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In-House Counsel's Evolving Duties: Statutory, Fiduciary and Ethical

Meeting Attorney Obligations During Investigations, Enforcement Actions, Litigation and Compliance Matters

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In-House Counsel's Evolving Duties: Statutory, Fiduciary and Ethical

Fulfilling Counsel's Obligations During Investigations, Regulatory Enforcement Actions, Litigation and Compliance Matters

May 19, 2011

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Program Scope

I. Introduction – The role of in-house counsel

II. Legal duties of in-house counsel

III. Minimizing liability

I. Introduction – The role of in-house counsel

A. Multiple roles and duties of in-house counsel

B. Counsel in trouble – cautionary case studies

A. Multiple roles and duties of in-house counsel

- Tension between roles as trusted advisor and gatekeeper
- Advocate for company client
- Compliance/gatekeeper function
  - Supervisor of employees (legal and non-legal)
- Responsibility for internal investigations
  - Determining whether to commence internal investigations
  - Conducting internal investigations
  - Communicating with government authorities
  - Producing documents to government authorities

A. Multiple roles and duties of in-house counsel (cont'd)

- Advisor on business transactions
- Ancillary responsibilities
  - Business advice
  - Accounting and internal audit matters
  - Public relations issues

B. Counsel in trouble – cautionary case studies

- U.S. v. Lauren Stevens Indictment, No. 10-cr-694-RWT (D. Md.)
  - GlaxoSmithKline in-house counsel indicted for obstructing an official proceeding, concealing and falsifying documents to influence a federal agency and making false statements to the FDA during its probe of off-label marketing of the drug Welbutrin.
    - The government alleged that Stevens wrongly represented to the FDA that a document production was "final" and "complete" and withheld non-privileged responsive documents.
  - Commenting on the Stevens indictment, Assistant Attorney General for the Civil Division of the Department of Justice said, "Where the facts and law allow, the Justice Department will pursue individuals responsible for illegal conduct just as vigorously as we pursue corporations."
  - But, last week, Judge Titus granted the defendant's Rule 29 motion for a judgment of acquittal finding the evidence insufficient to support a conviction. A transcript of the court's oral opinion can be found at http://www.americanbar.org/content/dam/aba/events/criminal_justice/rule29.authcheckdam.pdf

B. Counsel in trouble – cautionary case studies (cont'd)

- **Computer Associates ("CA")**
  - In 2004, the SEC brought an action charging securities fraud against Steven Woghin, the general counsel of CA, alleging that he participated in a $2.2 billion accounting fraud with CA's CEO and Head of Sales by backdating contracts, signing off on false regulatory filings and approving falsified contracts.
  - In July 2005, the US Attorney's Office for the EDNY indicted Woghin and others on conspiracy to commit securities fraud and obstruction of justice charges.
    - Included allegations that Woghin traveled to Hawaii to bribe a potentially hostile witness, coached witnesses on how to answer questions when being interviewed by the government and provided false information to outside lawyers with the knowledge that the information would be passed on to the government.
  - Woghin settled with the SEC in 2004 agreeing to a permanent injunction and officer and director bar with monetary sanctions. He also pled guilty to conspiracy and obstruction of justice pursuant to a cooperation agreement and was sentenced to 2 years in prison.

II. Legal Duties of in-house counsel

A. Ethical duties

B. Sarbanes-Oxley

C. Fiduciary duties

D. Compliance functions

A. Ethical Duties

1. Duty to investigate
2. Up-the-ladder reporting
3. Multiple representations
4. Statements to employees
5. Interviewing unrepresented employees
6. Interviewing represented employees

1. Duty to investigate

- Obligation of in-house counsel to inquire whether a violation of law may have occurred

2. Up-the-ladder reporting

- Model Rule of Professional Conduct 1.13(b) requires up-the-ladder reporting
  - (b) If **a lawyer for an organization knows** that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or **a violation of law** that reasonably might be imputed to the organization, and that is likely to result in **substantial injury** to the organization, then the lawyer shall proceed as is **reasonably necessary in the best interest** of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer **shall refer the matter to higher authority** in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law. (Emphasis added)
- Obligation to inquire into an issue before lawyer has "knowledge" of possible violation of law
- Obligation to consider "best interest of the organization"

2. Up-the-ladder reporting (cont'd)

- Commentary to Model Rule 1.13(b) states
  - "[T]he lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. **Ordinarily, referral to a higher authority would be necessary**. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. **If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization.** If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. **Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance** to warrant doing so in the best interest of the organization." (Emphasis Added)
  - "Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. "

2. Up-the-ladder reporting (cont'd)

- The Model Rules of Professional Conduct permit a lawyer to disclose information related to a representation if the lawyer reasonably believes that a violation is reasonably certain to result in substantial injury to the organization. (See Rule 1.13(c)-(d))

  (c) Except as provided in paragraph (d), if

  (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

  (2) the lawyer reasonably believes that the violation is **reasonably certain to result in substantial injury to the organization**,

  then the lawyer may reveal information relating to the representation whether or not Rule 1.6 [which sets forth circumstances under which lawyers may reveal confidential information] permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

  (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law. (Emphasis added)

2. Up-the-ladder reporting (cont'd)

- Model Rules of Professional Conduct Rule 1.13(c) (cont'd)
  - The commentary to Model Rule 1.13(c) states that under Rule 1.13(c), a lawyer may reveal confidential information relating to a representation "only when the organization's highest authority insists upon or fails to address threatened or ongoing action **that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization**." (Emphasis added)

2. Up-the-ladder reporting (cont'd)

- Rule 1.13 of the New York Rules of Professional Conduct permits but does not require up-the-ladder reporting and only allows lawyers to reveal confidential information as permitted by Rule 1.6. This rule is nearly identical to DR 5-109 of the New York Code of Professional Responsibility, except for Section (d), which had no equivalent in DR 5-109.

(b) If a lawyer for an organization knows that an officer, employee or the person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. **In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:**

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, **the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16**. (Emphasis added)

3. Multiple representations

- In government investigations, attorneys ethically may represent both a corporation and its "constituents" if their interests actually or potentially differ if
  - the attorney concludes that in the view of a disinterested lawyer, the representation would services the interests of both the corporation and its constituents; and
  - both clients give knowledgeable and informed consent.
  - See Assoc. of the Bar of the City of New York Comm. On Prof'l & Judicial Ethics, Formal Op. 2004-02 (June 2004) (decided under DR 5-101 of the New York Code of Professional Responsibility)

3. Multiple representations (cont'd)

- Must be mindful of changes in circumstances to be sure the "disinterested lawyers" test continues to be met over the course of the representation.
- Structure representation to minimize adverse effects if an actual conflict develops.
  - Prospective waivers that permit an attorney to continue to represent the company if a conflict arises.
  - Explicit agreements with individuals on the scope of the attorney-client privilege and the permissible use of information obtained.
  - Shadow counsel for employees.

4. Statements to employees

- Model Rule 1.13(f)
  - "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."
- New York Rule 1.13(a)
  - "When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization."
  - Identical to the Rule 5-109(a) of the New York Code of Professional Responsibility.

4. Statements to employees

- Corporate Miranda Warnings
  - In Upjohn v. United States, 449 U.S. 383 (1981), Supreme Court held that a corporation can assert the attorney-client privilege
  - The privilege generally applies to communications between attorneys for a corporation and the corporation's employees if:
    - Communication was made on orders of superiors to get legal advice for the company;
    - Required information was not available to management;
    - Communication related to the employees' corporate duties;
    - Employees were made aware that the reason for the communication was so that the corporation could secure legal advice; and
    - Communication was ordered to be kept confidential and did remain confidential.

4. Statements to employees (cont'd)

- Corporate Miranda Warnings (cont'd)
  - Attorneys interviewing corporate employees should give corporate Miranda warnings.
  - See United States v. Ruehle, 583 F.3d 600 (9th Cir. 2010) (reversing the district court's holding that suppressed statements obtained by company counsel from an employee and subsequently disclosed to the government). The Ninth Circuit held that because the employee knew that the company intended to disclose statements to the government before he made them, he did not intend the statements to be confidential.
    - Note – the district court had held that the law firm breached its ethical duties by not obtaining its client's written consent before disclosing the substance of his interview.

4. Statements to employees (cont'd)

- Corporate Miranda warnings:
  - The interviewing attorney is counsel to the company;
  - The interview is being conducted to assist the company;
  - The employee is expected to tell the truth and keep the substance of the interview confidential;
  - The communications are privileged and the privilege belongs to the company;
  - The company will determine whether to waive or assert the privilege; and
  - The company may share information with the government.
- Optional warnings:
  - The employee can retain counsel if he or she wishes;
  - The company will pay fees for individual counsel; and
  - The employee may be criminally prosecuted if he or she is not truthful and the company conveys the false information to the government (See e.g., U.S. v. Kumar).

4. Statements to employees (cont'd)

- Any representation that may eventually be relayed to the government can be the basis for obstruction of justice charges
  - U.S. v. Ray – Executive's conviction based on conspiracy to obstruct a preliminary inquiry by the company's general counsel
  - Rite Aid executives indicted in Middle District of Pennsylvania in June 2002 for, among other charges, conspiracy to obstruct justice based in part on actions they took to mislead internal investigators (also accused of taking steps to mislead SEC and FBI)
  - Computer Associates (U.S. v. Kumar): guilty pleas by executives included admission that executives obstructed government's investigation by providing false explanation for company's accounting practices to **company's lawyers, with the intent that those lawyers would repeat those false explanations to the government** and by lying to federal investigators

5. Interviewing unrepresented employees

- Rule 4.3 of the Model Rules of Professional Conduct prohibits a lawyer from giving advice to an unrepresented person, "other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."
- Model Rule 4.3 also provides that attorneys speaking with unrepresented persons should clearly inform the person that the attorney represents the organization and not the employee.
- New York Rule 4.3 is identical.

6. Interviewing represented employees

- No contact rule – Rule 4.2(a) of the Model Rules of Professional Conduct prohibits an attorney from communicating with a "person" the attorney knows to be represented by counsel in that "matter" without prior consent from counsel for that person.
- New York Rule 4.2(a) uses the word "party" rather than "person," which suggests that attorneys representing corporations in New York may be permitted to interview represented persons who are not parties to the litigation without their lawyers' permission.
  - In practice, most NY lawyers do not interview represented persons outside the presence of their lawyers.

B. Sarbanes-Oxley

- Section 307 of the Sarbanes Oxley Act of 2002 directed the SEC to, within 180 days, issue rules "setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers,"

  including a rule –

  - "(1) **requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counselor or the chief executive officer of the company (or the equivalent thereof);** and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors." (Emphasis added)

B. Sarbanes-Oxley (cont'd)

- In response to Section 307 of the Sarbanes-Oxley Act, the SEC promulgated 17 C.F.R. Section 205, which can be found at http://www.sec.gov/rules/final/33-8185.htm
- 17 C.F.R. Section 205, includes rigorous up-the-ladder reporting requirements and requires that a chief legal officer inquire into the "evidence of a material violation" of the securities laws or breach of fiduciary duty.
- Section 205.2(e) defines "evidence of a material violation" as "**credible evidence**, based upon which it would be **unreasonable**, under the circumstances, for a prudent and competent attorney **not to conclude** that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." (Emphasis added)

B. Sarbanes-Oxley (cont'd)

- From an ethical and reporting standpoint, the most pertinent provisions of 17 C.F.R. § 205 are the following:
  - Section 205.1 - Purpose and Scope:
    - This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer.
    - These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part.
    - Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.
      - Note that if state ethics rules impose a higher burden, attorneys must comply

B. Sarbanes-Oxley (cont'd)

- Section 205.3 - Issuer as client:
  - Section 205.3(a) - Representing an Issuer - provides that an attorney owes his or her professional and ethical duties to the company as an organization, and not to the company's officers, directors, or employees.

B. Sarbanes-Oxley (cont'd)

- Section 205.3(b) - Duty to report evidence of a material violation:
  - 205.3(b)(1) - provides that **if an attorney becomes aware of evidence of a material violation** (defined as a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law) by the issuer or by any officer, director) employee, or agent, **the attorney shall report such evidence to the company's chief legal officer or to both the issuer's chief legal officer and its chief executive officer forthwith.** The section goes on to state that by communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an Issuer.

B. Sarbanes-Oxley (cont'd)

- Section 205.3(b)(2**)** - provides that the chief legal officer shall inquire into the evidence of a material violation. **This section also provides that unless the chief legal officer reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the corporation to adopt an appropriate response, and shall advise the reporting attorney of such response.** If the chief legal officer determines no material violation has occurred, he or she also shall notify the reporting attorney.

- Section 205.3(b)(3) - provides that **unless a reporting attorney reasonably believes that the chief legal officer or the chief executive officer of the corporation has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to: (1) the audit committee; (2) another committee of the board of directors consisting solely of directors who are not employed by the corporation; or (3) the board of directors.**

B. Sarbanes-Oxley (cont'd)

- Section 205.3(b)(4) - provides that if an attorney believes that it would be futile to report evidence of a material violation to the corporation's chief legal officer and chief executive officers, the attorney may report directly to the audit committee, another appropriate committee, or the board.

- Section 205.3(d)(2) - Issuer confidences - provides that an attorney may reveal to the Commission, without the corporation's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary: (1) to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors; (2) to prevent the issuer, in a Commission investigation or administrative proceeding, from committing perjury; or (3) to rectify the consequences of a material violation that caused or may cause substantial injury to the financial interest or property of the issuer or investors.

C. Fiduciary duties

- Attorneys owe their clients duties of care and good faith
  - Do such duties require in-house attorneys to report wrongdoing?
  - Is a lawyer's duty to report wrongdoing different from that of other employees?
    - In the whistleblower context attorneys have been treated differently from other employees
    - In November 2010, the SEC proposed rules to implement a whistleblower program required by the Dodd-Frank Act pursuant to which the SEC will pay an award to eligible whistleblowers who voluntarily provide the SEC with original information about a violation of the federal securities laws that leads to a successful enforcement or related action.
    - To be considered "original information" the information must be derived from an individual's "independent knowledge" or "independent analysis."
    - The proposed rules exclude information obtained through a communication that is subject to the attorney-client privilege (except where an attorney is permitted to disclose the substance of a communication that would otherwise be privileged) and information obtained through a legal representation.

C. Fiduciary duties (cont'd)

- But, in the EU, in the privilege context, in-house lawyers have been treated more like employees than lawyers because of their economic dependence on their employers.
  - See Akzo Nobel Chemicals, Ltd. and Akcros Chemicals, Ltd. v. Comm'n, Case-550/07 P (September 14, 2010), reaffirmed a 1982 case AM&S Europe Ltd. v. Commission, Case 155/79 (1982), which held that legal advice is privileged only if it relates to the "client's right of defence" (meaning that the client affirmatively is seeking legal advice) and is imparted by an independent lawyer who is a member of an EU Bar Association. The Akzo Nobel court held that because of their economic dependence on their employers, in-house lawyers are not sufficiently independent to warrant privilege protection.

D. Compliance functions

- Corporate counsels' compliance function has received greater emphasis since the enactment of Sarbanes-Oxley in the wake of the accounting scandals in the early 2000s
  - On September 8, 2010, an SEC Administrative Law Judge cleared Theodore Urban, the General Counsel and Executive Vice President of Ferris, Baker Watts, Inc. ("FBW") of charges of failing reasonably to supervise a rogue broker in FBW's Retail Sales department. However, the ALJ found that Urban was the supervisor of the broker because as General Counsel his "opinions on legal and compliance issues were viewed as authoritative and his recommendations were generally followed by people in FBW's business units, but not by Retail Sales."
  - This decision makes it more likely that in-house legal and compliance personnel will be considered supervisors by the SEC and be subject to liability.

III. Minimizing liability

A. Reporting of corporate wrongdoing

B. Document retention and production

C. Representations to government authorities

D. Compliance with regulatory requirements and agreements

A. Reporting of corporate wrongdoing

- The SEC perceives attorneys as "gatekeepers" and attorneys who fail to report misconduct on a timely basis risk being charged by the SEC
  - SEC v. John E. Isselman
    - In September 2004, the SEC initiated its first up-the-ladder enforcement action **but** charged under Rule 13b2-2 (relating to representations in documents and reports filed with the SEC) **not** Rule 205 because the conduct took place before Rule 205's implementation.
    - Isselman, the general counsel of a NASDAQ listed company, learned of illegal conduct by company employees but failed to prevent his company from violating the law and six months later reported his concerns to the company's outside counsel and audit committee.
    - Isselman agreed to a cease-and-desist order and paid a $50,000 civil penalty.

A. Reporting of corporate wrongdoing (cont'd)

- SEC v. David Drummond
  - In January 2005, the SEC brought a cease-and-desist action against Google and its general counsel in connection with the company's failure to register more than $800 million in stock option grants to employees.
  - The SEC contended that the general counsel advised Google's Board that it could continue to issue options, but failed to inform the Board that registration and disclosure obligations had been triggered or that there were risks in relying on an exemption, which in fact was inapplicable.
  - Helane Morrison, Administrator of the SEC's San Francisco District Office, stated: "Attorneys who undertake action on behalf of their company are no less accountable than any other corporate officers. By deciding Google could escape its disclosure requirements, and failing to inform the Board of the legal risks of his determination, Drummond caused the company to run afoul of the federal securities laws." (See http://www.sec.gov/news/press/2005-6.htm)
  - To settle the action, Drummon agreed to cease and desist from violating the SEC's registration and related financial disclosure requirements.

B. Document retention and production

- Document retention policy
- Instituting document holds
  - How much information to retain?
    - Predicting scope of internal investigation, government investigations, and civil litigation
  - For how long?
  - To whom is document hold directed?
- Implementation issues – electronic data
- Subpoenas – negotiations with the government and litigants

B. Document retention and production (cont'd)

- **Obstruction of justice -- 18 U.S.C. § 1519** -- Destruction, alteration, or falsification of records in Federal investigations and bankruptcy: "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the **intent to impede, obstruct, or influence** the investigation or proper administration of **any matter within the jurisdiction of any department or agency of the United States** or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both." (Emphasis added)
  - Investigation need not have been commenced
  - Does not require a willful or corrupt state of mind

B. Document retention and production (cont'd)

- Civil litigation/spoliation issues
  - Duty to preserve precedes filing of a complaint and attaches where party is on notice that litigation is likely to be commenced or reasonably anticipates litigation
  - In a series of decisions in 2003 and 2004, in the Zubulake v. UBS Warburg case, Judge Shira Scheindlin of the SDNY addressed a number of issues relating to the preservation of electronic evidence including: i) the scope of a party's duty to preserve electronic evidence; ii) a lawyer's duty to monitor a client's compliance with electronic data preservation and production; iii) data sampling; iv) cost shifting; and v) the imposition of sanctions for the spoliation (or destruction) of electronic evidence

B. Document retention and production (cont'd)

- Practical steps to avoid exposure for obstruction of justice
  - Communicate and document the understood scope and meaning of document requests with the issuing government agency
  - Confer with counsel and document clear decision not to produce materials
  - For voluminous electronic productions, obtain government approval of search terms and protocols
  - Promptly institute document holds
  - Document efforts to insure compliance by affected employees

C. Representations to government authorities

- Other Statutory bases for prosecution for false representations
  - 18 U.S.C. § 1503 – referred to as the omnibus section, makes it a crime to "corruptly" influence, obstruct, or impede the due administration of justice
  - 18 U.S.C. § 1512 – deals with witness tampering
  - 18 U.S.C. § 1505 "Obstruction of proceedings before departments, agencies, and committees" – Prohibits the obstruction of any proceeding by a federal agency

D. Compliance with regulatory requirements and agreements

- Compliance with corporate monitorships imposed in connection with deferred prosecution and non-prosecution agreements
- Obligation of regulated companies to disclose internal investigations? Government investigations? Wells notices?
  - Goldman Sachs fined by FINRA for failing to disclose receipt of Wells notice
  - "Materiality" test
  - Reg S-K, which applies to quarterly and annual reports, requires public companies to "[d]escribe briefly any **material** pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject." (Emphasis added)

Additional Resources

Jonathan S. Sack, “Internal Investigations: Start Off On the Right Foot, Key Structural Decisions Will Determine Reliability and Credibility”, New York Law Journal, October 12, 2010
http://www.maglaw.com/publications/data/00232/_res/id=sa_File1/070101026Morvillo.pdf

Jonathan S. Sack and Barbara L. Trencher, “Whistleblower Laws: Protections For Employees, Risks to Corporations?,” *International Comparative Legal Guide to: Business Crime 2011*
http://www.maglaw.com/publications/data/00233/_res/id=sa_File1/BC11_Chapter-2_Morvillo.pdf