A New Frontier: Best Practices in Fraud Investigations and Emerging Trends in SEC and DOJ Enforcement

June 15, 2009
Agenda

- Introduction
- Presentation
  - Gary Kleinrichert, FTI Consulting’s Forensic and Litigation Consulting Practice
  - Jose A. Lopez, Schopf & Weiss LLP
  - Pravin Rao, Perkins Coie
- Questions and Answers — (anonymous)
- Slides — now available on front page of Securities Docket
  > www.securitiesdocket.com
- Wrap-up
Webcast Series

- Series of webcasts
- www.securitiesdocket.com/webcasts
Change in Administration = Change in Regulatory Focus

The focus of regulatory reform has been to ensure that three general areas of risk are regulated without gaps:

- Market Efficiency
- Systemic Risk
- Consumer Protection

It is expected that President Obama will present the administration’s proposal on June 17th.
The Future of Financial Market Regulation

**Systemic Risk Regulator** – Regulator(s) who address systemic risk to the markets. Either (1) expanding the power of the Fed, (2) create a new agency, or (3) creating council of sitting regulators to address gaps in regulation.

**Market Efficiency** – Regulator(s) whose sole responsibility is to ensure the efficiency and level playing field of markets. (e.g. expanding powers of the SEC and more cooperation between SEC and CFTC, FINRA, etc.)

**Consumer Protection** – Regulator(s) whose responsibility it to regulate consumer financial products such as mortgages, mutual funds, credit cards, etc.
Democratic lawmakers are reported to have a plan to create an agency to regulate consumer financial products. The new regulator would police financial products sold to consumers, such as mortgages, credit cards and savings accounts.

- The Obama administration is currently expected to include such a regulator in its broader regulatory revamp to be unveiled June 17.
- Reportedly, there is growing consensus between the administration and Democratic lawmakers, that a consumer products agency should be created.
- Under a plan by Sen. Christopher Dodd (D., Conn.), chairman of the Senate Banking Committee, the regulator would be given "broad regulatory and enforcement authority over credit and bank products." It would also protect consumers from predatory lending by mortgage brokers, banks and financial institutions. The plan would remove some of the Fed's power.
New SEC Chief Mary Shapiro is addressing the “failures” of the SEC

“I have also discovered in the past four months that much attention needs to be focused on the internal operations of the agency, the processes that guide our work, the agency’s infrastructure and how we are organized. I have been disappointed to find that in some areas of our internal operations, we fall short of what the taxpayer has a right to expect of us, and what our employees have a right to expect of a world-class organization.”

- Shapiro has indicated that there are many aspects of the SEC need to be improved and cooperation between the various regulatory agencies needs to increase.
- Recent headlines alleging insider trading on the part of SEC employees increases the pressure on the SEC to get its house in order.
- It now appears that the SEC will not be merged or eliminated. Shapiro wants to show that the additional regulatory responsibilities emerging from the Obama administration’s regulatory priorities should fall under the umbrella of the SEC.
Inadequate Budgets and Staffing are Being Addressed

- 3,700-person staff now oversees more than 35,000 registrants:
  - 12,000 public companies
  - 8,000 mutual funds
  - 11,000 advisors
  - 5,000 broker-dealers

- Between 2005 and 2007, the SEC lost 10% of its employees. In that same period, registered investment advisors grew 32% and assets regulated jumped by over 70%.
  - The number of investigative attorneys at the SEC decreased 11.5% between FY2004 and FY2008.
  - If 2011 budget request is filled, 400 FTE and 1,000 new positions will be filled.
SEC Has Not Grown with the Market

Cumulative Growth in Securities Trading Volume vs. Total SEC FTE

<table>
<thead>
<tr>
<th>Actual Figures</th>
<th>2003</th>
<th>2008</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Volume (in trillions)</td>
<td>$23</td>
<td>$82</td>
<td>261%</td>
</tr>
<tr>
<td>SEC Staff (in FTE)</td>
<td>3,060</td>
<td>3,511</td>
<td>15%</td>
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Source: Appendix to the testimony of Mary Shapiro before the Subcommittee on Financial Services and General Government, June 2, 2009.
Increased SEC Enforcement

• Since the end of January as compared to the same time last year, the SEC has:
  • Filed nearly three times as many temporary restraining order cases;
  • Issued more than twice as many formal orders; and
  • Opened over 20% more investigations into fraud.

• The SEC is currently a money-maker, projected to collect $1.3 billion in fees in FY 2009 while operating on a budget of approximately $1 billion.
New Enforcement Leadership

New Director of the Division of Enforcement, Robert Khuzami, brings extensive securities and white collar prosecution experience.

- Formerly chief of the Securities and Fraud Unit in the U.S. Attorney’s Office for the Southern District of New York, he plans to:
  - Increase the number of SEC trial attorneys;
  - Increase paralegal and paraprofessional support to free up enforcement attorneys;
  - Create specialized groups of attorneys along industry or transactional lines and increase collaborations across regions; and
  - Reconfigure the management structure of the division to reduce the levels of review and approvals needed to continue investigations in a timely manner.
The “New Era of Responsibility”

SEC has Plans for Aggressive and Accelerated Investigations

• Incentivize whistleblowers to come forward with tips and increase its ability to sort, analyze, and act on those tips.

• Greater freedom and authority of the enforcement staff:
  • Accelerated ability to formalize investigations and therefore greater power to issue subpoenas; and
  • Greater authority to negotiate cases that impose monetary penalties.
Increasing the Efficiency and Effectiveness of the SEC

**Whistleblowers**
- Use complaints more often to initiate investigations
- Compensate individuals who provide useful proof of fraud
- Use outside agencies to sort through complaints and determine credible leads

**Subpoenas and Penalties**
- SEC support staff will be able to make more decisions without higher level approval
- Better able to issue subpoenas
- Better ability to negotiate cases with a monetary penalty associated

**Increased Enforcement**
- Funds for more trial attorneys
- Consolidation of hierarchy to eliminate many different levels of approval
- Increasing support staff
- Grouping attorneys into specialized groups, increasing collaboration
Budget Increases at the DOJ

• **Current budget is approximately $25.6 billion:**
  - 2010 budget asks to increase budget by 3.5% to $26.5 billion.
  - Current bill in Congress for an additional $500 million over 2 years.

• **Current employees 104,288**
  ([http://data.bestplacetowork.org/bptw/detail/DJ00](http://data.bestplacetowork.org/bptw/detail/DJ00))
  - Looking for creation of 87 more positions
  - New positions would concentrate mainly on
    - FBI agents
    - Prosecution attorneys
    - Concentration on mortgage fraud and current economic crisis
Increased Response to White Collar Crime

Policy

- Obama condemned white collar crime while campaigning
- Promised to investigate mortgage fraud and other similar types of white collar crime
- Amendment to False Claims Act

Changes

- 2010 budget increases Justice Department budget by 3.5%
- Wants to create an additional 118 new positions, 87 being lawyers
- If a person attempts to make a false “claim” to obtain government funds, they are liable

Actions

- Additional prosecutors will bring a variety of cases to trial including bankruptcy and fraud
- The public is also very concerned about the use of bailout funds; increased regulation will monitor funds use
- DOJ attorneys are now able to issue civil investigative demands (CIDs) for testimony and documents
Hedge Fund Regulation

Proposal that hedge funds and other pooled investments (including private equity funds and perhaps venture capital) will be regulated

- They will likely be required to increase transparency and submit to outside exams by outside auditors.

- On May 14th, subject to a 60-day comment period, the SEC proposed that investment advisors that retained custody of client funds (as opposed to entrusting client funds to independent third party custodians) would be required to submit to annual surprise examinations.

  - These examinations would allow auditors to look into the fund’s books and records and to receive a report from a registered public accounting firm assessing the internal controls of the fund advisor.
Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act, (FCPA) enforcement expected to remain vigorous.

- DOJ working with international law enforcement community
- Fines for violating this Act are steep, companies have paid as much as $1.6 billion in fines
- FCPA unit is the most successful in the DOJ

**Because of the declining economy and instability of corporations, the DOJ may further the trend of prosecuting individuals**
FCPA Enforcement Expected to Remain Vigorous

**FCPA is considered the most successful unit of the DOJ.**

- 10 FBI agents and 8 DOJ attorneys work only on FCPA investigations.
- The FBI team now has the resources to conduct follow-up investigations into customs transactions, customs brokers, freight forwarders, and their clients.
- Oil and medical device industries are a focus.
- Enforcement actions are being coordinated with ITAR investigations.
Fraud Enforcement and Recovery Act

• Signed into law on 5/20/2009
• Intended to stop misuse of government funds and prevent fraud, especially commodities, mortgages, and securities.
  • Broadens the definition of a financial institution to include “mortgage lending business.”
  • Allows government more power to investigate institutions
  • Adds criminal penalties for institutions that misuse TARP funds
  • Makes all offshore money transfers done to evade taxes illegal
• Amends Civil False Claim Act
  • Makes it easier for whistleblowers to get in touch with authorities
Fraud Enforcement and Recovery Act

• **Monetary Concerns**
  - $165 million a year to hire federal prosecutors
  - $75 million in 2010 for FBI
  - $65 million in 2011 for FBI
  - $50 million/year for U.S. Attorney’s Office
  - $40 million for certain divisions at the Department of Justice
  - $80 million/year for 2010 and 2011 for other offices to combat fraud

• **Commission Establishment**
  - FERA establishes a bipartisan, 10 person commission with a $5 million per year budget. Its purpose is to investigate the issues that may have led to the current economic situation.
  - The commission is to issue recommendations by December 15, 2010.
Potential Federal Regulation of Insurance

1. **Resolution Authority**
   - More comprehensive
   - Applicable to all holding companies and subsidiaries

2. **Systemic Risk Regulator**
   - Can mandate agencies to maintain certain capital levels
     - Either through their own authority or delegation to other agencies
   - Also compel companies to take corrective actions

3. **Federal Insurance Regulatory Agency**
   - May also institute a chartering process for insurance companies

*Federal insurance regulation may be increased because of the Treasury Department’s approval of the Capital Purchase Program, which provides funds to certain life insurers*
Swaps

Obama administration announced a plan on May 15 to regulate the OTC derivatives market, including credit default swaps.

• Plan also calls for amendments to various laws which would allow for supervision and regulation of all OTC derivatives by the SEC and CFTC.
• These regulations would include reporting and capital requirements.
Swaps

Authorizing the Regulation of Swaps Act Introduced in Senate

• If passed, the “Swaps Bill” would repeal a number of US laws that currently bar the regulation of swaps agreements.

• The Swaps Bill would grant immediate authority to Federal Financial Regulators to oversee any swap agreements.

• SEC and CFTC would have sole authority to (but not be required to) regulate and oversee their respective exchanges and clearing agencies and their related swaps.
State and Local Governments affected

• State and local governments are preparing for massive budget shortfalls.

• These shortfalls are raising concerns about default on municipal bonds, long considered one of the safest investments.
  • In May, Moody’s assigned a negative outlook to the creditworthiness of every local government in the US.

• If municipal issuers stop paying on their debt, they will rely on insurance to repay investors.
SEC plans to expand pay disclosure beyond executives.

- Currently, firms must only disclose the compensation of the top 5 execs.
- “Star performers” in various industries often make more than the top execs.
- Firms would have to disclose in more general terms how lower-ranking employees are paid.
- Companies may also have to disclose ties to compensation consultants.
- These disclosures are especially important as compensation relates to overall risk management.
  - This applies especially to financial firms, where traders have received big bonuses for transactions that put the whole company at risk.
Investigation of Pay-to-Play

Following the lead of NY Attorney General Andrew Cuomo, many state Attorneys General are investigating pay-to-play schemes between public pension funds, placement agents, and investment managers.

- Carlyle Group recently settled with the NY AG and agreed to a code of conduct eliminating the use of placement agents in the retention of public fund investments.

SEC recently requested information from two dozen pension fund managers and financial companies as part of investigation into whether money managers made inappropriate payment to gain business.
Campaign Promises of the Obama Administration regarding competitive behaviors

Obama promised to:

• reinvigorate antitrust enforcement
• increase review of merger activity
• aggressively enforce against international cartels

We can expect:

• increased merger investigations and challenges
• increased emphasis on conduct
• increased focus on consumer protection
• increased cartel enforcement
Challenge of the Current Economy

• Increased merger activity may result as financially strong companies acquire struggling ones.

• Incentives for collusion increase as companies fight for steadily decreasing consumer spending.

• The Obama administration must balance antitrust enforcement with economic recovery.
SEC and DOJ Turning Up the Heat: What Companies Should Do

• **Look for issues now**
  - Be preventative
  - Internal controls
  - Institute internal investigation procedures

• **Check current compliance procedures**
  - Review Sarbanes-Oxley, financial reporting, and securities compliance

• **Whistleblowers**
  - Speak with lawyers to ensure internal policies are effective

Institute concrete procedures and investigation techniques and be preventative
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Webcast
SEC: THE WAY IT WAS

The Cox Commission

- "Voluntary-regulation" approach for investment banks
- Enforcement focus on smaller, less-significant cases (penny stocks, boiler-room operators, and Ponzi schemes)
- Obstacles created for staff to negotiate settlements and initiate formal investigations
- Enforcement not keeping up with increasingly sophisticated financial products (SEC Office of Risk Assessment staff reduced to one)
- Lower fines ($1 B in 2008 vs. $1.6 B in 2007, and $3 B annually 2004-06)
- Commission tamped down on Enforcement for being "too aggressive"
- Staff morale down

Funding/Staff Levels

- 2008 funding level minor increase compared to 2006/2007
- SEC staff reduced almost 9% between 2005 and 2008

The Stats

- 671 enforcement cases in 2008 fiscal year (2nd highest in SEC history)
- Actions against broker-dealers dropped 33% from 2007 to 2008
- DOJ securities fraud actions drop 87% from 2000 to 2007
Catalysts for Change

- Pequot Scandal
- Collapse of investment banks
- Missing Madoff \textit{ponzi} scheme
- Perceived slack oversight
- Financial crisis
- Cox blamed SEC staff for failures
- New administration
President Obama's Impact On the SEC

- Appointed Mary Shapiro Chairman of the SEC
- Mary Schapiro's known as a regulator who's both smart and tough
- Mary will provide the new ideas, new reforms, and new spirit of accountability that the SEC desperately needs so that fraud like the Madoff scandal doesn't happen again.
Current Developments

SEC priorities have shifted – it will act faster – and be more prosecutorial.

SEC Chair, Mary Schapiro

[A] strong and reinvigorated SEC will be on the beat like never before to catch wrongdoers.

I like to tell the staff we are going to act like our hair is on fire.

SEC Director of Enforcement, Ex-Prosecutor, Robert Khuzami:

As head of the SEC's Division of Enforcement, the staff and I will relentlessly pursue and bring to justice those whose misconduct infects our markets, corrodes investor confidence and has caused so much financial suffering. . .
Changes at the SEC

- End of SEC's “penalty pilot” experiment
- More rapid approval of formal orders of investigation
- Possibly allow staff to make the “Wells decision”
- More use of TROs or other emergency actions
- More use of “freeze letters”

- Imposing penalties in Cease and Desist Proceedings
  - (proposed legislation H.R. 6513 may be reintroduced)

- Funding
  - Proposed additional $37 million for 2009 fiscal year
  - Proposed 2010 budget increase funding by 13 %
How to Survive In This Hostile Climate

- Master the SEC’s Enforcement Manual
- Conduct an Effective Investigation
- If Charges Are Filed, Aggressively Seek Information and Documents
SEC Enforcement Manual Highlights

- Manual provides important insight into SEC decision making

- Manual is available at
  www.sec.gov/divisions/enforce/enforcementmanual.pdf

- Manual serves two helpful purposes:
  - First, provides information into SEC staff expectations
  - Second, helps establish boundaries for SEC
Initiating An Investigation

- Manual identifies standards used for opening an inquiry or investigation
- Manual suggests ranking investigations in order of importance from significant to critically important.
- Factors to consider in ranking:
  - is subject matter an SEC priority
  - magnitude of the potential violations
  - resources required to investigate
The Wells Process

Manual expressly gives staff discretion, upon request, “to allow recipient of the notice to review non-privileged portions of the investigative file, including documents that the recipient likely would receive during discovery if the Commission were to file a recommended action or proceeding.”
Termination Notices

The Manual provides that the Division should notify individuals and entities at the earliest opportunity when the staff has determined not to recommend an enforcement action against them to the Commission.
Document Production

- Standards for document production include the following:
  - Documents should be produced in electronic format, including OCR text
  - Respondent must maintain the originals of all documents responsive to the subpoena
  - Staff may consider web-based production or review
Witness Assurance Letter

- Manual provides a process for “civil immunity”
- In limited circumstances and with specific authorization of the Commission, staff may provide a witness with a letter assuring him or her that the SEC does not intend to bring an enforcement action.

Considerations:
- Is Commission unable to seek testimony from the witness in any other fashion?
- Will the witness provide evidence against others? Is it impractical to obtain the evidence from other sources?
- Based on current knowledge, should the witness be the subject of a recommendation for an enforcement action?
Waiver of Privilege

Manual provides that:

- The staff should not ask a party to waive the attorney-client privilege or work product privileges and is directed not to do so.

- All decisions regarding the potential waiver of privilege are to be reviewed by supervisory staff.

- Waiver of privilege is not a prerequisite to obtaining credit for cooperation.
Know Your Case

- Extremely important to conduct a thorough internal investigation.

- Decide early whether to obtain separate counsel for officers and directors

- After investigation consider self-reporting
Aggressively Seek Documents and Information

- Consider all options for getting relevant materials

- FOIA Requests to SEC

- FOIA Requests to State agencies and other regulators

- Motions to Compel
President Obama’s FOIA View

President Obama’s January 21, 2009 Executive Order addressed to the “Heads of Executive Departments and Agencies”—including the SEC—provides that “[a]ll agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”

In implementing this Executive Order, Attorney General Holder issued a March 19, 2009 Memorandum for Heads of Executive Departments and Agencies giving guidance on the presumption of FOIA openness. Attorney General Holder instructed that “an agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.”
Recent Litigation

- Mark Cuban filed a lawsuit seeking documents relating to his insider trading case
- Former officer recently filed a motion to compel production of FBI and United States Postal Inspector documents
  - Motion argues that law enforcement/investigative privilege is “very narrow.”
- In U.S. v. Thompson, __ F.3d __ (D.C. Cir. April 17, 2009) (No. 08-5203) Court ordered production of documents to individual defendant that corporation confidentially produced to government
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Perception of Enforcement Over the Last Eight Years

- Bush Administration accused of being weak on enforcement
  - Lack of policing Wall Street
  - Lax oversight of Antitrust
  - Overall, oversight of corporate fraud not viewed as a priority
White Collar Enforcement Down

- Post- 9/11 Shift to Terrorism and Intelligence
  - More than 1800 FBI agents (nearly 1/3 of all agents in criminal programs)

- 2001-2007 – FBI Funding/Staffing
  - Sought 1,100 more agents for criminal investigations but staffing decreased by 132 agents
  - Sought increase of $800 million, but received increase of only $50 million (2007 budget cycle obtained money for one new agent for criminal investigations)
  - Staffing on mortgage fraud cases – hundreds of agents below levels of 1980s during the S & L crisis
White Collar Referrals and Prosecutions 2000-2007

- Criminal referrals by FBI to federal prosecutors dropped 26%
- Financial institution fraud cases dropped 48%
- Insurance fraud cases dropped 75%
- Securities fraud cases dropped 17%
White Collar Prosecutions
Other Law Enforcement Agencies

- IRS – Criminal referrals dropped from 3,300 in 1987 to 2,600 in 2007
- US Postal Inspection Services – Criminal referrals dropped from 6,600 in 1987 to 5,100 in 2007
- Secret Service – Criminal referrals dropped from 12,200 in 1987 to 5,100 in 2007
Obama Pronouncements

- "Let's, first of all, understand that the biggest problem in this whole process was the deregulation of the financial system."
- "The problem is we still have an archaic, 20th century regulatory system for 21st–century financial markets."
- Washington was "asleep at the switch" and Madoff scheme "was made possible in part because the regulators who were assigned to oversee Wall Street dropped the ball."
Obama Appointments

Attorney General, DOJ: Eric Holder
- "The Justice Department must wage an aggressive effort against financial fraud and market manipulations. As taxpayers are asked to rescue large segments of our economy, they also have a right to demand accountability for wrongdoing that only DOJ can provide."

SEC Chairman, Mary Schapiro
- "First and foremost... I will move aggressively to reinvigorate enforcement at the SEC. With investor confidence shaken, it is imperative that the SEC be given the resources and the support it needs to investigate and go after those who cut corners, cheat investors, and break the law."
White Collar Legislative Initiatives

- Schumer-Shelby Bill – S. 331
  - Proposed to dedicate $110 million annually to add hundreds of new investigators and prosecutors to financial fraud units at DOJ, FBI, SEC
  - Schumer: "Our white collar crime divisions are under-staffed, under-funded, and overwhelmed."

- Barney Frank Bill
  - Proposed to give the Fed the power to gather information about the inner workings of banks, investment firms, insurance companies, hedge funds, etc.
What We Can Expect

- Political imperative – bad economic times - desire to bring those accountable to justice
- Tighter regulation (Frank bill) - likely to lead to more white collar enforcement
- Massive bailouts - will be an outcry for accountability
- Budgetary/financial incentives in pursuing white-collar crime – can bring some money into the government coffers
- Bad economic times likely to reduce turnover in U.S. Attorney's Offices and enhance capability to handle white-collar cases
Expected Focus of Obama White Collar Crime Enforcement

- Regulated financial industries and institutions
- Frauds against the government (contracting frauds, health care frauds)
- Securities frauds
- Environmental crimes
- Corporate frauds
- Foreign Corrupt Practices Act cases
  - December 15, 2008 – Siemens pled guilty to criminal violations as part of $800 million settlement with DOJ and SEC
- Continued Anti-Cartel Enforcement
Coping with Reinvigorated Enforcement

Internal Investigations: Two Guiding Principles

- "One size does not fit all"
- "What you don't know can hurt you"
What's at Stake?

- Company's reputation and revenue
- Employees' reputation and jobs
- Civil litigation
- Civil fines, judgments and penalties
- Criminal penalties
Events that Prompt an Internal Investigation

- "External Event" – Subpoena or an arrest or a search warrant
- "Internal Event" – Tip or whistleblower (no government involvement)
Why Conduct an Internal Investigation?

- Identify and limit harm to the company
- Obligations under laws, regulations to self-disclose
- Assist in criminal defense of company
- Puts company in better light with government regulators
- Puts company in better light with shareholders, public
Who Should Conduct the Investigation?

- Objective
- Experienced
- Credible
- Privilege issues – in-house vs. outside counsel
- Potential conflict of in-house counsel
- Benefits of in-house counsel working together with outside counsel
Developing a Game Plan

- Define scope of investigation
- Who should be interviewed (both inside and outside the company)
- What databases need to be searched?
- Who needs to be notified?
- Privacy issues and concerns
- How to track and document what is done
- Written game plan is advisable
Communication Issues

- With Client:
  - advise restraint until investigation is completed
  - Caution in apprising operations managers of progress of investigation - don’t "educate" them to facts since they may be witnesses

- Disclosure to Government
  - Statutory/Regulatory requirements
  - Advantage in being pre-emptive
Privilege Issues

- "Upjohn Warning" – Make sure employees understand that counsel represents company
Privilege Waiver

- Change in DOJ Policy – Filip Memo
- SEC Adopted Same Policy
- Specter Bill to Prohibit Waiver Request by Government
Document Preservation, Review, and Analysis

- Preserve documents – and confirm search
- Important to conduct adequate document review before witness interviews
- Review/Search of electronic documents is essential – need to get IT involved early
- Memorialize everything done to search for records and ensure document integrity and control
Third Party Assistance

- Third parties may be brought in to assist investigation - forensic accountants, electronic data recovery experts, private investigators

- Third parties may be considered agents of the company, so written agreement that spells out their role and obligations is advisable
Witness Interviews

- Preparation – Review relevant documents, identify witnesses to interview and determine order of witness interviews
- Have relevant documents available and consider allowing witnesses to review *prior* to interview
- Interview those with knowledge and contact with government or adverse parties
Rules for Interviews

- **Upjohn Warnings at the outset**
  - Counsel represents the company, not the employee
  - Privilege is held by the company
  - It is the company's decision alone to waive the privilege

- **Counsel should explain that conversation should be kept confidential from everyone except the employee's attorney**

- **If employee asks if she needs a lawyer, reiterate that counsel is not the employee's attorney and cannot provide legal advice. However, employee is free to consult her own lawyer at any time.**
Rules for Interviews (Continued)

- Be careful about sharing information with employee (for instance, about what others have said) – in criminal investigation, could have adverse consequences
- Do not say anything that you do not want recorded or repeated to third parties or government investigators
- Be careful that notes document facts (which may be produced to the government) as opposed to opinion work product (which probably will not be produced to the government)
Providing Counsel to Employees

- Where interests of employee and company may diverge, company may want to recommend that employee retain separate counsel
- Indemnification of legal fees is governed by state law and the company's articles of incorporation or by-laws
- DOJ Policy change re: indemnification
Employee Rights Memorandum

- In government investigations, company may want to issue a memorandum to employees explaining the rights of employees to decide whether or not to speak to investigators

- Have to be very careful if issue such a memorandum, that it is not seen as evidence of non-cooperation
Employee Misconduct

- Culpable employees – important that there be some sanctions, including termination if appropriate – government will consider action taken by company in assessing cooperation
- Whistleblowers – may have performance issues, but need to be careful in imposing sanctions that appear vindictive
Final Report

- Company needs to decide whether it wants a written or oral report – benefit of written report in memorializing full scope of investigation
- If report is done, exercise caution to minimize risk of privilege waiver – generally, stick to the facts
Questions?
Thank You

Thank you for attending this webcast.