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Internal Investigations Involving Product Safety Issues

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Internal Investigations Involving Product Safety Issues (April 5, 2016)

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Key Considerations When Conducting Internal Investigations Involving Product Safety Issues

Product safety recalls occur in heavily regulated environments and can pose an existential threat to a company. A product recall's ripple effects may include harm to brand, global regulatory scrutiny, internal investigations, congressional and criminal investigations, federal and state consumer fraud litigation, commercial disputes with supply chain partners, product liability suits, and consumer class actions.

In almost every recall scenario, some type of internal investigation will be necessary, and in many cases, multiple investigations, involving global enforcement entities and stakeholders, are increasingly common. From the initial reporting and root cause determination, to follow-on regulatory inquiries, a company can find itself involved in several overlapping and cascading investigations. A dynamic akin to Russian nesting dolls can even emerge, where regulatory authorities also investigate a company's initial internal recall determination.

Companies involved in recalls should be aware of the wide-ranging implications of their root cause investigations and regulatory reporting determinations. Critical missteps in internal investigations can have severe consequences in later government investigations and/or follow-on litigation. Navigating issues relating to complex regulatory requirements, privilege, legal ethics, and data preservation can be challenging in any investigation; they become even more so in recall-related investigations where companies are necessarily required to make reporting and recall determinations under tight deadlines and in the public spotlight. Below we offer guidance on key product safety investigation topics.

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I. REGULATORY CONSIDERATIONS IN INTERNAL INVESTIGATIONS INVOLVING CONSUMER SAFETY

A. Background

1. In recent years, federal agencies tasked with enforcing consumer product safety regulations have become increasingly aggressive in investigating and pursuing enforcement actions to penalize violations of product safety laws.
2. Two principal U.S. agencies governing product safety recalls are the Consumer Product Safety Commission ("CPSC"), which regulates consumer products, and the National Highway Traffic Safety Administration ("NHTSA"), which regulates motor vehicles and motor vehicle equipment.
3. Both agencies impose stringent reporting obligations on regulated entities. These obligations can be onerous, as they require extensive disclosure of information pertaining to known safety defects, noncompliance issues, and unreasonable safety risks within a short amount of time following a determination that a reportable risk is present.
4. Both agencies have the power to investigate potential violations of substantive regulations as well as failures to report or delays in reporting. Both agencies can assess monetary penalties for failing to timely report.
5. In a classic case of "the cover-up is worse than the crime," the agencies tend to take a more punitive, hardline approach with companies that report issues belatedly or not at all. In recent years, the CPSC and NHTSA have assessed record penalties against companies that allegedly have failed to timely or adequately report product safety issues.
6. Confidentiality protections in civil litigation may not apply in regulatory investigations involving product safety recalls. In March 2016, NHTSA issued guidance that protective orders and settlement agreements in private litigation should include carve-out provisions allowing for relevant information to be reported to NHTSA and other safety regulators.
7. In the course of an internal investigation, a company may learn of information relating to its products that could implicate consumer safety. If so, it should immediately consult

with knowledgeable counsel to assess whether regulatory reporting obligations have been triggered and, if so, develop a strategy for engaging with the appropriate agency in the required timeframes. By taking a proactive approach to safety issues, a company can help ensure it has a cooperative, productive relationship with consumer safety regulators.

B. Federal Safety Regulatory Agencies

1. U.S. Consumer Product Safety Commission

a) Reporting Requirements

(1) Under U.S. law, a manufacturer of consumer products must report to the CPSC "immediately"—that is, within 24 hours—upon obtaining information that reasonably supports the conclusion that one or more products:

(a) contains a defect that could create a substantial product hazard;

(b) creates an unreasonable risk of injury or death; or

(c) fails to comply with consumer product safety rules, regulations or standards. *See* 15 U.S.C. § 2064(b); 16 C.F.R. § 1115.14(e).

(2) A report is required as soon as "one could reasonably conclude the existence" of a reportable defect, risk, or noncompliance. 16 C.F.R. § 1115.12(a). If a manufacturer is unsure whether it possesses reportable information, the manufacturer is permitted to conduct an expeditious investigation lasting up to ten days for the purpose of evaluating whether the reporting obligation has been triggered. *Id.* § 1115.14(d). However, a manufacturer should not delay reporting simply to confirm the presence of a defect, risk, or noncompliance to a certainty. *Id.* § 1115.12(a).

(3) The most common basis for reporting consumer safety incidents to the CPSC is Section 15(b)(2), which requires reporting when a manufacturer has information suggesting both a defect and a substantial product hazard. According to the CPSC,

"whether the information available reasonably suggests a defect" should be the first question a company asks in deciding whether to report. *See* 16 C.F.R. § 1115.4. If the information reasonably supports the conclusion that a defect exists, the company must then consider "whether that defect could create a substantial product hazard." *Id.*

(4) Manufacturers have little useful regulatory guidance in evaluating whether their product contains a reportable defect. The term "defect" is not defined in the Safety Act. The CPSC's regulations state the presence of a defect is determined "[o]n a case-by-case basis" by reference to, among other things, the word's dictionary definition. *See id.* Under that definition, any "fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function" could be a reportable defect. *Id.* The CPSC's definition is broad enough to encompass several different kinds of defects, including design defects, manufacturing defects, marketing defects, and labeling defects. *Id.*

(5) However, not all products that present a risk of injury are defective. CPSC regulations state that a knife, for example, presents a risk of injury even when it functions perfectly. *Id.* If the usefulness of the product is "made possible by the same aspect which presents the risk of injury," the commission will weigh the risk against the product's utility, considering a wide variety of factors. *See id.* This balancing test is particularly appropriate in cases "where there is evidence showing that the corrective action sought will have an adverse effect on the ability of the product to perform its intended function." *In the Matter of Dye and Dye*, CPSC Docket No. 88-1, 1989 WL 435534, at *10 (CPSC July 17, 1991).

(6) A substantial product hazard means that, because of the defect, the product poses "a substantial risk of injury to the public." *See id.* § 2064(a). According to the CPSC, "[m]ost defects could present a

substantial product hazard if the public is exposed to significant numbers of defective products or if the possible injury is serious or is likely to occur." 16 C.F.R. § 1111.4. Manufacturers "are urged to report if in doubt as to whether a defect could present a substantial product hazard." *Id.*

(7) Importantly, even absent a defect, a manufacturer has an independent obligation to report to the CPSC if it obtains information that reasonably supports the conclusion that its product creates an unreasonable risk of injury or death. *See* 15 U.S.C. § 2064(b); 16 C.F.R. § 1115.14(e).

b) Penalties

(1) A manufacturer's knowing failure to submit a timely report can result in substantial civil penalties. *See* 15 U.S.C. §§ 2068(a)(4), 2069(a)(1). A failure to report is considered "knowing" if the manufacturer either had actual knowledge of reportable information or could reasonably be presumed to have such knowledge under the circumstances. *See id.* § 2069(d).

(2) Civil penalties range from a minimum of $100,000, for the failure to report a single consumer incident, to a maximum of $15 million, for a related series of violations. *See id.* § 2069(a)(1). The regulations do not define when a "series of violations" are related, but the CPSC will commonly treat all incidents involving either the same product or same defect as related. The size of the penalty depends on a number of factors, including "the nature, circumstances, extent, and gravity of the violation, including the nature of the product defect, the severity of the risk of injury, the occurrence or absence of injury, the number of defective products distributed, [and] the appropriateness of such penalty in relation to the size of the business of the person charged." *Id.* § 2069(b).

2. National Highway Traffic Safety Administration

a) Reporting Requirements

(1) U.S. law provides that a manufacturer of a motor vehicle or of motor vehicle replacement equipment must report a defect to NHTSA if the manufacturer "learns the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety." 49 U.S.C. § 30118(c)(1); *see also* 49 C.F.R. § 573.6(a) ("Each manufacturer shall furnish a report to the NHTSA for each defect in his vehicles or in his items of original or replacement equipment that he or the Administrator determines to be related to motor vehicle safety . . . ."). Such a report must be made within five working days after the defect or noncompliance is determined to exist. 49 C.F.R. § 573.6(b).

(2) A manufacturer must also make a report to NHTSA when it "decides in good faith that the vehicle or equipment does not comply with an applicable motor vehicle safety standard prescribed under this chapter." 49 U.S.C. § 30118(c)(2); 49 C.F.R. § 573.6(a).

(3) "[M]otor vehicle equipment" is broadly defined to include, in relevant part, "any system, part, or component of a motor vehicle as originally manufactured" and "any similar part or component manufactured or sold for replacement or improvement of a system, part, or component, or as an accessory or addition to a motor vehicle." 49 U.S.C. § 30102 (a)(7).

(4) The reporting standard requires that two elements be met: there must be (1) a "defect" which is (2) "related to motor vehicle safety." 49 U.S.C. § 30118(c).

(5) The statute defines a defect as including "any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment." 49 U.S.C. § 30102(a)(2). A defect exists whenever there is a "non-de minimus number of failures," which must be assessed "in terms of the facts and

circumstances of each particular case." *United States v. General Motors Corp.*, 518 F.2d 420, 438 n.84 (D.C. Cir. 1975).

(6) The statute defines "motor vehicle safety" as "the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident." 49 U.S.C. § 30102(a)(8).

(7) The threshold for reporting is low; a manufacturer is required to report even if it believes that the defect is "inconsequential" in terms of the defect's impact on safety. The statute's legislative history makes clear that Congress "intends that the Secretary be notified when a manufacturer believes that such safety-related defect or failure to comply is inconsequential as it relates to motor vehicle safety," although the manufacturer can file a petition for inconsequentiality in such circumstances. H.R. Rep. 93-1191, at 21 (1974).

b) Penalties

(1) A manufacturer that fails to report a defect or non-compliance with a safety standard may be liable for civil penalties in the amount of not more than $7,000 for each violation, with a maximum penalty of $17.35 million for "a related series of violations."

(2) While the maximum penalty amount is the same for both failing to report and for late reporting, NHTSA is more likely to assess penalties, and penalties in greater amounts, for failing to report entirely rather than for late reporting. Indeed, the statute requires NHTSA to consider "[the] gravity of the violation" in determining the amount of a penalty, 49 U.S.C. § 30165(c), and a complete failure to report is a more serious violation than late reporting. Further, each day a violation continues constitutes an additional violation for purposes of assessing penalties, so continued delay in reporting, where

reporting is required, risks increased penalties. 77 Fed. Reg. 70, 710, 70,711 (Nov. 27, 2012) (noting that "NHTSA is amending Section 578.6(a)(3) to increase the maximum civil penalty from $6,000 to $7,000 *per violation per day*" (emphasis added)).

C. Recent Investigation & Enforcement Developments

1. CPSC

a) Civil penalties levied by the CPSC continue to rise year over year, and the current CPSC Chairman has publicly announced that the Commission will pursue more significant penalties for violations of safety laws, including failure to timely report product hazards.

b) In March 2016, the CPSC assessed a record $15.4 million penalty against Gree, a manufacturer of dehumidifiers which posed a fire risk. In a public settlement agreement, the CPSC alleged that Gree failed to report fires to the Commission, knowingly made misrepresentations to CPSC staff, and put UL certification marks on products that failed to meet UL standards.

c) In May 2015, the CPSC and the DOJ filed suit in federal district court against Zen Magnets seeking, among other relief, an order compelling it to issue a mandatory recall of certain small, extremely powerful magnets that could cause death or serious injury when swallowed by children.

d) CPSC Chairman Elliot Kaye recently announced publicly that penalties would continue to rise as the agency does not want the penalties to be interpreted by manufacturers "as nothing more than the cost of doing business."

2. NHTSA

a) In recent years NHTSA also has subjected companies to unprecedented penalties for deficient safety risk reporting.

b) Toyota

(1) In 2009 and 2010, Toyota recalled nearly eight million vehicles that were subject to "unintended acceleration" due to sticky accelerator pedals or the possibility that the accelerator pedal could be stuck beneath the floor mat.

(2) NHTSA fined Toyota a total of $48.8 million for failing to notify the agency of these defects and to conduct recalls in a timely manner.

(3) Following on NHTSA's investigation and fines, the U.S. Department of Justice ("DOJ") conducted a criminal investigation into Toyota's conduct. In March 2014, Toyota agreed to enter into a Deferred Prosecution Agreement, under which it admitted to misleading consumers by concealing and making deceptive statements about the sticky accelerator pedal and floor mat issues. Toyota agreed to pay a $1.2 billion penalty, and an independent monitor was appointed to oversee various aspects of Toyota's compliance with safety policies and procedures.

c) General Motors

(1) In 2014, following a long-delayed investigation, General Motors ("GM") recalled a large number of vehicles containing defective ignition switches that could inadvertently shut off while vehicles were in motion, disabling airbags and other features.

(2) In May 2014, NHTSA fined GM $35 million for failing to provide notice of this safety-related defect within five days. NHTSA further required that GM provide, within 15 days, a comprehensive written plan laying out how GM intended to maximize its recall rates to remedy the faulty ignition switch in vehicles already on the road. GM was required to explain to NHTSA how it would conduct consumer outreach and reduce the likelihood that a certain type of key which aggravated the defect would be used in the future. NHTSA also required that GM provide it with biweekly status reports on its recall efforts for six months, and monthly status reports thereafter. Finally, NHTSA required GM to meet with it on a monthly basis for one year to discuss its efforts to implement internal safety and policy recommendations arising from GM's internal investigation into how the company addressed its ignition switch defect.

(3) In September 2015, DOJ announced a resolution of its separate criminal investigation into the same conduct. GM agreed to pay a $900 million penalty and also became subject to oversight by an independent compliance monitor.

d) Fiat Chrysler

(1) In 2015, NHTSA conducted an investigation into claims that Fiat Chrysler ("FCA") had not properly conducted a number of safety recalls.

(2) In July 2015, based on FCA's failures to provide effective and timely recall remedies, and to provide appropriate notification to vehicle owners, dealers, and NHTSA, the agency imposed a non-contingent, cash penalty on FCA of $70 million. NHTSA required FCA to spend an additional $20 million on outreach to consumers and other members of the automotive industry to provide education on NHTSA safety regulations and to enhance future safety recall efforts. FCA also was required to undertake improvements to its internal safety and compliance processes and procedures, to train its employees on NHTSA safety regulations, and to engage a third-party consultant to review and evaluate its training, processes, and procedures. Finally, FCA was required to retain an independent monitor to oversee its implementation of NHTSA's order. Failure to adhere to the terms of this agreement would result in FCA having to pay as much as an additional $15 million in civil penalties.

(3) In December 2015, NHTSA imposed another $70 million cash penalty for FCA's failure to provide early warning data to NHTSA, such as warranty claims and consumer complaints, as required by law.

D. Confidentiality Considerations

1. On March 11, 2016, NHTSA published a bulletin in the Federal Register articulating its policy position about the use of protective orders or settlement agreements in private litigation

to prohibit the disclosure of information relating to potential motor vehicle safety defects. 81 Fed. Reg. 13026.

2. NHTSA expressed the view that such confidential treatment, to the extent it may prevent safety-related information from being transmitted to NHTSA, is not in the public interest.

3. Accordingly, NHTSA recommended that litigants include express carve-out provisions in such confidentiality orders and settlement agreements which provide that information may be disclosed to NHTSA or other regulators with an interest in the subject matter of the suit.

4. NHTSA's bulletin is not binding on federal courts. However — and regardless of the extent to which it alters the behavior of litigants — it signals NHTSA's interest in scrutinizing private litigation as a source of evidence of previously undisclosed vehicle safety problems.

5. If NHTSA learns about an issue from a private lawsuit that it deems to be a safety-related defect subject to its reporting obligations, the manufacturer could be subject to investigation and enforcement action for failing to report.

6. This risk puts yet another thumb on the scale in favor of reporting a potential safety defect. If there is a chance that evidence of the defect would arise in civil discovery, the company must assume that the regulator will ultimately obtain it. Civil penalties could be assessed, and the agency would likely view the company as uncooperative and a bad faith actor, resulting in less negotiating flexibility by the agency.

II. COMMON ISSUES ARISING IN INTERNAL INVESTIGATIONS

A. Data Preservation

1. To conduct a reliable and credible internal investigation, a company must be attentive to data preservation issues from the outset. A duty to preserve only attaches when litigation becomes reasonably foreseeable. *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011). However, determining when litigation is reasonably foreseeable is a fact-specific standard that encompasses a good deal of discretion. Accordingly, in a recall situation involving a possible product defect, often a company should not wait until a complaint is

filed or demand letter served before it issues a hold notice and takes other steps to preserve potentially relevant information. *See, e.g.*, *id.*, at 1321 (affirming the lower court's decision that the duty to preserve attached at the time that Rambus began developing a potential litigation strategy for future patent litigation even though no case had been filed yet).

2. NHTSA and CPSC regulations also require the retention of certain records pertaining to potential safety defects, investigations, and certifications. *See, e.g.*, 49 C.F.R. § 576 (NHTSA record retention requirements); 16 C.F.R. § 1107.26 (CPSC recordkeeping requirements for children's products); 16 C.F.R. § 1112.25 (CPSC recordkeeping requirements for third party conformity assessment bodies). Safety regulators also routinely include document and data preservation requests in their responses to company reports regarding product safety defect and noncompliance issues.

3. Preserving relevant data is a critical step in cooperating in a government investigation, and a company that fails to take steps to do so at the outset of an investigation risks losing the chance to earn valuable cooperation credit down the road.

B. Privilege Fundamentals for Internal Investigations

1. Once a company learns of a possible product safety issue it will need to determine whether it is necessary to report the issue to the relevant federal agency and conduct a root cause analysis. And, if the company decides that it needs to report the issue, the company may need to investigate further the issue as part of a government investigation or in response to pending litigation related to the issue. Regardless of the timing, companies will often prefer to keep the results of the investigation and the material developed in an investigation privileged and protected from public disclosure. Thus, it is critical that from the beginning of the investigation, companies focus on conducting internal investigations in a manner that preserves privilege to the maximum extent possible.

2. From the outset of the engagement, it is critical to identify the client and the purpose of the investigation.

   a) In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court adopted a functional approach to determining the identity of the client is for purposes of when a communication is or is not privileged. The Court considered a communication privileged when a communication is made by an employee with information necessary for the corporation to secure legal advice or when employee who receives the communication had a need to know the legal advice. The attorney-client privilege applies so long as "the communication [was] not disseminated beyond those persons who, because of the corporate structure, need to know its contents." *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977).

b) Communications made in the course of an investigation for purposes of gathering information to enable counsel to advise on regulatory reporting requirements are paradigmatic privileged communications. Regardless, counsel should clearly articulate the legal purpose of the investigation early and often, *e.g.*, in a formal letter indicating that company management have requested counsel to conduct an investigation for purpose of providing legal advice to the company, in engagement letters, and especially during witness interviews.

c) There is particular risk of waiver in recall-related investigations because information must travel quickly, and fact-gathering efforts will likely be diffuse and often are global. Thus, companies should consider constituting an investigative team with clearly defined roles and responsibilities, making clear that non-lawyers on the team are acting as agents of legal counsel. Companies should also consider establishing communication protocols so that sensitive investigative information is identified in a manner that maximizes the privilege, and not shared beyond those individuals with a "need to know."

3. Consider special legal issues that might affect privilege for investigations conducted outside of the United States.

a) In 2010, the European Court of Justice held that because in-house counsel are unable to exercise independence from the companies that employ them, their communications with the company are not privileged. Thus, a company should evaluate the privilege risks that flow from having in-house lawyers lead an investigation if that investigation may ultimately be the focus of litigation in the European Union. *See* Case C-550/07P, *Akzo Nobel Chemicals Ltd. v. European Comm'n*, 2010 E.C.R. I-08301.

4. Provide company employees with a proper *Upjohn* warning when interviewing them as part of an investigation.

   a) The *Upjohn* warning to an employee being interviewed should generally cover the following points: (1) that the interviewer is a lawyer for the company and does not represent the interviewee personally; (2) that the purpose of the interview is to gather facts in order to provide legal advice to the company; (3) that the interview is privileged and that privilege belongs to the company, not the person being interviewed; and (4) that the company may decide to share the information provided by the witness with third parties.

   b) As part of the interview, the interviewer should document the fact that he or she delivered the *Upjohn* warning to the interviewee.

   c) Individuals being interviewed in internal investigations may well be the subject of scrutiny in government investigations. It is important to consider issues that can arise where there is a lack of clarity about whom counsel represents. *United States v. Ruehle* is an example of the problems that can arise in such circumstances. 583 F.3d 600 (9th Cir. 2009). There, outside counsel interviewed William Ruehle, the CFO of Broadcom, and he made numerous statements that he later sought to suppress as privileged in his criminal trial. Ruehle argued that outside counsel had represented him and other individual officers in shareholder suits and failed to advise him during the interview that his statements could be disclosed to third parties. The district court suppressed Ruehle's interview statements and concluded that outside counsel had breached their duty of loyalty to Ruehle. The court also referred the lawyers involved to the California State Bar for possible discipline. *United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009), *rev'd sub nom. United States v. Ruehle*, 583 F.3d 600. In its decision, the court noted that there was no record that counsel provided an adequate *Upjohn* warning because there was no mention of the warning in the attorneys' notes. *Id.* at 1116. While the Ninth Circuit ultimately overturned the district court's privilege ruling on the ground that Ruehle knew his statements would be disclosed to the company's auditors—and thus were not confidential—this case illustrates the problems that can occur when there is a lack of clarity about whom outside counsel represents and when attorneys fail to provide adequate *Upjohn* warnings.

5. Prepare interview memoranda with an eye toward preserving privilege.

   a) Well-crafted interview summaries should avoid the need to revisit topics with witnesses and can serve as a resource to the rest of the investigative team. However, to ensure that the content of those summaries remain privileged, interviews should not be recorded or transcribed verbatim. *See* Fed. R. Crim. P. 26.2(a), (f)(2).

   b) The interview summary should include language documenting that it does not constitute a transcript and that the content of the interview is not presented sequentially. Moreover, it should state that it contains the thoughts, mental impressions and conclusions of the attorney.

6. Reporting the results of the investigation

   a) The conclusion of an investigation, particularly one that will inform the Government's decision about whether to bring an enforcement action, may involve some form of agency reporting. Such reporting may implicate a variety of privilege considerations.

   b) In the case *In re OM Sec. Litig.*, 226 F.R.D. 579 (N.D. Ohio 2005), the court found that privilege was waived as to certain the investigation results when counsel for the Audit Committee presented a report to the full board, which was not the client. *Id.* at 591-92. However, in at least one case, a court has held that a company's disclosure to the Consumer Product Safety Commission did not constitute waiver because the self-critical analysis protection applied to the mandatory reporting. *See Roberts v. Carrier Corp.*, 107 F.R.D. 678, 685 (N.D. Ind. 1985).

7. Recent cases and developments

a) Case law concerning the preservation and waiver of privilege is always developing. Thus, it is critical that counsel review the applicable case law for the jurisdiction(s) at issue. Awareness of the nuances in state, federal, and international law will best prepare you to ensure that the investigation report and related work product remains privileged if your client so desires. What follows are summaries of some of the more recent and high-profile decisions involving internal investigations and the preservation of attorney-client privilege and the work product doctrine surrounding those investigations.

b) The risk inherent with non-attorneys participating in the investigation:

(1) In *United States ex rel. Barko v. Halliburton Co.*, 37 F. Supp. 3d 1 (D.D.C. 2014), a D.C. district court held that materials related to Kellogg Brown & Root's internal investigation were not privileged in part because non-attorneys conducted the interviews. The D.C. Circuit subsequently vacated the district court decision because the non-attorneys were acting at the direction of in-house counsel and were effectively agents of the attorneys. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (2014). The D.C. Circuit relied upon the Supreme Court's decision in *Upjohn* to reach this conclusion. *Id.*

(2) The district court's decision, however, demonstrates that a company assumes an increased risk that a court may determine that an internal investigation is not privileged when the company uses in-house counsel or non-attorneys to conduct the investigation. *See also, e.g., United States v. ISS Marine Servs., Inc.*, 905 F. Supp. 2d 121 (D.D.C. 2012) (holding that an investigation conducted by internal audit personnel was not covered by the attorney-client privilege and not protected by the work product doctrine).

(3) Some of the key takeaways from the DC Circuit's decision are: (1) companies should document at the outset of an investigation that a significant purpose of the investigation is to provide legal advice; (2) interviewees should be instructed that the purpose of the interview is to provide legal advice to the company; and (3) if the decision is made not to have attorneys conduct the interviews then they should actively direct and monitor the investigation to ensure that it remains privileged.

c) Alternative means of preparing interview memoranda to limit work product that may be discoverable in the future:

(1) The Office of the Governor of New Jersey retained a law firm to conduct an internal investigation into the 2013 closing of local lanes on the George Washington Bridge, an incident commonly referred to as "Bridgegate." The Governor's Office made the law firm's report public and the accompanying interview memoranda were also provided to the U.S. Attorney's Office and the New Jersey Legislative Select Committee on Investigations. In a subsequent criminal action, two individuals being criminally prosecuted for their roles in Bridgegate sought the notes from those interviews. The judge quashed the subpoena after it was determined that the attorneys conducting the interview had changed their normal practice and only had one attorney take notes during the interview, with the notes being taken electronically. The attorneys then turned the electronic notes into the interview memoranda, resulting in a single final document with no remaining notes. *United States v. Baroni*, 2:15-CR-00193-SDW, 2015 WL 9049528 (D.N.J. Dec. 16, 2015) (slip op.).

(2) Judge Wigenton noted with frustration that the law firm "did not delete or shred documents, [but] the process of overwriting their interview notes and drafts of the summaries had the same effect." *Id.* at *4.

(3) Importantly, while this process did have the effect of limiting the information that might otherwise be

discoverable, the court did note that it might violate the firm's "ethical obligations under the New Jersey Office of the Attorney General and Department of Law's Outside Counsel Guidelines." *Id.* at *4 n.7.

d) Foreign countries' views on privilege and the use of international unlicensed attorneys may undermine privilege assertions in U.S. cases:

(1) In *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479 (S.D.N.Y. 2013), the court denied privilege protection to materials connected to investigations conducted in China that do not touch upon legal matters in the United States. *Id.* at 492.

(2) The Court also held that even those documents that are connected to a U.S. matter still may not be privileged if they were prepared by in-house counsel within China that were not licensed to practice law. Citing an earlier decision in *Gucci America v. Guess?, Inc.*, 271 F.R.D. 58, 64 (S.D.N.Y. 2010), the court rejected a "functional equivalent" test and instead held that the attorney-client privilege requires a showing that the communication was made to a licensed member of the bar. In China, in-house counsel do not need to be licensed attorneys and thus, the privilege did not extend to such communications. *Id.* at 494-95.

e) Shareholders may have the right to access otherwise privileged materials from a corporate internal investigation.

(1) In *Wal-Mart Stores, Inc. v. IBEW*, 95 A.3d 1264 (2014), the Supreme Court of the State of Delaware affirmed the Court of Chancery's application of the 5th Circuit's rule in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) (the "*Garner* doctrine"), and permitted IBEW to review Wal-Mart's privileged materials related to an investigation into possible Foreign Corrupt Practices Act violations by its Mexican subsidiary.

(a) Under *Garner*, shareholders may invade a corporation's attorney-client privilege to prove fiduciary breaches by those in control of the corporation, as long as there is a showing of "good cause." *Garner*, 430 F.2d at 1104.

(2) The Delaware Supreme Court found that the plaintiffs were entitled to the privileged documents under Section 220 of the Delaware General Corporation Law because the plaintiff sought "information regarding the handling of the WalMex investigation, whether a cover up took place, and what details were shared with the Wal-Mart Board," and such issues related to alleged fiduciary breaches. *Wal-Mart*, 95 A.3d at 1278. The Court held that this rationale applied to both the attorney-client privilege and the attorney work product doctrine. *Id.* at 1278-81.

f) Disclosing the results of a privileged investigation does not necessarily waive protection over the underlying materials:

(1) In *In re General Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521 (S.D.N.Y. 2015), the court found that GM did not waive privilege over underlying interview memoranda when it agreed to make its investigation report public and share it with Congress and various agencies. The court concluded that GM's disclosure of the report, as well as documents and materials reviewed, did not evidence an intent to disclose underlying privileged communications (*e.g.*, notes and summaries of the interviews that reflect attorney work product and attorney-client communications). *Id.* at 533-34.

(a) In reaching this conclusion, the court noted the similarities with the situation *Upjohn*. The interviews and internal investigation were conducted for the purpose of providing legal advice to the company in light of possible misconduct by company personnel. Counsel conducting the interviews explicitly told interviewees that the purpose of the interview was to collect information to provide legal advice to the company, and that the matters discussed were confidential. Moreover, GM did not provide documents reflecting communications between lawyers and employees to any third-party. *Id.* at 527-28.

(2) Other courts, however, have held in recent years that the public distribution of an internal investigation report can effect a waiver of the privilege, including a waiver over the underlying interview memoranda and work product. In *Estate of Paterno v. NCAA*, No. 2013-2082 slip op. at 19-22 (Pa. Ct. Com. Pl. Sept. 11, 2014), the court rejected Penn State University's assertion of privilege and held that the University's voluntary disclosure of the Freeh Group's investigation into the University's knowledge and alleged wrongdoing related to sexual abuse by former football coach Jerry Sandusky (the "Freeh Report"), waived privilege as to the underlying documents relating to the investigation and the Freeh Report.

(a) In *Paterno*, the court determined that documents underlying the Freeh Report were not prepared in anticipation of litigation and thus, could not be viewed as attorney work product. The Court further relied upon the fact that Penn State's engagement letter did not reference "securing either an opinion of law, legal services or assistance in a legal matter." *Id.* at 22-23. This underscores the importance of documenting the legal purpose of the investigation.

C. Preserving privilege when engaging third-parties:

1. As a general rule, disclosing privileged communications to a non-attorney third party waives privilege. However, courts permit communications with certain third parties in order to assist the attorney in providing legal advice to the client. This issue looms large in a recall scenario, where any number of third party consultants (*e.g.*, engineers, accountants, and public relations experts) may be involved in providing analyses for the company's report.

2. In *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), the Second Circuit established parameters for the extension of the

attorney-client privilege to non-attorney third parties. Subsequently, most other circuits adopted the *Kovel* doctrine.

a) Under *Kovel*, a communication with a non-attorney such as an accountant or engineer remains privileged if "the communication [is] made in confidence for the purpose of obtaining legal advice from the lawyer." *Id.* at 922. The privilege extends to communications that are "necessary, or at least highly useful" to discussions between the client and attorney. *Id.* Thus, communications with an expert who plays a translating or interpreting function are privileged because the communications help the attorney better understand and convey the information. *Id.*

b) The most common type of expert is an accountant in a tax case (the original scenario in *Kovel*), but the *Kovel* doctrine has also been applied in certain instances to patent agents (*e.g.*, *Foseco Int'l Ltd. v. Fireline, Inc.*, 546 F. Supp. 22 (N.D. Ohio 1982)), auditors (*United States ex rel. Robinson v. Northrup Grumman Corp.*, No. 89 C 6111, 2003 WL 21439871 (N.D. Ill. June 20, 2003)), PR agents (*In re Copper Market Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001)), business consultants (*Sieger v. Zak*, 18 Misc. 3d 1143(a) (N.Y. Sup. Ct. Feb. 21, 2008)), and others. The structure of the relationship between the attorney and the third party is important in determining whether or not the protection of the privilege will apply. *See, e.g., Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300 (D.N.J. 2008) (the retainer agreement between the client and investment bank did not state the engagement was for a legal purpose, and thus, the court determined that the relationship was not privileged).

3. There are strong arguments that experts retained to assist with a product liability-related matter fit within the *Kovel* standards. For example, in 2009, the U.S. District Court for South Carolina held that privilege was not waived when Bausch & Lomb retained Panzica Consulting to conduct an audit following an FDA inspection. *In re New York Renu With Moistureloc Product Liability Litig.*, No. 766,000/2007, MDL. 1785, C/A 2:06–MN–77777–DC, 2009 WL 2842745, at *2 (D.S.C. July 6, 2009). The court explained that Panzica had

extensive experience helping companies comply with FDA standards and outside counsel needed to retain Panzica to help it advise Bausch & Lomb. The court also noted in support of this decision that Panzica's report was a communication to counsel and not distributed to anyone other than the client and its attorneys. *Id.*

4. When working with such a third party consultant, it is important to ensure that counsel carefully establishes and oversees the relationship to protect the privileged nature of the relationship as best as possible. For example, as part of the engagement, counsel should:

    a) Be the primary point of contact for any communications with the third party expert;

    b) Document that the purpose of the engagement with the third party expert is to assist counsel in providing legal advice to the client; and

    c) Ensure that the expert knows that he or she should avoid discussing the investigation without a lawyer present.