sions at every level clearly indicate that a much stronger showing of necessity and unavailability is required before opinion work product can be discovered. Some courts have even held that no showing of hardship or need will be sufficient to warrant the discovery of opinion work product. Because documents that include an attorney's mental impressions or professional judgments are much more likely to be protected than documents that are largely factual, the lesson is clear. Whenever possible, documents generated by or for attorneys during the course of an internal investigation should include and reflect impressions and judgments. All such documents should also be stamped or labeled “Attorney Work Product” and handled in a confidential manner consistent with an intent to maintain and assert the privilege.

To increase the likelihood that the corporation will be able to invoke successfully the attorney-client privilege and the work product doctrine in the face of discovery requests by third parties, the following steps should be taken:

1. Management should draft a clear written authorization directing counsel to undertake the investigation for the purpose of providing legal advice to management.
2. Management’s written authorization should identify and express appropriate concern with anticipated litigation and should explicitly authorize counsel to explore potential litigation issues and defenses.
3. The written authorization should clearly state that counsel may retain the services of auditors, accountants, or other non-attorneys who may be needed to assist counsel with the investigation.
4. Counsel should stamp or label all documents created during the investigation “Attorney-Client Communication” or “Attorney Work

37. "As a practical matter, the presence of an attorney's mental impressions in the document operates to make the document less readily discoverable and raises the quantum of 'substantial need' and 'undue hardship' that must be shown to obtain the document." ABA Privilege Monograph, supra note 11, at 142.
38. An appropriate level of “confidentiality” is essential to the maintenance of the work product privilege. See In re Grand Jury Proceedings, 727 F.2d 1352, 1356-57 (4th Cir. 1984); United States v. Cote, 456 F.2d 142, 144-45 (8th Cir. 1972). The voluntary disclosure of work product materials to an adversary, but not necessarily to another third party such as a government agency, may waive the privilege. See United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980); American Standard Inc. v. Bendix Corp., 71 F.R.D. 443, 446-47 (W.D. Mo. 1976).
Product,” file these documents separately, and handle them in a way that will protect the applicable privileges against contentions that the privileges have been waived because of a failure to maintain confidentiality.

5. All non-attorneys assisting counsel with the investigation should sign appropriate confidentiality agreements.

6. Care should be taken throughout the investigation to draft documents in a manner supporting and reinforcing the applicability of the privileges. For example, interview memoranda should include the views, impressions, and opinions of the attorneys who conduct the interviews.

7. Counsel should advise everyone involved in the investigation concerning the need for confidentiality and should caution those involved about conduct that could lead to the waiver of one or both of the privileges.

IV. VOLUNTARY DISCLOSURES AND VOLUNTARY DISCLOSURE PROGRAMS

Taking our scenario a step further, let us assume that outside counsel were retained to conduct an investigation relating to the subsidiary’s dealings with the indicted agency official. Assume further that counsel have completed the investigation and have provided management with a report summarizing counsel’s findings, analyzing the legal implications of the situation, and discussing various legal recommendations. Overall, the picture is not pretty. The report reveals that serious improprieties, including bribes, kickbacks, and other improper conduct, influenced the awarding of several contracts to the subsidiary.

At this point, the corporation has several options. Management could fire those involved, strengthen its control systems, and take other internal actions to ensure that the improper conduct has ceased. A response limited to internal corrective action, however, is fraught with legal difficulty. More-

39. Disclosure of the results of an internal investigation revealing corporate misconduct may be required by federal securities laws. See, e.g., United States v. Dole, 601 F. Supp. 430 (E.D.N.Y. 1984); SEC v. Joseph Schlitz Brewing Co., 452 F. Supp. 824 (E.D. Wis. 1978). Although a failure to report knowledge of a felony is not, without more, a crime, any act that might be construed as an affirmative concealment could be a misprision of a felony under 18 U.S.C. § 4 (1988). United States v. Ciambrone, 750 F.2d 1416, 1417 (9th Cir. 1984); United States v. Hodges, 566 F.2d 674, 675 (9th Cir. 1977); United States v. King, 402 F.2d 694, 695 (9th Cir. 1968). Other criminal statutes, including the Criminal False Fictitious or Fraudulent Claims Act, 18 U.S.C. § 287 (1988), and the Criminal Fraud and False Statements Act, 18 U.S.C. § 1001 (1988), can also pose threats of criminal liability if a corporation adopts a business as usual approach with respect to government contracts that have been tainted by fraud.
over, a major corporation that discovers significant wrongdoing during the course of an internal investigation and fails to report the wrongdoing runs a terrible public relations risk, particularly if the wrongdoing has public interest implications. The last thing any corporate executive needs is an excited media in pursuit of a story headlined “Management Coverup.”

Another option is to make some sort of a “voluntary disclosure” to the affected federal agency and attempt to work out a solution to the corporation’s problems before the agency or the Department of Justice commences litigation. As a practical matter, it may be the corporation’s only viable option. Nevertheless, the advantages and disadvantages of a voluntary disclosure should be weighed carefully because any disclosure of illegal activity will expose the corporation to civil and criminal penalties. Management will, of course, want to satisfy itself that making a disclosure is consistent with its fiduciary responsibilities. At the same time, the corporation will want to receive some benefits in return for its voluntary disclosure and cooperation.

If the affected federal agency does not have a formal “voluntary disclosure” program, you may be writing on a relatively clean slate. This situation may work to the corporation’s advantage, however, because there may be more room for negotiation with the agency, with respect to both the best means of resolving issues raised by the investigation and important ancillary matters, such as the agency’s willingness to protect any voluntary report that might be filed with the agency from third parties.

Formal voluntary disclosure programs are a fairly recent phenomenon. In the mid-1970's, when it became apparent that many American corporations had made questionable payments to facilitate business transactions in foreign countries, the SEC established a program encouraging corporations to investigate such payments and report the results to the SEC. Typically, after conducting an internal investigation, the corporation would file a report with the SEC describing in general terms the investigation conducted, management’s knowledge of any questionable payments, and the impact of the corporation’s decision to abandon the payment practice. The nature of the corporation’s voluntary disclosure was sometimes described as “generic”:

the disclosures were somewhat general and, for diplomatic reasons, the identities of the recipients of the payments were not disclosed.41

The SEC’s voluntary disclosure program spared the Commission the need to conduct time-consuming and expensive investigations. The SEC provided significant incentives to encourage corporations to participate in the program. In exchange for making a generic voluntary disclosure and a commitment to abandon the practice, the SEC relieved corporations of the burden and expense of a formal SEC investigation and possible future litigation. The Commission also promised “leniency” to corporations participating in the program; more than 350 major corporations ultimately made voluntary disclosures to the SEC.42

More recently, the Department of Defense (DOD or Department) established a sweeping voluntary disclosure program. In June 1986, a Blue Ribbon Presidential Commission on Defense Management chaired by David Packard recommended that DOD place greater emphasis on contractor self-governance.43 In July, in response to the “Packard Commission” Report, DOD announced the adoption of policies to encourage DOD contractors to disclose voluntarily problems involving contractual relationships with the Department.44

DOD’s program is popular with defense contractors.45 The program has become quite formalized, to the point where the Department has developed a standard voluntary disclosure agreement (XYZ Agreement).46 Among other things, the agreement emphasizes that any corporate disclosure is voluntary. A corporation making a disclosure is not required to conduct an

41. See Discovery, supra note 40, at 1167.
42. See In re Sealed Case, 676 F.2d at 801; Coffee, Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response, 63 Va. L. Rev. 1099, 1102-03, 1116-17 (1977).
internal investigation or to file a formal report with DOD. The report must describe the investigation conducted, identify files, documents, and records reviewed, identify all individuals interviewed, summarize any supporting audit activity, and describe the facts that were found. The XYZ Agreement makes it clear that any report or other information disclosed by the corporation is subject to verification, audit, and investigation by the Department.  

There is a significant incentive for government contractors with DOD contractual problems to participate in the program, because a felony conviction can result in debarment for up to three years. Although DOD has reserved the right to refer appropriate matters to the Department of Justice for investigation and civil or criminal prosecution, DOD has promised that any determinations it might make with respect to suspension or debarment will consider the “contractor's achievements in ensuring corporate integrity.” Not surprisingly, DOD views participation in its voluntary disclosure program as one indication of integrity and meaningful self-governance.

If the agency has a formal voluntary disclosure program in place, the corporation should carefully review the rules and regulations governing the program before making any disclosure. Such rules and regulations may control

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47. XYZ Agreement, supra note 46, Part A, para. 1.
48. The corporation's interests will be severely prejudiced if the agency concludes that the corporation failed to conduct, or to completely and accurately report on, any investigation initiated. Moreover, if a court finds that the corporation's voluntary disclosure was selective or was for the purpose of furthering some improper scheme, the court will imply a waiver of any otherwise applicable privileges. In re Sealed Case, 676 F.2d 793, 824-25 (D.C. Cir. 1982); In re John Doe Corp., 675 F.2d 482, 491 (2d Cir. 1982); In re Doe, 551 F.2d 899 (2d Cir. 1977); 49. XYZ Agreement, supra note 46, Part A, paras. 3 and 5. 48 C.F.R. § 209.406-4 (1989).
50. XYZ Agreement, supra note 46, Part A, paras. 7-8. The Department of Justice has provided U.S. Attorneys with Justice Department Guidelines regarding DOD's voluntary disclosure program. See Memorandum from William C. Hendricks III, Chief, Fraud Section, Criminal Division, to United States Attorneys (Jul. 17, 1987), VOLUNTARY DISCLOSURE, supra note 44, Exhibit 9.
52. As stated by Deputy Secretary of Defense Taft, it is the DOD's view that: early voluntary disclosure, coupled with full cooperation and complete access to necessary records, are strong indications of an attitude of contractor integrity even in the wake of disclosures of potential criminal liability. We will consider such cooperation as an important factor in any decisions that the Department takes in the matter. VOLUNTARY DISCLOSURE, supra note 44, Exhibit 3.
such critical issues as: (1) the extent of the disclosure required; (2) whether or not the corporation will have to provide or make available documents, including counsel's final report to management, to the agency; and (3) the extent to which the agency may share copies of the report and supporting documents with other agencies or third parties. These and other issues should be thoroughly discussed with the agency before any voluntary disclosure is made, particularly if corporate interests could be harmed if documents prepared during the investigation were to fall into the wrong hands.

V. THE CONSEQUENCES OF MAKING A VOLUNTARY DISCLOSURE

When a corporation elects to make a voluntary disclosure to a federal agency it is likely to be the beginning of a protracted process. The obvious purpose of the disclosure is to facilitate the resolution of issues identified during the investigation. Third parties, however, may also have an interest in the subject matter of the investigation as well as in documents created during the investigation. As a consequence, a corporation must give careful consideration to all possible effects of a disclosure, including those that reach beyond the corporation's immediate relationship with the contracting agency.

A. Which Documents, if any, Will Have to be Provided to the Affected Federal Agency?

It is important to determine which documents generated during the corporation's internal investigation might have to be provided to the affected agency. Under DOD's voluntary disclosure program, a corporation can make a voluntary disclosure without providing the agency with a written report of the corporation's internal investigation. If counsel has prepared a report for management, however, it is likely that the agency will request a copy. The agency may insist upon receiving audit reports or other documents pertaining to the investigation as well.

In establishing their respective voluntary disclosure programs, both the SEC and DOD reserved the right to ask for additional information from

55. Because the agency will likely want a copy of the report prepared for management, care must be exercised in drafting the report. To avoid waiver of privilege issues, the report must provide a full and complete description of the irregularities identified during the investigation. It may be possible, however, to restrict details that could be particularly damaging if discovered by third parties to an internal report prepared by counsel in anticipation of possible future litigation. The agency should have no need for such attorney work product if the report submitted by the corporation is complete and subject to independent verification. Nevertheless, the corporation should thoroughly discuss the wisdom of preparing a separate report in anticipation of litigation.

56. See XYZ Agreement, supra note 46, Part A, para. 5(A)(2).
companies making voluntary disclosures. In the SEC's case, the Commission insisted on a right of access to all materials underlying the internal investigation. As the court noted in In re Sealed Case: 57

SEC access to corporate records concerning the matters under investigation was a logical, even necessary, feature of the voluntary disclosure program. No corporation could have reasonably expected to submit a report to the SEC and receive lenient treatment in return unless the SEC could check the accuracy of the report.

Similarly, a voluntary disclosure to DOD is subject to verification and audit, 58 and the standard XYZ Agreement preserves the Department's right to request supplemental information. 59 A corporation may decline to provide additional information, but such a declination may adversely affect the government's assessment of the corporation's willingness to cooperate. 60

For the reasons discussed in Part VI, documents that are physically provided to an agency are much more likely to find their way into the hands of third parties than those retained by the corporation. As a consequence, before the corporation makes a voluntary disclosure and provides documents to the agency, an attempt should be made to limit the number of documents that have to be provided to the agency.

B. The Need for a Voluntary Disclosure Agreement

Once the corporation decides voluntarily to disclose information, the first step is to discuss the corporation's intent with the agency and to negotiate a voluntary disclosure agreement. The agreement should specify which documents, if any, the corporation will have to provide in support of its voluntary disclosure. The corporation should try to persuade agency officials that a report of the investigation prepared by the corporation or by counsel on behalf of the corporation should be sufficient to meet the agency's needs. The agency is likely to insist on a right to ask for supplemental information or additional documents. While a provision to this effect is reasonable, an attempt should be made to resist open-ended commitments that could obligate

57. 676 F.2d 793, 819 (D.C. Cir. 1982).
58. XYZ Agreement, supra note 46, Part A, para. 9.
59. Id. Part A, para. 5(B). If the agency concludes that it needs to examine other documents, in addition to the investigation report, to verify the accuracy of representations made, the corporation should grant the agency access to the necessary documents rather than provide copies. Obviously, third parties may find it more difficult to obtain copies of documents that are not within the agency's possession, custody, or control.
60. Id. at Part A, para. 5(C).
the corporation to provide or to make available to the agency all documents
generated during the internal investigation.\textsuperscript{61}

The voluntary disclosure agreement should also clearly state what the
agency's response will be if another agency or a private party attempts to
obtain copies of the investigation report or any other documents provided to
the agency. The agency should be willing to resist requests for such docu-
ments under the Freedom of Information Act (FOIA).\textsuperscript{62} It should also be
willing to provide the corporation with advance notice before furnishing a
copy of the report or other documents to another federal agency.\textsuperscript{63}

Language preserving the applicability of the attorney-client and work
product privileges is critical and should be included in the voluntary disclo-
sure agreement. For example, the agreement should include provisions:

1. reflecting the corporation's belief that the attorney-client and
work product privileges apply to all documents generated during the
course of the internal investigation;

2. reserving to the corporation the right to assert the privileges in
subsequent proceedings involving the agency or third parties;\textsuperscript{64}

3. providing that the production of the report and other documents
pertaining to the corporation's internal investigation to the agency will
not constitute a waiver of any applicable privilege with respect to third
parties;\textsuperscript{65}

\textsuperscript{61} At least one court has suggested that "there is no significance to the distinction be-
tween full access and physical possession" regarding disclosure of materials to an agency. \textit{In
re Subpoenas Duces Tecum}, 738 F.2d 1367, 1373 (D.C. Cir. 1984). If that is the case, a
litigation opponent will have broadened opportunities to argue waiver of privilege.

\textsuperscript{62} 5 U.S.C. § 552 (1988); see XYZ Agreement, \textit{supra} note 46, Part C, para. 1; see \textit{also}
ISC Group, Inc. v. United States Dep't of Defense, 35 Cont. Cas. Fed. (CCH) ¶ 75,667 (D.C.
Cir. May 22, 1989) (discussed in Part VI(B)).

\textsuperscript{63} Some agencies have a policy of offering qualified confidentiality. The Federal Trade
Commission generally tries to provide ten days notice before disclosing information. \textit{See}, e.g.,

\textsuperscript{64} DOD's XYZ Agreement specifically acknowledges that "the attorney-client privilege
and the attorney work product privilege may attach to certain information, documents, com-
munications, and notes, memoranda, recordings, or detailed descriptions of interviews,
whether or not voluntarily submitted in connection with this disclosure or in connection with
the submission of any of the supplemental information." \textit{XYZ Agreement, supra} note 46, Part
A, para. 6. At the same time, the government "reserves the right to agree or disagree with the
asserted applicability" of any privilege. \textit{Id}. Thus, the practical effect of the XYZ Agreement
is to defer disputes over privilege to a later date.

\textsuperscript{65} A court, depending on the facts before it, could reach a different conclusion. A
number of cases, however, have emphasized the importance of continuing to assert the privi-
lege to avoid an implied waiver. \textit{See} Fox v. Cal. Sierra Fin. Servs., 120 F.R.D. 520 (N.D. Cal.
1988); Teachers Ins. and Annuity Ass'n v. Shamrock Broadcasting Co., 521 F. Supp. 638
4. requiring the agency to file and otherwise handle the documents in a manner that is consistent with the corporation’s belief that the attorney-client and work product privileges apply to corporate documents held by the agency; and
5. providing for the return of the documents to the corporation when the agency has completed its review and the underlying issues are resolved. If the agency is unwilling to provide reasonable protection for the corporation’s report, or is insensitive to the corporation’s need to include language that may prevent a waiver of the attorney-client and work product privileges, the corporation may wish to reconsider its options.

VI. The Impact of Making a Voluntary Disclosure on the Ability of Third Parties to Gain Access to Documents Generated During the Course of the Investigation

Before making a voluntary disclosure and providing a report to a federal agency, the corporation should carefully consider the impact disclosure is likely to have on the corporation’s ability to protect information developed during the investigation from (1) other federal and state agencies, (2) the Congress, and (3) competitors, employees, and other private parties. The corporation must also determine whether disclosure risks exposing only those documents filed with the agency, or additional materials associated with the investigation, including internal correspondence, questionnaires, interview memoranda, and Executive Committee minutes reflecting discussions with counsel relative to the investigation. The resolution of these uncertainties will be influenced by a number of factors, including the rules and regulations applicable to the agency’s voluntary disclosure program, the terms and conditions of the voluntary disclosure agreement, statutory constraints, the agency’s rules regarding FOIA requests, and the rapidly evolving law with respect to “waiver” of privilege.

A. The Chances that Materials Provided to the Agency Will Be Made Available to Other Agencies or to Congress

A document provided to a federal agency under a voluntary disclosure may be disseminated to other federal agencies. DOD’s XYZ Agreement, for example, specifically reserves to DOD the right to “transfer documents provided by the corporation to any department or agency within the Executive

66. See XYZ Agreement, supra note 46, Part C, para. 3.
Branch if the information relates to matters within the organization's jurisdiction.\textsuperscript{67} Moreover, many federal agencies, as a matter of policy or comity, will share documents with other federal agencies\textsuperscript{68} and sometimes with state agencies as well.\textsuperscript{69} In addition, a number of federal agencies are subject to statutes that mandate information sharing with other agencies.\textsuperscript{70} Congressional committees may also be able to obtain copies of the report and other documents submitted to the agency.\textsuperscript{71}

Because documents provided to a federal agency are frequently made available to other agencies, a corporation making a voluntary disclosure should seek assurances from the agency that none of the corporation's documents will be released, even to other federal agencies or Congress, unless the agency provides advance notice to the corporation.\textsuperscript{72} At the very least, advance notice affords a corporation the opportunity to seek appropriate commitments and assurances from the agency receiving copies of the documents and, if such assurances and commitments are not forthcoming, to seek judicial relief.\textsuperscript{73} Without advance notice, the risk of leaks or disclosures in response to FOIA requests increases. Equally important, secondary

\textsuperscript{67} Id. Part C, para. 2.


\textsuperscript{72} See generally FTC v. Texaco Inc., 555 F.2d 862, 883-85 (D.C. Cir. 1977) (en banc) (FTC required to give corporation 10 days notice before disclosing documents which the company designated as confidential); FTC v. Anderson, 442 F. Supp. 1118 (D.D.C. 1977) (FTC required to provide 10 days notice, or such notice which is feasible under the circumstances, before disclosing corporate documents).

\textsuperscript{73} See supra note 70.
recipients, including other federal agencies, could use the corporation’s documents for some inappropriate purpose. In the absence of notice, the corporation would not have an opportunity either to object or to prepare itself for involvement in some other proceeding.

B. The Chances That Nongovernmental Third Parties Will be Able to Obtain Copies of Documents Generated During the Course of the Internal Investigation

This issue involves two categories of documents: those voluntarily disclosed to the agency and those generated during the internal investigation, but not provided to the agency.

The first category, those provided to the agency, raises practical as well as legal issues. As discussed above, the risk that the corporation’s report and supporting documents may be leaked to a third party increases if the affected agency provides copies to other agencies or to Congress. As a practical matter, once documents are handed over to a federal agency, effective control over the material is lost. Nevertheless, the corporation can minimize the risk of disclosure through leaks or inadvertence, if the voluntary disclosure agreement includes provisions that will: (1) sensitize the agency to the corporation’s concerns; (2) require the agency to file and otherwise handle the documents in a manner consistent with their confidential nature; and (3) require the agency to provide the corporation with reasonable notice before the documents are shared with other agencies.

The corporation should also be prepared to confront the possibility that an interested third party may try to obtain the report or other documents by making a FOIA request. Before making a voluntary disclosure, the agency’s rules and regulations relating to FOIA requests should be reviewed. Some agencies broadly construe their disclosure obligations under FOIA. Others take a more restrictive view. In any event, the voluntary disclosure agreement should address this important issue. The agreement should reflect, as the current DOD agreement does, the agency’s willingness to treat information obtained pursuant to the agreement as confidential. The agreement should also state, as explicitly as possible, the agency’s agreement not to release the report or supporting documents to third parties pursuant to a FOIA request. At the very least, the agreement should provide that, if the

74. The XYZ Agreement provides that “[t]o the extent permitted by law and regulations, documents] will not be released by the Department of Defense to the public pursuant to a Freedom of Information Act (FOIA) request.” XYZ Agreement, supra note 46, Part C, para. 1.
agency is required to comply with a FOIA request for the documents, the agency will provide advance notice to the corporation.\footnote{75}{DOD's rules provide for prior notice. 32 C.F.R. \S 286.27(h)(1)(1988); see also Exec. Order No. 12,600, 3 C.F.R. 235 (1989), reprinted in 5 U.S.C. \S 552 at 447 (1988) (requiring all executive departments and agencies subject to FOIA to make good faith efforts to provide advance notice of any proposed disclosure of confidential commercial information). If necessary, the corporation can file suit to block a proposed release under FOIA. See Chrysler Corp. v. Brown, 441 U.S. 281, 285, 317-18 (1979); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 337 (D.C. Cir. 1989); CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1133-34 n.1 (D.C. Cir. 1987).}

There are several additional precautions that the corporation should take to minimize the likelihood that documents provided to a federal agency pursuant to a voluntary disclosure agreement will be disclosed pursuant to a FOIA request. Assuming there is a reasonable basis for doing so, the corporation should stamp the report itself and any supporting documents as follows:

This document contains commercial or financial information which is privileged and confidential and is protected from disclosure pursuant to 5 U.S.C. \S 552(b)(4). It also contains information compiled for law enforcement purposes and is protected from disclosure pursuant to 5 U.S.C. \S 552(b)(7)(A).

Subsequently, when the corporation provides documents to the agency, it should include a cover letter reminding the agency that the documents contain confidential, proprietary, and law enforcement information, and that the documents should not, in the corporation's view, be disclosed to third parties submitting FOIA requests.

A recent case decided by the United States District Court for the District of Columbia provides hope that FOIA will not prove to be a useful tool to third parties seeking access to reports of internal corporate investigations. In \textit{ISC Group, Inc. v. Department of Defense}, the court held that an internal investigation report voluntarily provided to DOD was exempt from disclosure under FOIA because the report contained confidential commercial or financial information within the meaning of section 552(b)(4).\footnote{76}{35 Cont. Cas. Fed. (CCH) \ ¶ 75,667 (D.C. Cir. May 22, 1989).} The court concluded that the report was "confidential" notwithstanding the corporation's disclosure to the Department of Defense because:

[T]he report at issue was submitted under DOD's voluntary disclosure program, which was adopted in 1986 to encourage defense contractors to establish a program of self-governance and voluntary disclosure . . . . Disclosure of information submitted under a confidentiality agreement could undermine the ability of the government to obtain such information. This would jeopardize the ef-
fectiveness of the voluntary disclosure program and the ability of DOD to police its contracts with private companies. From a broader perspective, disclosure of such information would raise serious questions about the integrity of the government in promising confidentiality to future submitters.  

The court also found the report exempt from disclosure pursuant to section 552(b)(7) because the agency was using the report for law enforcement purposes. The court explained:

[The] investigative report was prepared with the express intent to provide it to DOD [Inspector General] for use in investigating alleged criminal violations—to determine what had occurred and who was responsible. The report was compiled after DOD learned of the alleged cost mischarging, and it was prepared with the approval of DOD [Inspector General]. Further, the information in the report is being used to determine whether [the corporation] or others involved, should be prosecuted. In light of these circumstances, it is clear that the report was compiled for law enforcement purposes, despite the fact that it was prepared by a private company. To conclude otherwise would elevate form over substance and frustrate the purpose of the exemption.

If a third party is unable to obtain a copy of the report pursuant to a FOIA request or otherwise, it might try to obtain the denied information by filing suit against the corporation and pursuing discovery. In this situation, the third party will undoubtedly claim that the corporation's production of documents to the agency waived any privilege which might otherwise have protected the documents from discovery.

As a general rule, the corporation will be deemed to have waived the attorney-client privilege if a privileged communication is disclosed to persons not included in the privileged relationship. An intent to waive the privilege is not required. Once waived, the privilege is waived for all purposes. Disclosures may also waive the work product privilege, although some courts have been willing to recognize a "limited waiver," in which the privilege will be considered waived, but only with respect to the person to

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77. Id. at 82,672.
78. Id. at 82,673.
79. See In re Subpoenas Duces Tecum, 738 F.2d 1367, 1369-70 (D.C. Cir. 1984); Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981); United States v. American Tel. & Tel., 642 F.2d 1285, 1299 (D.C. Cir. 1980).
81. See, e.g., In re Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988); In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984); Permian Corp. 665 F.2d 1214, 1219 (D.C. Cir. 1981).
whom the disclosure was made. For example, MCI's willingness to share certain documents with the Department of Justice for possible use in an antitrust suit against AT&T did not preclude MCI from asserting the work product privilege against AT&T in another proceeding.\textsuperscript{82} As the court in \textit{United States v. AT&T} explained: "The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship . . . . A disclosure . . . not inconsistent with maintaining secrecy against opponents shall be allowed without waiver of the privilege."\textsuperscript{83} The "limited waiver" concept has also been embraced by some courts that have considered the impact on the attorney-client privilege of a disclosure voluntarily made to a federal agency following an internal investigation, even though the federal agency's interests were not the same as those of the corporation.

In \textit{Diversified Industries, Inc. v. Meredith}, the United States Court of Appeals for the Eighth Circuit held that documents provided voluntarily to the SEC were not discoverable by a party in subsequent litigation because:

As Diversified disclosed these documents in a separate and non-public SEC investigation, we conclude that only a limited waiver of the privilege occurred. To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.\textsuperscript{84}

Unfortunately, a number of other courts have expressly rejected \textit{Diversified Industries}' "limited waiver" approach.\textsuperscript{85} In \textit{Permian Corporation v. United States},\textsuperscript{86} the United States Court of Appeals for the District of Columbia Circuit held that the disclosure of certain attorney-client communications to the staff of the SEC waived the attorney-client privilege. The court stated, "[w]e believe that the attorney-client privilege should be available only at the traditional price: A litigant who wishes to assert confidentiality must maintain genuine confidentiality."\textsuperscript{87} The United States Court of Appeals for the

\textsuperscript{82} \textit{American Tel. & Tel.}, 642 F.2d at 1299.

\textsuperscript{83} \textit{Id.}; accord \textit{In re Sealed Case}, 676 F.2d 793, 809 (D.C. Cir. 1982); GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979); see also Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222-23 (4th Cir. 1976).

\textsuperscript{84} 572 F.2d 596 (8th Cir. 1978) (citations omitted).


\textsuperscript{86} 665 F.2d 1214, 1220 (D.C. Cir. 1981).

\textsuperscript{87} \textit{Id.} at 1222. In \textit{In re Sealed Case}, 676 F.2d 793, 823-24 (D.C. Cir. 1982), the D.C. Circuit reiterated its rejection of \textit{Diversified Industries}' "limited waiver" approach. The court's finding of an implied waiver in \textit{Sealed Case} was heavily influenced by its conclusion that the corporation had failed to make a full and complete disclosure and was thus trying to manipulate the privilege. \textit{Id.} at 824-25.
Fourth Circuit reached a similar conclusion in *In re Martin Marietta*.

In *Martin Marietta*, the court permitted a former employee indicted for mail fraud to discover audit papers, witness statements, administrative settlement agreement materials, and other documents associated with an internal investigation because the corporation had provided the documents or underlying data to the government during negotiations for an administrative settlement agreement. The court reasoned that, because the materials had been "published," they no longer enjoyed the protection afforded by the attorney-client privilege.

Other courts have suggested a "middle ground" between *Diversified Industries* and the conclusions reached by the Fourth Circuit and the D.C. Circuit in *Martin Marietta* and *Permian*. In *Teachers Insurance and Annuity Ass'n v. Shamrock Broadcasting Co.*, a third party attempted to compel Teachers to produce certain documents that the corporation had turned over to the SEC pursuant to a subpoena. After reviewing a number of cases, the court concluded that a voluntary disclosure of documents to an agency would waive the attorney-client privilege completely "unless the right to assert the privilege in subsequent proceedings is specifically reserved at the time disclosure is made."

In light of these cases, a corporation should not voluntarily provide documents pertaining to its internal investigation to a federal agency without attempting to include in the voluntary disclosure agreement acknowledgement of an intent to preserve the attorney-client and work product privileges, at least with respect to third parties. Failure to reach an agreement on this important point will greatly increase the likelihood that a litigation opponent will be able to acquire, through discovery, not only documents provided to the agency, but other documents generated during the internal investigation as well.

One other factor may significantly influence the decision of a court that is trying to determine whether to imply a waiver of privilege when the only breach of confidentiality has been the voluntary disclosure of a report and supporting documents to a federal agency. That factor is "fairness". If the court concludes that the corporation has not made a full and complete dis-

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88. 856 F.2d 619 (4th Cir. 1988).
89. Id. at 624.
91. Id. at 644-45; accord Fox v. Cal. Sierra Fin. Servs., 120 F.R.D. 520, 526 (N.D. Cal. 1988).
closure, or is otherwise trying to secure benefits associated with a voluntary disclosure while attempting to shield important facts or circumstances from the agency, the court is likely to find an implied waiver of privilege. As the District of Columbia Circuit emphasized in In re Sealed Case:

The lawyer's work product privilege was conceived by lawyers who succeeded in having lawyers-become-judges accept the idea. The basis for that acceptance was that, while honesty, full disclosure, and fair dealing are indispensable to justice, our judicial system—an adversary system, in most instances—should function more effectively where the work product of the lawyer is protected from unnecessary disclosure. But here, the agreement to cooperate with the SEC in determining the facts was intended to alter the adversary relationship. Together the parties were to seek the truth. Certainly, in such circumstances where lawyer and client attempt to manipulate the work product privilege as Company and its counsel have done in this case, the cause of justice compels disclosure, and a waiver is implied.

VII. CONCLUSION

For a host of legal, public policy, and self-governance reasons, internal corporate investigations are likely to become increasingly common. Corporations initiating internal investigations should carefully structure them to ensure that the attorney-client and work product privileges will protect from discovery documents generated during the course of such investigations. If an investigation reveals evidence of fraud or other serious wrongdoing, the corporation should consider making a voluntary disclosure to the appropriate government agency. Before any such disclosure is made, however, the consequences of disclosure, including the impact of disclosure on the ability of third parties to gain access to documents generated during the course of the internal investigation, should be carefully considered.

A voluntary disclosure to a federal agency will not necessarily result in a waiver of the attorney-client and work product privileges, at least with respect to third parties. Negotiating an acceptable voluntary disclosure agreement with the agency prior to disclosure, however, is critical. Terms and conditions should be included in the agreement to minimize the likelihood

93. See, e.g., In re Subpoenas Duces Tecum, 738 F.2d 1367, 1371 (D.C. Cir. 1984); In re John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) (claim of privilege is not consistent with selective disclosure); Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 688 (S.D.N.Y. 1980) ("limited waiver may be inappropriate where unfairness would result"); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("[a]n important consideration in assessing the issue of waiver is fairness").

94. 676 F.2d 793, 824-25 (D.C. Cir. 1982).
that the corporation’s voluntary disclosure will be deemed to be an express or implied waiver of the attorney-client or work product privilege. If a satisfactory agreement cannot be negotiated, third parties engaged in litigation with the corporation may be able to gain access not only to disclosed material, but to other documents generated during the course of the internal investigation as well.