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## Governmental Impact On Internal Investigations

*The Editor interviews Julian Solotorovsky, Partner in Kelley Drye & Warren LLP's Chicago office and Chair of the firm's White Collar Crime and Investigations practice group.*

**Editor:** Are there more internal investigations today than say, 10 years ago?

**Solotorovsky:** There are far more.

**Editor:** Do you attribute this to the requirements of Sarbanes-Oxley ("SOX")?

**Solotorovsky:** Certainly, the requirements of Section 404 of SOX have led to an increase in the number of internal investigations being conducted by public companies, but I believe that the increase in internal investigations in recent years has been fueled by more than SOX requirements.

**Editor:** What other factors do you think have caused the increase in investigations?

**Solotorovsky:** The Department of Justice ("DOJ") and other governmental agencies, with the Securities and Exchange Commission ("SEC") being the most active one these days, have come to realize that if you can get companies to conduct thorough internal investigations, they can accomplish a great deal more than by the government's conducting investigations on its own.

**Editor:** It seems more logical that the DOJ and government agencies would want to do the investigations themselves. Why would they want to rely on companies to investigate themselves?

**Solotorovsky:** I think that there are really three main reasons why the government wants companies to investigate themselves: First, they can bring more cases without having to significantly increase their manpower. With the federal budget constraints we are seeing at present, this reason grows ever more important. Perhaps, the best example of this practice is the Foreign Corrupt Practice Act section at the DOJ. They run a very lean section with a small number of attorneys who are producing more and more prosecutions that rely on companies conducting internal investigations.

Second, the government's investigating corporations is typically more difficult than investigating misconduct that involves individuals rather than corporations. The larger the corporation, the more challenging the investigation. In fact, the DOJ's so-called Filip Memorandum ("Filip Memo"), which has been given the form title "Principles of Federal Prosecution of Business Organizations," has a section on "The Value of Cooperation" in which it states that one of the reasons why DOJ wants corporations to conduct internal investigations and then self-report is because DOJ recognizes that if it did the investigations of corporations, it would be difficult to do a good job. What DOJ says is that "a corporation's cooperation may be critical in identifying potentially relevant actions and locating relevant evidence among other things, and in doing so expeditiously." Title 9, Chapter 9-28.700(B).

Third, electronic discovery grows more difficult and more challenging by



**Julian  
Solotorovsky**

the day and will become an ever bigger reason for the DOJ and government agencies to want companies to conduct internal investigations. When conducting their investigation of companies, either through grand jury subpoenas or criminal investigative demands (CIDs), the DOJ and government agencies will frequently be confronted with hundreds of thousands of e-mails and hundreds, if not thousands, of voluminous Excel spreadsheets to review. These reviews will be hard to do, time consuming and expensive.

I have recently been in situations where after having turned over huge amounts of electronic discovery pursuant to grand jury subpoenas issued to corporations, and after being confronted with the daunting task of reviewing all of this electronic discovery, the Assistant United States Attorneys (AUSAs) and their agents have come back to us and asked us to do the review of the discovery and to figure out what is the wheat and what is the chaff.

**Editor:** Are you finding that government attorneys are going beyond the guidelines set forth in the Filip Memo in their requests to you relating to internal investigation?

**Solotorovsky:** Yes – sometimes. In the past few years, I have been in situations where after the serving of grand jury subpoenas and having an active grand jury investigation underway, while representing corporations, I have met with AUSAs. The AUSAs have requested that we conduct internal investigations on specific factual issues that they have focused in on. In conjunction with this request, they have sometimes asked us to turn over the memos of interviews generated during the investigation.

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The request to turn over interview notes and memos goes beyond the Filip Memo guidelines. The Filip Memo was created after the previous McNulty Memo, which encouraged prosecutors to require corporations to waive attorney-client privilege and attorney work product, and encouraged companies to refuse to pay the legal fees of employees, was declared unconstitutional. The Filip Memo states: "To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyer's interviews." Title 9, Chapter 9-28.720 f.n.3.

**Editor: In such a situation, how have you been able to get credit for your client under the Filip Memo guidelines without waiving attorney-client privilege and attorney work product?**

**Solotorovsky:** You have to walk a fine line and do everything you can to avoid a waiver. Getting as much credit as possible for your cooperation without waiving privilege is your goal. Typically, I decline to turn over any notes and memoranda of interviews. What I do is to have a meeting with the AUSAs and agents in which I go through the most relevant documents with them and discuss my understanding of what happened factually without ascribing the source of that knowledge to a particular witness interviewed. That can result in the AUSAs and agents pushing for more details and the actual interview memos, but I push back, as gently as possible, and cite footnote 3 of the Filip Memo.

I would also add that one of the big issues you face when conducting an investigation that will result in a self-report to the DOJ or a government agency is whether to generate a written report. My preference is to report directly to the general counsel or a special committee of the board of directors and to do so orally without a written report unless special circumstances make a written report more advisable.

I typically advise the general counsel or special committee that it is entirely possible that shareholder suits may arise down the line based on the conduct and facts contained in the internal investigation and that the first items requested in

the discovery request will be any reports generated by an internal investigation as well as notes and memos of any interviews and documents given to the DOJ, a grand jury or government agencies. Obviously, if you have waived the privileges and given these documents to the government, you will have a hard time objecting to their production in civil litigation.

**Editor: What about arguing that the production to the DOJ or the government agency was a limited waiver of the privilege?**

**Solotorovsky:** Ten or 20 years ago, I was able to execute written agreements with AUSAs who agreed that there would be a limited waiver of attorney-client privilege and attorney work product. The most frequent situations where this occurred was in health care fraud cases where there was a reliance on counsel defense.

This is no longer the case today as all of the federal circuits, with the exception of the 8th Circuit, refuse to allow a "selective" or "limited" waiver of attorney-client privilege and attorney work product, which allows for the production of attorney-client privileged material or attorney work product generated during an internal investigation to the government without there being a broad waiver.

**Editor: Do you see the number of internal investigations continuing to increase in the future?**

**Solotorovsky:** Yes, very much so. The Dodd-Frank Act is currently scheduled to go into effect on July 21, 2011. The Dodd-Frank Act contains a whistleblower provision which includes a mandatory cash award of 10 percent to 30 percent of the total sanctions recovered by the government greater than \$1 million as a result of the whistleblower's assistance.

The SEC has taken note of the phenomenon in other whistleblower situations, the False Claims Act, where the whistleblower has looked for the big payday and goes to an outside attorney to file a False Claims Act case rather than bringing concerns to in-house counsel or the compliance department. The SEC is proposing rules relating to

whistleblowers that will give them a larger percentage of the recovery if they first go to the internal compliance department. The SEC's website currently contains information relating to Dodd-Frank in which they state "... the proposed rules include provisions to discourage employees from bypassing their own company's internal compliance programs ... the proposed rules ... permit the SEC to consider higher percentage awards for whistleblowers who first report their information through effective company compliance programs."

With the Dodd-Frank Act going into effect with whistleblower provisions and rules, companies will need to conduct internal investigations when substantive complaints or concerns are received from individuals. The impact of Dodd-Frank is that there will be an increase in internal investigations with a corresponding increase in self-reports to the SEC and other agencies.

**Editor: Let me circle back to your discussion of electronic discovery being a reason for the government to want internal investigations to be conducted by the company because it can be so enormous in scope and so time-consuming. Is there anything you can do to manage the situation and keep electronic discovery to a minimum while conducting an internal investigation?**

**Solotorovsky:** That really depends on the status of the internal investigation with the DOJ or the government agency involved. If the investigation is being conducted at the request of the government or if you are in a position to give the DOJ or the SEC, or whatever agency is involved, a notification that you are conducting an investigation that will result in a self-report, then your electronic discovery may be significantly reduced by meeting with the government attorneys and/or agents as early as possible to tell them what you are doing. You can review with them the custodians you are searching and the search terms you intend to use. This will hopefully enable you to limit your e-discovery during the internal investigation, and importantly, reduce the likelihood of subsequent grand jury subpoenas or CIDs asking for additional information.