

Internal Investigations: Special Committees

by Gregory A. Markel and Sarah Fedner, Seyfarth Shaw LLP, with Practical Law Litigation

Status: **Maintained** | Jurisdiction: **United States**

This document is published by Practical Law and can be found at: us.practicallaw.tr.com/w-005-5446

Request a free trial and demonstration at: us.practicallaw.tr.com/practical-law

A Practice Note examining the key issues and best practices involved in internal investigations conducted by a special committee of independent directors. This Note explains the main considerations for forming the committee, the roles and responsibilities of the committee and its counsel, the committee's report on its findings and conclusions, and the disciplinary and remedial actions that the committee may recommend or employ.

This Practice Note received a Burton Award for Distinguished Legal Writing.

In recent years, companies increasingly have been undertaking internal investigations to uncover, assess, and remediate corporate wrongdoing. Some internal investigations are overseen by the company's board of directors, which can be appropriate if a majority of the board is comprised of independent directors. The board sometimes delegates the supervision of an investigation to an existing board committee, such as the audit committee (see Box, Audit Committee Investigations), or the board creates a new special committee of independent board members to oversee the investigation.

Typically, a special committee is used to investigate matters where the board of directors is concerned about the company's ability to conduct an independent investigation (for example, because the allegations implicate the company's senior management or certain board members). Common scenarios include where:

- The company has made a significant accounting restatement.
- A government agency is investigating the company.
- The company's internal or outside auditors have raised an issue of actual or potential misconduct or inadequate internal controls.
- The company suspects potential antitrust violations and is considering applying for amnesty under the Department of Justice's (DOJ's) Leniency Program for antitrust violations (for more information, see [Practice Note, Leniency Program for Antitrust Violations](#)).

- A whistleblower has made serious allegations against a member of management or the board of directors (for more information, see [Practice Note, Internal Investigations: Whistleblower Complaints](#)).
- The board suspects personal misconduct involving senior management.
- Shareholders have filed or threatened to file a derivative action against the directors or officers for breach of fiduciary duty (for more information, see [Practice Note, Shareholder Derivative Litigation: Special Litigation Committees](#)).

This Note highlights key issues surrounding an internal investigation conducted by a special committee of independent directors. The work of a special committee and its counsel is challenging. It requires good judgment, a willingness to make tough decisions, constant vigilance to preserve the committee's independence and privilege, and trust between the committee and its counsel. This Note provides guidance on best practices. However, each investigation is different so judgments about the applicability of these practices must be made throughout an investigation to independently and thoroughly conduct the investigation based on the facts and circumstances encountered.

For information on conducting internal investigations generally, see: [Conducting Internal Corporate Investigations Toolkit](#).



Forming the Committee

Principal issues for the company and its counsel to address in forming a special committee include:

- The scope of the committee's authority (see [Authority of the Committee](#)).
- The selection of the committee members and size of the committee (see [Selection of Committee Members](#)).
- The independence of the committee (see [Independence of the Committee](#)).
- The compensation of the committee members (see [Compensation of Committee Members](#)).

Authority of the Committee

The independent board members should determine a committee's authority to conduct an internal investigation. Assuming a majority of the board is independent, the independent board members should pass a resolution memorializing the committee's authority. The resolution should state:

- The reasons for the investigation.
- A description of the scope of what the committee will investigate.
- That the board of directors is delegating the investigation to either:
 - an existing committee; or
 - a new committee established as part of the resolution.
- Whether the committee will:
 - make final decisions on the issues; or
 - report its recommendations to the board of directors, which retains final decision-making power.

To maintain the committee's independence where it is not given final decision-making power, the resolution should also state that the committee's findings and recommendations are not subject to the board of directors' approval.

If the board of directors is comprised of a majority of independent directors, and the independence of those directors is clear, the board usually retains decision-making authority. However, factors that might weigh in favor of the committee having decision-making authority include:

- The seriousness of the issues involved, such as the nature of the alleged misconduct, the positions of

those potentially implicated, and the economic and reputational risks to the company if the alleged misconduct is substantiated.

- The need for special expertise in dealing with the issues.
- The learning curve and time commitment necessary to properly evaluate the issues.

The board of directors should also provide the committee with the authority to:

- Direct the company to implement a litigation hold for all relevant employees or business units (for more information, see [Practice Note, Implementing a Litigation Hold](#)).
- Obtain documents.
- Interview any current employee.
- Request any former employee to sit for an interview.
- Retain, at the company's expense, experts and advisors, including independent legal counsel (see [Retaining Advisors](#)).

This delegation allows the committee to direct the investigation without the board of directors' day-to-day review of the committee's actions.

If the committee's scope of authority needs to be revised due to additional allegations or newly discovered information, the committee can request that the board of directors expand its authority.

Selection of Committee Members

The selection of committee members plays a critical role in the effectiveness of the investigation. The company's in-house counsel generally assists the board of directors in making decisions about the composition of the committee where in-house counsel's conduct is not at issue.

The committee should be comprised of at least two independent directors (see [Independence of the Committee](#)), however, three is preferable. Where the committee consists of three or more independent directors, the board of directors generally appoints one director as the chairperson.

If the board of directors does not have enough independent directors to serve on the committee, it may add new independent directors to the board. In doing so, the board should ensure it complies with the company's bylaws and all applicable state corporate laws. The expectation should be that any newly added directors are permanent and will remain on the board after the investigation concludes.

Some factors the board of directors should consider in selecting the committee members include the candidate's:

- Availability and interest to serve given the considerable time commitment involved in overseeing and conducting the investigation.
- Expertise in the subject matter of the investigation.
- Previous board committee experience.
- Prior experience supervising an internal investigation.
- Judgment.
- Ability to:
 - work collaboratively;
 - act decisively; and
 - testify well in a deposition or at trial.

Independence of the Committee

In forming the committee, the board of directors must assess whether there are any conflicts of interest that might undermine the independence of the committee members or create an appearance of lack of independence. Selecting committee members who are not independent can:

- Lead to the loss of protections under the business judgment rule (for more information, see [Practice Note, Criminal and Civil Liability for Corporations, Officers, and Directors: The Business Judgment Rule](#)).
- Nullify the value of the committee's work by, for example, undermining the credibility of the committee's investigation or findings.
- Decrease the likelihood of reaching a favorable settlement with the government or shareholders.

Common conflicts of interest include where a person:

- Was directly involved in the alleged misconduct.
- Received a significant personal benefit from the alleged misconduct.
- Could be held liable due to the person's position with the company regardless of whether they were involved in the alleged misconduct.
- Has a close relationship with someone who was directly involved in or benefited personally from the alleged misconduct or may be held liable due to their position.

Members of management generally do not serve on the special committee where the investigation concerns the company's or a management member's misconduct.

Additionally, it is preferable that the committee does not include any members of the compensation committee.

To establish the independence of the committee, the best practice is to populate the committee with board members (possibly including new board members) who are above reproach (see, for example, *Booth Family Tr. v. Jeffries*, 640 F.3d 134, 143 (6th Cir. 2011)). The board of directors should assume there will be litigation over the committee's independence, and review all associations a director has with:

- Conflicted directors.
- Any individuals who are potential targets of the investigation.

The typical basis for concern about a possible conflict is a person's potential involvement in the conduct the committee is investigating. However, many potential conflicts of interest are difficult to identify. Recent court decisions show that judges are willing to find conflicts of interest in a wide range of relationships, for example:

- A director and their spouse's co-ownership of a private plane with the company's controlling shareholder, which showed an "extremely close, personal bond" between the families (*Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016)).
- A mutually beneficial ongoing business relationship between a director and the controlling shareholder (*Sandys*, 152 A.3d at 134).
- The company, committee members, and alleged wrongdoers' significant ties to the same university, which were "so substantial that they cause[d] reasonable doubt" about the committee's independence (*In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 930-35, 942-48 (Del. Ch. 2003)).
- A director's 50-year friendship with the company's chairperson (*Del. Cty. Empls. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022-23 (Del. 2015)).

However, a judge is unlikely to find a director not independent merely because they were named as a defendant in a shareholder derivative lawsuit (see, for example, *Pinchuck v. State St. Corp.*, 2011 WL 477315, at *11 (Mass. Super. 2011)).

Although not determinative, the board of directors should also assess whether a proposed committee member is independent under any relevant stock exchange rules (see, for example, *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 59-61 (Del. Ch. 2015)).

After the committee retains independent counsel (see Legal Counsel), the committee and its counsel should reevaluate the independence of the committee members. Further, to maintain the independence of the committee throughout the investigation, the committee should:

- Mandate that management and in-house counsel not be involved in the decision-making for the investigation.
- Where feasible and depending on the nature of the allegations, limit committee members' contact with any officers under investigation.
- Discourage committee members from casually discussing the investigation with directors not on the committee, including during board of directors meetings, except for carefully considered updates on the progress or status of the investigation generally.
- Encourage committee members to consult with committee counsel before any interaction with non-committee members.

Compensation of Committee Members

In addition to receiving compensation for serving on the board of directors, committee members typically also receive compensation for serving on the committee if a material amount of work is required. Particularly where there is a lack of precedent, a board of directors can, where the expense is justified, engage a compensation consultant to advise on what other companies typically pay committee members in similar situations.

To avoid the perception that the board of directors is influencing the committee's decision, the board should try to set the compensation before the committee begins its work or, where the workload is uncertain, after the work is completed. If the committee has a chairperson, the chairperson may receive greater compensation than other members of the committee, particularly where the chairperson takes on a heavier workload.

Overall, compensation should generally be in line with the compensation paid to chairpersons or members of other standing committees. If the investigation takes longer than expected, the board of directors can amend the committee's compensation during or preferably after the completion of the investigation.

Retaining Advisors

The committee should be authorized to retain its own independent legal counsel, experts, and other advisors to provide advice and guidance on issues related to the

investigation. The need for outside experts is a judgment call for the committee to make with committee counsel's advice. Experts are often expensive and, if they are unnecessary, the temptation to hire experts should be resisted. On the other hand, if expertise is needed, declining to hire experts is unwise.

Legal Counsel

The committee should retain its own counsel to:

- Provide advice on how to:
 - conduct the investigation, including how to maintain the attorney-client privilege and work product protection; and
 - remain independent and avoid any conflicts.
- Conduct certain parts of the investigation that the committee delegates to counsel, such as conducting interviews and reviewing documents.

To maintain independence, committee counsel should represent only the committee and not the company or the full board of directors.

Beyond the typical review of relevant skills and experience, the committee should ensure that its selected counsel does not have any conflicts of interest. Specifically, committee counsel should be independent from:

- The board of directors.
- The company's management.
- Any individual who is a potential target of the investigation.

Further, committee counsel should not be the company's regular outside counsel or have recently performed work for the company.

Committee counsel's retention letter should state:

- The potential misconduct to investigate.
- The scope of the inquiry.
- That counsel will advise the committee of its legal rights and obligations.

The committee can later expand the scope of counsel's engagement. However, the committee, not committee counsel, must control and direct the overall investigation (see Committee Versus Committee Counsel).

For a sample retainer letter to engage outside counsel for an internal investigation with integrated drafting notes, see [Standard Document, Internal Investigations: Engagement \(Retainer\) Letter](#).

Experts and Other Advisors

Like committee counsel, any experts or other advisors the committee retains must be independent from:

- The board of directors.
- The company's management.
- Any individual who is a potential target of the investigation.

The committee and committee counsel should not select experts or advisors who the company uses regularly. It is preferable that the experts and advisors have not previously performed any material recent work for the company. (See, for example, *Kahn v. Tremont Corp.*, 694 A.2d 422, 426, 429-30 (Del. 1997).)

Committees typically engage the following experts and advisors:

- Forensic accountants (for more information about retaining and working with forensic accountants during an internal investigation, see [Practice Note, Internal Investigations: Retaining and Working with Forensic Accountants](#)).
- Economists.
- Subject matter experts with specialized industry-specific knowledge, such as a cybersecurity expert.

The engagement agreement with any selected expert or advisor should describe:

- The scope of the engagement.
- The tasks that the expert or advisor will perform.

Conducting the Investigation

In conducting an internal investigation, it is critical for the committee and committee counsel to understand:

- Their separate roles and responsibilities (see [Committee Versus Committee Counsel](#)).
- How to perform document collection and review (see [Document Collection and Review](#)).
- How to conduct witness interviews (see [Witness Interviews](#)).
- Best practices for maintaining the attorney-client privilege and work product protection throughout the investigation (see [Maintaining the Attorney-Client Privilege and Work Product Protection](#)).

Committee Versus Committee Counsel

The committee (and not its counsel) directs the investigation. The committee must remain fully engaged in the investigation and not relinquish its decision-making responsibilities to committee counsel. In its role, the committee should:

- **Set the agenda and determine the timing and number of committee meetings.** The committee should meet regularly with committee counsel, for example, monthly. However, the pace of an investigation ultimately dictates the frequency of the meetings. The committee may schedule special meetings if something important arises and generally can adjust the schedule when necessary.
- **Provide ongoing input to committee counsel.** The committee should communicate regularly with committee counsel to manage the focus and scope of the investigation. The committee should evaluate committee counsel's recommendations on conducting the investigation and provide feedback and approve or reject the recommendations.

The committee must retain both the reality and appearance of being in charge and engaged to demonstrate its independence.

Committee counsel should always maintain its independence when dealing with company counsel. However, committee counsel might be able to find areas where it is efficient to cooperate with company counsel without compromising independence (see [Box, Common Interest and Joint Defense Agreements](#)).

Typically, committee counsel's primary responsibilities are to:

- **Provide the committee with guidance on how to conduct the investigation.** This includes advising on:
 - best practices;
 - lines of inquiry;
 - how to implement the committee's directives;
 - document collection and review;
 - identifying witnesses to interview; and
 - interview protocols.
- **Conduct the parts of the investigation that the committee delegates to committee counsel.** This generally consists of a substantial amount of the day-to-day work but not the ultimate decision-making.

Without a mandate from the committee, committee counsel should not aim to investigate any and all potential wrongdoing at the company. However, committee counsel should report to the committee any suspected misconduct it discovers that is outside the scope of the investigation.

- **Regularly update the committee on the investigation's status, key documents, and any important developments.** This includes providing the committee with information on key documents and interviews, as well as any other information or materials the committee requests. Committee counsel can keep the committee informed through:
 - in-person meetings;
 - conference calls;
 - emails; and
 - memoranda.
- **Draft the committee meeting minutes.** Committee counsel should be responsible for drafting the meeting minutes and should discourage committee members from taking unnecessary notes during the meetings.

In drafting the meeting minutes, committee counsel should:

- Assume the minutes are not privileged. The committee or the company may decide to disclose the minutes to, for example, a government agency or plaintiff's counsel.
- Identify the meeting date, location, and attendees, and indicate that the committee approved the previous meeting's minutes.
- Describe the topics discussed generally and avoid going into detail. For example, counsel can include:
 - general descriptions of past and future activities (such as noting that committee counsel outlined the schedule of upcoming interviews); and
 - an updated tentative schedule for completion of pending work.
- Avoid providing interim conclusions about the investigation.
- Show that the investigation is reasonable.
- Reflect that the committee, not committee counsel, is controlling the investigation.

Document Collection and Review

Document collection and review are critical to reconstructing past events and assisting committee counsel to identify witness to interview and in further

fact-finding during witness interviews. In handling document collection and review, committee counsel should consider whether it can avoid duplicating the collection and first-level review of documents that company counsel has already performed, while maintaining the independence of the committee's review. This means that committee counsel should:

- Review the process that company counsel used, including the process for locating and selecting documents.
- Determine whether the process that company counsel used was appropriate.
- Point to any search results or documents from company counsel's review process that committee counsel wants to review or wants the committee to review.
- Identify and recommend to the committee any additional:
 - searches for the committee to authorize; and
 - information for the committee to obtain.

Committee counsel should provide the committee with its assessment of what efforts do not need to be duplicated and what additional searches or review are needed. The committee should then direct committee counsel on how to proceed.

Witness Interviews

The committee and committee counsel can identify potential witnesses to interview by speaking with company counsel, reviewing documents, considering current employees, former employees, and third parties, and conducting a small number of scoping interviews. For more information about identifying potential witnesses, see [Practice Note, Internal Investigations: Strategically Planning the Witness Interviews: Identifying Potential Witnesses](#).

Committee counsel typically conduct most, if not all, witness interviews. For information on how to conduct a witness interview, see [Practice Notes, Internal Investigations: Conducting a Witness Interview](#) and [Internal Investigations: Using Soft Skills to Conduct a Successful Witness Interview](#).

While the committee members can participate in the interviews, they usually only do so for important witnesses. The committee and committee counsel should request that the company keep them apprised of any impending changes that could affect interviewing any relevant witness, such as termination or change of

location, so that an interview can be scheduled before the change.

To maintain the attorney-client privilege and work product protection for witness interviews (see *Maintaining the Attorney-Client Privilege and Work Product Protection*), committee counsel must:

- Be present at and memorialize any witness interview attended or led by the committee members (for more information, see [Standard Document, Internal Investigations: Witness Interview Memorandum](#)). Committee members should not take notes during the interview.
- Advise committee members that if they discuss the contents of a witness interview with anyone other than committee counsel or other committee members, they risk waiving the attorney-client privilege and work product protection.
- At the beginning of every interview, provide the interviewee with an *Upjohn warning* informing the interviewee that:
 - the board of directors has authorized the committee to conduct an internal investigation into potential misconduct;
 - the committee is investigating the facts and circumstances surrounding the potential misconduct;
 - the committee retained counsel to assist it in its investigation;
 - committee counsel represents only the committee and not the company or the interviewee;
 - the interview is being conducted to assist counsel in gathering facts concerning the investigation to provide legal advice to the committee;
 - the interview is subject to the attorney-client privilege, but the privilege belongs to and is controlled solely by the committee;
 - information discussed in the interview must remain confidential to maintain the attorney-client privilege and, therefore, counsel requests that the interviewee not share the contents of the interview with anyone except for the interviewee's attorney; and
 - the committee may decide to waive the privilege in the future and disclose to a third party, including the government, certain information the interviewee provides.

For more information about providing *Upjohn warnings*, see [Practice Note, Internal Investigations: Giving Upjohn](#)

[Warnings and Standard Document, Internal Investigations: Example of an Upjohn Warning](#).

A witness should be allowed to ask questions about the *Upjohn warning* to ensure that the witness understands and is willing to proceed. For information on how to deal with common interviewee questions, see [Practice Note, Internal Investigations: Giving Upjohn Warnings: Interviewee Questions](#).

For information on conducting witness interviews, see [Conducting Internal Corporate Investigations Toolkit: Conducting the Interviews and Investigation](#).

Maintaining the Attorney-Client Privilege and Work Product Protection

Maintaining the attorney-client privilege and work product protection is critically important to the success of an internal investigation (unless there is a conscious decision to waive privilege). Committee counsel's legal advice to the committee is protected by the attorney-client privilege (see, for example, *In re OM Securities Litig.*, 226 F.R.D. 579, 587 (N.D. Ohio 2005)). Documents created by committee counsel or at their direction during the investigation are protected by the work product doctrine (see, for example, *Matter of Contl. Illinois Securities Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984)). These privileges belong to the special committee (*In re BCE W., L.P.*, 2000 WL 1239117, at *2 (S.D.N.Y. Aug. 31, 2000)).

To protect against an inadvertent waiver, the committee and committee counsel should:

- Provide *Upjohn warnings* at all witness interviews and instruct witnesses to keep the discussions confidential (see *Witness Interviews*).
- Ensure that any non-attorneys involved in the investigation (other than committee members) work at the direction of designated attorneys.
- Include legends on documents and communications indicating that they are protected by the attorney-client privilege or work product protection where applicable.
- In multinational investigations, become familiar with the privilege rules of other relevant jurisdictions and never assume that communications that would be privileged in the US are protected under a foreign jurisdiction's rules.
- Request that committee members review any of the company's public statements about the investigation before the company issues them.

- Wall off the legal department from the investigation if it has exposure for the potential misconduct under investigation.
- Avoid disclosing any documents or other information about the investigation (including the contents of witness interviews, committee meetings, and interim or final investigation reports) to individuals outside the committee, and ensure the committee members are aware that they risk waiving the attorney-client privilege and work product protection if they disclose these materials (see, for example, *SEC v. Roberts*, 254 F.R.D. 371, 383 (N.D. Cal. 2008) (the attorney-client privilege does not protect communications between attorneys and board members that are not special committee members conducting internal investigation)).

The board of directors may require the committee to provide it with interim reports about the investigation, particularly during a lengthy investigation. Information provided to the board of directors may not be protected by the attorney-client privilege (*S.E.C. v. Roberts*, 254 F.R.D. 371, 383 (N.D. Cal. 2008)). Given that any information the committee provides to the board of directors might later be disclosed in litigation or voluntarily provided to the government, and because interim conclusions often change over the course of an investigation, the committee should limit providing interim reports to situations where there is a specific reason to do so (for example, where new developments require the board of directors to expand the committee's scope of authority or where the information the committee's investigation uncovers requires the board to take an immediate action). An interim report should note that the investigation is incomplete and any facts or conclusions in the report are preliminary and subject to change.

For more information on ensuring the proper creation and maintenance of the attorney-client privilege and work product protection over communications made or documents created during an internal investigation, see [Conducting Internal Corporate Investigations Toolkit: Attorney-Client Privilege and the Work Product Doctrine](#).

For a collection of resources to help counsel navigate the attorney-client privilege and work product protection in federal litigation, see [Attorney-Client Privilege and Work Product Doctrine Toolkit](#).

The Committee's Findings and Conclusions

At the conclusion of the investigation, the committee, with or without its counsel, should provide an oral or a written final report of its findings and conclusions to at least the

independent members of the board of directors who are not conflicted. The committee and committee counsel must carefully consider what to include in the report because it may not be protected by the attorney-client privilege and its disclosure may waive all communications regarding the subject matter (*Ryan v. Gifford*, 2007 WL 4259557, at *3 (Del. Ch. Nov. 30, 2007) and *S.E.C. v. Roberts*, 254 F.R.D. at 383). To help protect against a waiver, committee counsel should state that the report is being provided to the board solely in their fiduciary capacity.

The committee, with committee counsel's advice and guidance, must decide whether to provide the final report in written or oral form. While a written report reduces the likelihood that the findings are misconstrued or misremembered, it is difficult to keep the report confidential, which may lead to it being discoverable by the government or private litigants. A middle option, which is used frequently, is to create a PowerPoint presentation and display it during the oral presentation so that the decision-making body can follow the main points. For more information about the advantages and disadvantages of a written report generally, see [Standard Document, Internal Investigations: Investigation Report: Drafting Note: Decision to Write a Report](#).

The committee must decide whether non-independent or conflicted board members may receive or be present for the report based on the facts and circumstances, including the reasons those board members are not independent or conflicted. Where the board of directors has delegated to the committee only the authority to make a recommendation, the full board, ideally with non-independent or conflicted directors recused, makes the ultimate decision about whether to adopt the committee's findings.

The final report should:

- Explain the investigatory process, including:
 - the document review and collection process;
 - some selected key documents (in certain circumstances); and
 - the number of witnesses interviewed.
- Contain the key facts the committee uncovered.
- Provide committee counsel's legal analysis of the committee's findings and advice going forward.

For a sample investigation report prepared after the completion of an internal investigation, see [Standard Document, Internal Investigations: Investigation Report](#). For information about strengthening the potential

protections for the contents of the report, see [Practice Note, Internal Investigations: Conducting an Investigation While Preserving the Attorney-Client Privilege and Work Product Doctrine Protections: Contents of the Report](#).

Disciplinary and Remedial Actions

The committee's investigation might find that certain employees engaged in misconduct. Depending on the committee's authority, it can either recommend or implement disciplinary action against the implicated employees and other remedial actions, such as:

- Enacting new compliance procedures.
- Improving internal controls.
- Promoting ethical behavior and awareness of policies.
- Hiring new personnel.
- Compensating injured parties.
- Suing the employees that engaged in the misconduct.
- Terminating the employees that engaged in the misconduct.

If the government or regulators are unaware of the misconduct, the committee, depending on its authority, must decide whether to report the misconduct or recommend that the company self-report the misconduct. Voluntary disclosure might be advantageous, particularly where extensive misconduct occurred or the company qualifies for leniency under the DOJ's leniency program for antitrust violations. In some instances, particularly in regulated industries, the law may require a company to self-report certain misconduct.

Joint Defense Agreements

As part of its strategy for sharing and obtaining information, the committee and committee counsel can enter into a joint defense agreement (also called a common interest or common purpose agreement) with:

- Company counsel on behalf of the company.
- Counsel for individual employees.

Joint defense agreements are useful because they allow parties with similar legal interests who are involved in an investigation or a legal proceeding to share information with each other

without waiving the attorney-client privilege or work product protection. Entering into this type of agreement, for example, allows company counsel and committee counsel to avoid duplicative work wherever possible with a reduced risk of waiving the attorney-client privilege or work product protection. It might also be the only viable method to exchange information without waiving privilege.

However, these agreements can jeopardize a company's ability to obtain cooperation credit from the government. A joint defense agreement between the committee and an employee gives the employee control over the information they disclose to the corporation. As a result, the corporation may only be able to use internally the information the employee discloses and may be precluded from disclosing the information to the DOJ. To receive cooperation credit, the DOJ requires corporations to disclose all relevant information about individuals who were involved in or responsible for the misconduct. Therefore, a joint defense agreement with an employee could result in a company receiving less cooperation credit because it cannot disclose all relevant facts. Accordingly, despite the DOJ's statements that a company's participation in a joint defense agreement does not render it ineligible to receive cooperation credit, the agreement with the employee could result in the company receiving less cooperation credit.

The common interest doctrine (also called the joint defense privilege) is more easily waived than the attorney-client privilege or work product protection. For example, the joint defense privilege is generally waived if a party to the joint defense agreement becomes an adversary. There is also a risk of waiver for all parties if one party to the joint defense agreement waives the privilege, such as where an employee withdraws from the agreement and agrees to cooperate with the government's investigation of the company. The terms of joint defense agreements vary on these issues and counsel must carefully consider them before entering into an agreement.

The DOJ often views joint defense agreements with employees involved in the misconduct unfavorably and therefore unlikely to provide any accommodation to a company where it is precluded from disclosing information due to a

joint defense agreement with an employee. As a result, the committee and committee counsel should evaluate thoroughly whether to enter into a joint defense agreement with an employee.

For more information on cooperation credit, including guidance for receiving cooperation credit, see [Practice Note, Criminal and Civil Liability for Corporations, Officers, and Directors: DOJ Guidelines](#).

For a sample agreement, see [Standard Document, Investigations: Joint Defense and Confidentiality Agreement](#).

Audit Committee Investigations

A board of directors often tasks the company's audit committee with overseeing internal investigations when all the members have no conflicts of interest related to the investigation (see Independence of the Committee), particularly for investigations of Foreign Corrupt Practices Act (FCPA) violations. The benefits of assigning the investigation to the audit committee include that it:

- Has specialized knowledge, particularly about financial issues.
- Already exists and its members have worked together.
- Is comprised of independent directors (see, for example, [Practice Note, Corporate Governance Standards: Audit Committee: SEC Rules and Requirements: Independence](#) and [NYSE Standards: Independence](#)).

About Practical Law

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call 1-800-733-2889 or e-mail referenceattorneys@tr.com.

The best practices that should be employed in the context of an audit committee investigation are similar to those that apply in a special committee investigation.

An audit committee may also undertake an investigation on its own initiative where consistent with its existing charter after discovering potential misconduct during its regular responsibilities, for example, from:

- **An employee's anonymous report.** Section 301 of the Sarbanes-Oxley Act of 2002 (SOX) requires audit committees of public companies to establish procedures for employees to anonymously report potential accounting or financial fraud (15 U.S.C. § 78j-1(m)(4)).
- **The company's outside auditors.** Section 10A(b)(1)(B) of the Securities Exchange Act of 1934 requires outside auditors to "inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer, or the board of directors of the issuer in the absence of such a committee, is adequately informed with respect to illegal acts."
- **An internal auditor.** Public companies generally have an internal audit function to provide management and the audit committee with ongoing assessments of the company's risk management and internal control processes (see Section 303A.07, NYSE Listed Company Manual).

SOX Section 301 authorizes audit committees to engage and pay independent counsel and other experts to help carry out their duties. The audit committee's counsel must advise the audit committee that disclosing any information about its investigation to the company's outside auditors could waive the committee's attorney-client privilege or work product protection, depending on the jurisdiction. If the audit committee intends to disclose the information to outside auditors, the audit committee should consider entering into a confidentiality agreement to help decrease the chance that a court finds a waiver of the attorney-client privilege or work product protection.

For a collection of resources addressing the governance standards for and duties of an audit committee, see [Audit Committee Role and Responsibilities Toolkit](#).