



**When Trouble's Knocking at Your Door:
Planning an Effective First
Response to a Government or
Internal Investigation**

January 20, 2016

John Marti and Beth Forsythe, Dorsey & Whitney LLP

**When Trouble’s Knocking at Your Door:
Planning an Effective First Response to a
Government or Internal Investigation
Contents**

	Page No.
Dorsey’s Government Enforcement and Corporate Investigations Practice Overview and Team	3
PowerPoint Presentation	8
Application and Affidavit for Search Warrant, Residence of Thomas J. Petters, United States District Court, State and District of Minnesota, September 19, 2008	17
Individual Accountability for Corporate Wrongdoing Memo, U.S. Department of Justice, Office of the Deputy Attorney General, Sally Quillian Yates, September 9, 2015	35
DOJ, SEC Change “Cooperation Credit” Process, Add Resources to Fight Corruption, Dorsey & Whitney LLP, November 18, 2015	42
SEC Fines KBR \$130,000 for Using Employee Confidentiality Agreement that Violates Dodd-Frank Whistleblower Protections, Dorsey & Whitney LLP, April 2, 2015	44



Dorsey's Government Enforcement and Corporate Investigations Practice

Dorsey's Government Enforcement and Corporate Investigations Practice Group has extensive capabilities in due diligence and internal investigations. Our Group assists our clients in three primary ways: (1) preventing government investigations and enforcement actions by developing and maintaining innovative compliance programs and internal safeguards; (2) investigating potential problems internally and conducting due diligence before any governmental involvement arises, thereby managing enterprise and reputational risks; and (3) responding to government-initiated investigations and enforcement actions when they occur, whether in the civil, criminal or regulatory context.

Set forth below is an outline of Dorsey's capabilities in due diligence and internal investigations. Its purpose is to set out a number of ways in which Dorsey can support our clients in these areas.

DUE DILIGENCE AND INTERNAL INVESTIGATION SERVICES—INTRODUCTION

Effective assessment and implementation of strategy in times of crisis are critical to a company's response, regulator reaction, and public perception.

Confronted with a subpoena from the United States Department of Justice ("DOJ") Antitrust Division, a company turned to Dorsey to address the subpoena and further investigate why the DOJ had issued the subpoena. What the client originally viewed as a broad industry sweep to gather information, turned into a major criminal investigation that would engulf an entire industry and many of its major players. Working closely with the company, Dorsey performed an internal investigation, reviewing millions of pages of documents and interviewing tens of witnesses, from senior management to lower level employees. It carefully protected its investigation through the attorney work-product doctrine and thoughtfully cloaked its findings and recommendations in the attorney-client privilege, limiting the use of detailed written reports. The company and its employees avoided DOJ prosecution and Dorsey's investigation proved invaluable in ongoing civil litigation.

PRIVILEGE

The attorney-client privilege and attorney work product doctrine are essential tools in the due diligence and investigative process.

In September 2012, a corporate client whose CFO had commenced an internal investigation in India consulted with Dorsey about next steps. The CFO had already retained a leading accounting firm to carry out the investigation and had discussed the matter with the general counsel of the company's US subsidiary. Addressing the accountant's work product, Dorsey advised the client that the accountant's work product were subject to production both to regulators and in litigation that the company was considering against its joint venture partner. The company's best course of conduct would have been to structure its investigation so that it could choose whether to produce or protect documents created in the investigation. The attorney-client privilege and attorney work-product doctrine would have accomplished this goal.

Our clients can use the attorney-client privilege and the attorney work-product both to protect advice addressing its due diligence policies and procedures and its internal investigations.

DUE DILIGENCE

Due diligence has traditionally been carried out to ensure compliance with anti-corruption requirements and to address reputational issues such as the prohibition of child labor. We have seen a recognition by organizations that due diligence has become an important tool in driving business excellence.

Privileged advice on due diligence policy

Dorsey can usefully advise at this stage on the approach to due diligence now under consideration, benchmarking it against procedures adopted by a number of other organizations and against the Department of Justice and Securities and Exchange Commission Resource Guide to the U.S. Foreign Corrupt Practices Act.

Working closely with in-house counsel and corporate security officers, Dorsey has constructed and performed due diligence for several clients in connection with mergers and acquisitions transactions and for distributorship and joint venture relationships. Advice and direction given by Dorsey, and all client communications throughout the due diligence process are protected by the attorney-client privilege. Dorsey's internal memoranda and communications are protected by the attorney work-product doctrine.

Privileged advice on the use of contract terms with third parties

Due diligence does not end after completion of the transaction. Due diligence follow up and investigations of third-party relationships (e.g., distributorships and joint ventures), needs to be repeated during the course of the relationship. Well-constructed contract terms can allow for this subsequent due diligence and for access by to necessary books, records and information of third parties. Without appropriate contract terms, a company may be left with a relationship that it cannot lawfully terminate even though the relationship may drag the company into a compliance mess. Inadequate contract language may also inhibit the company's ability to investigate possible breaches and compliance issues and then address those issues, because the contract does not allow it access to third party documents and information.

In October 2012, a corporate client engaged in arbitration proceedings against an agent the client had appointed some years previously approached Dorsey for advice. The company had appointed the agent to assist in developing business in a country known for corruption. The client developed substantial business with the help of the agent and now faced an arbitration claim by the agent for the contractual percentage of that business. The client became concerned that it did not know how the agent had obtained the business and therefore whether it would be reimbursing corrupt payments if it paid the agreed commission. The contract provided no rights of inspection of the books of the agent or of the agent's owner, with the result that it decided that it was better to contest the arbitration proceedings rather than pay voluntarily. If the client had had in place a contractual framework allowing it through due diligence to ensure its agent had complied with the law, it could have avoided an expensive arbitration and reduced risk to its reputation.

Dorsey is experienced in drafting third-party agreements that ensure post-transaction due diligence. It reviews contracts for other risks, including anti-trust compliance and for the appropriate use of warranties of compliance by the third party.

Privileged enhanced due diligence in higher risk cases

Our clients may identify that certain risk factors involved in some third-party relationships are such that enhanced due diligence is necessary. Dorsey can conduct remote research and analysis into third parties or use local resources, for example out of its Shanghai office, to provide enhanced due diligence.

INTERNAL INVESTIGATIONS

Dorsey has significant legal experience to support our client's investigators and in-house counsel.

Dorsey lawyers teamed up with a client's internal fraud and malpractice team to investigate a whistleblower's claims that a client employee had taken bribes from sub-contractors on major projects he was supervising. Working with the in-house team, we developed the investigation strategy, advising on the use of telephone and email monitoring and other investigative techniques. The investigation successfully identified those involved in the corruption. We then successfully represented the client in the action it took to recover its losses.

Privileged advice on preservation of evidence

While an organization has the obligation to preserve relevant documents and information when litigation is threatened or commenced, there may be circumstances in which the need to investigate covertly affects the way in which evidence is preserved. Here, Dorsey's experience and judgment is invaluable. Dorsey has a team of in-house IT forensic specialists to advise on maintenance and retention of the various types of electronic data. Those experts also have developed close relationships with outside forensic experts whom Dorsey can bring in to assist when needed. In most cases, Dorsey has already negotiated reduced rates for those outside experts.

Privileged advice on lawful methods of investigation

Notorious examples of poorly managed investigations abound. They often lead to greater problems for an organization and its senior personnel than the matters under investigation. Poorly managed investigations, perhaps driven by the pressure to resolve the issue under investigation can damage corporate reputations. Dorsey has the knowledge and expertise to advise on the proper and effective methods of investigation, such as monitoring communications and searching offices or personnel. Dorsey works with investigators applying the legal principles to the methods under consideration.

LegalMine™ review of documents

Dorsey designed LegalMine™ as a cost-effective document review facility used for litigation, internal investigations, and transactional due diligence and reviews. Powerful technology, data culling techniques and the use of our skilled and experienced contract attorneys reduces review time and increases review consistency, drastically cutting costs. Most clients choose LegalMine™'s fixed, per document, charging structure. LegalMine™ charges only for the documents reviewed, not what has been culled. Once we know the population for review, we identify a timeframe for completion of the review and the price.

- *An international food company used LegalMine™ to review documents in connection with an internal investigation. Emails were collected from over twenty custodians. After culling, including key word searches, several thousand potentially relevant documents were identified for review in the client's preferred-vendor platform. LegalMine™ completed the review in two days. Dorsey notified the client that the review substantiated our finding that no improper conduct had occurred.*
- *A global engineering and construction firm utilized LegalMine™ to review internal documents in anticipation of a multi-million dollar litigation. A LegalMine™ team of 25 contract attorneys conducted a responsive, privilege, and issue review of 1.9 million documents (post-culling) during the required period. Using dedicated staff, sophisticated technology, and standardized processes, the client realized significant cost savings over a more traditional review approach.*

Privileged investigations

We can supplement the skill of internal client investigators with our experienced lawyers. We routinely work with investigators to advise on strategy, objectives, methods of investigation, and on the results as they are achieved. Typical issues on which we advise in relation to internal investigations are whether it is appropriate to self-report to the authorities, the termination of employment of individuals, positioning for litigation or commencing litigation to protect the organization's interests.

Our involvement in an investigation maximizes the chances the attorney-client privilege or the attorney work-product doctrine will protect the confidentiality of documents created in its course of the investigation.

A large private company with operations in France and Russia retained Dorsey to investigate certain unsubstantiated cash withdrawals made by one of its executives, which he reportedly had used to make improper payments to French, Russian, and Italian government officials. Over the course of the following year, Dorsey completed a thorough investigation and made recommendations to the Board on appropriate remedial steps. Dorsey also oversaw development and implementation of a system-wide fraud compliance program for the company.

VALUE-ADDED SERVICES

We will look for ways in which we can provide additional value for our clients. Those additional value-added services may include the following:

Training

Dorsey attorneys are available to support our clients training programs by providing workshops on a range of topics such as compliance updates, the lawfulness of methods of investigation, evidentiary requirements, the effect of employee rights on investigations, and maintaining confidentiality and privilege in communications.

Informational Resources

Dorsey Anti-Corruption Digest. Dorsey's monthly digest of global enforcement action is available to our clients. It has been described on Forbes.com as "one of the ones you should read. It's one of those that list out what cases have been brought, etc., but it does a better job on the international side than anything else I've seen, bar none."

Anti-Fraud Network. Dorsey partner Nick Burkill started the Anti-Fraud Network to help professionals working to recover the proceeds of fraud, corruption, and other dishonesty. It now has over 850 members from around the world on its LinkedIn group, and it has been recognized by the London Financial Times for its innovation. Its monthly newsletter contains contributions from a range of professionals from around the world.

FCA Now Blog. The False Claims Act is the government's principal tool for addressing fraud in contracting, healthcare, mortgage lending, and grant administration. FCA Now provides timely developments about the law, enforcement trends, and other insights from Dorsey's proven FCA litigators.

SEC Actions Blog. Dorsey partner Tom Gorman publishes a widely-read securities blog, which analyzes trends in securities enforcement inquiries and litigation, and provides expert commentary for the LEXIS Securities web page.



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John Marti and Beth Forsythe
Dorsey & Whitney LLP

January 20, 2016



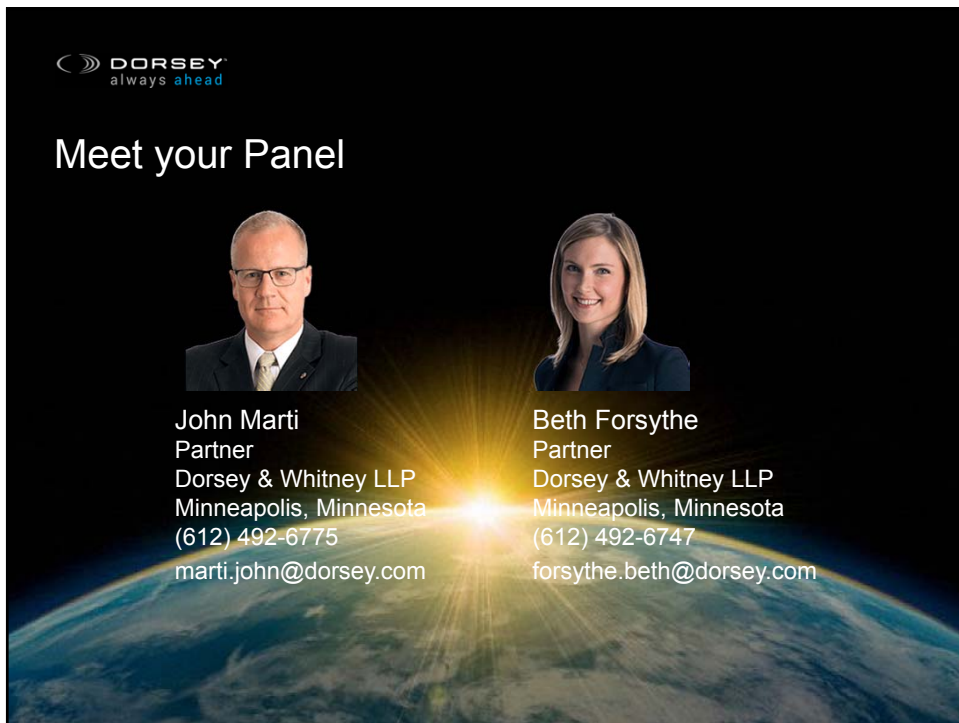
Meet your Panel



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Agenda

- Objectives and Risks
- Investigations
 - Government
 - Internal
- Preparing for that Day
- How We Can Help



“Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence.” John Adams



Objectives in Developing Your Response

“If you don't know where you are going, you'll end up someplace else.” Yogi Berra

- Identify, Investigate, and Remediate the Risk
- Resolve All Government Matters (Criminal, Civil, Regulatory)
- Resume Normal Operations
- Regain the Confidence of Customers, Investors, & Government



Government Investigation – The Covert Phase

“There are things we don't know we don't know.” Donald Rumsfeld



September 8, 2008 8:45pm (Ex. 9)

Petters: See the only thing that makes me believe that there is like some divine intervention, seriously, when, when you get to it there's no possibility we could of got away with this for so long.

- How Government Investigations Begin
- What the Government Does Before You Know

Govt Ex. 9 at Trial



From Covert to Overt – How You Find Out

- Administrative and Civil Subpoenas
- Overt Interviews
- Grand Jury Subpoenas
- Target Letter
- Search warrants
- Indictment

United States District Court
STATE AND DISTRICT OF MINNESOTA

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)

Thomas Petters' Residence, 655 Bushway Road, Wayzata, Minnesota

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT
Case Number: 08-437-364 (FL)

I, Timothy Bisswurm, being duly sworn depose and say:
I am a(n) Special Agent, FBI and have reason to believe that on the person of or on the premises knows as (name, description and/or location)
Thomas Petters' Residence, 655 Bushway Road, Wayzata, Minnesota

in the State and District of Minnesota there is now concealed a certain person or property, namely (describe the person or property)
Please see Attached List of Items to be Seized

which is (use one or more lines for search warrant and attach as both under Rule 41(c) of the Federal Rules of Criminal Procedure)
property that constitutes evidence of the commission of a crime, contraband, fruits of criminal activity, and/or means of committing a crime
concerning a violation of Title 18, United States Code, Section(s) 1341, 1346, 1956 and 1957.

The facts to support a finding of Probable Cause are as follows:
See Affidavit attached hereto and incorporated herein by reference.

Continued on the attached sheet and made a part hereof. Yes No

Sworn to before me, and subscribed in my presence
September 19, 2008 12:11pm at Minneapolis, MN

Signature of Officer
TIMOTHY BISSWURM, Special Agent
FBI



A Bad Day - Search Warrant

- Probable Cause of a Crime – Evidence in the Location
- Teams of Agents
- Multiple Locations
- Control - Officer Safety and Preservation of Evidence
- Accompanied by Other Investigative Actions



FBI Agents outside PGW, September 24, 2008

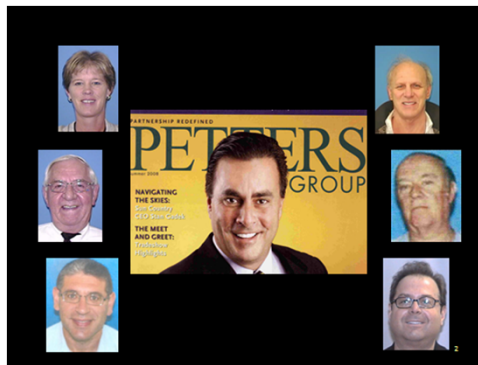
Bellagio hotel room, Site of Petters Interview, Sept 24, 2008, Suppression Hearing Exhibit



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Critical Assumptions

- Senior Officers are Implicated
- Insiders are cooperating
- The Government has tape, and is collecting more
- The Government has evidence from 3rd parties
- There is more to come



Slide 2 from Closing Argument
(with Govt Ex 66F)

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Agents Are Knocking at Your Employee's Door

- Interviews often contemporaneous with other actions
- Agents are seeking admissions and cooperation
- May be recorded
- The employee may tell you, but may not
- Prepare by Training



Bob White,
PCI Chief Operating Officer



When the Trigger Is Not the Government: Internal Investigations

- When to Consider
- Determine the Objective
- Understand the Environment
- Plan the Investigation
- Execute the Plan
- Understand the Aftermath

9/10/2008 12:43 pm (Ex 389)

Petters: I gotcha. I'm sure he wants it yesterday, but anyway. Ah ... Just don't want these fuckin' auditors coming in here. Feel like goin' out and ... and gettin' drunk and gamble and ... Die.

Govt Ex 389 at Trial



Challenges

- Obtaining cooperation – Yates Memo
- Keeping the Investigation Confidential
- Maintaining Privilege
- Whistleblowers
- Disclosure



FROM: Sally Quillian Yates *SQY*
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.



Elements of a Response Plan

“Plans are of little importance, but planning is essential.”
Winston Churchill

- The Team - Designated Roles and Responsibilities
- Communications
- Continuity of Operations
- Information Management – Policies
- Protocols
- Exercise the Plan – Train Your Team



Typical Search Warrant Protocol

- Initial Response
- Review and Understand the Warrant
- Information Systems
- Address Employees
- Observe and Document the Search
- Back Brief



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The Other Issues You Can't Ignore

- Human Relations and Employee Morale
- Customer and Investor Relations
- Finance
- Insurance
- Follow on Litigation



Tom Petters, speaking to workers and guests about the searches. Sept. 25, 2008. Exhibit from Government Response to Defendant's Motion to Change Venue.

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Common Issues for Investigations

- Who is the Client?
- Information Systems – Evidence Preservation
- Employee Representation/JDAs
- Privilege
- Cooperation?
- Parallel Proceedings – Foreign and Domestic

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,
Plaintiff,
v.
THOMAS J. PETERS,
GREGORY M. BELL,
and LANCELOT INVESTMENT
MANAGEMENT LLC,
Defendants,
and
INNA GOLDMAN,
INNA GOLDMAN REVOCABLE TRUST,
ASIA TRUST LTD., BLUE SKY TRUST,
and GREGORY BELL REVOCABLE
TRUST,
Relief Defendants.

CIVIL ACTION
FILE NO.
JURY TRIAL DEMANDED

FILED UNDER SEAL
COMPLAINT

Plaintiff United States Securities and Exchange Commission
("Commission") alleges as follows:

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The First 48 Hours

- This is Crisis Management – Leadership is Informed by Legal Issues
- Work the Problem Now, It Won't Age Well

"It is almost always the cover-up rather than the event that causes trouble." Howard Baker



Sherburne County Jail
Booking photo
October 3, 2008

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How We Can Help

- Prevent - Evaluate and Mitigate Risk, Plan and Train
- Investigate – Get the facts, understand the problem
- Respond – World-wide, Multi-Disciplinary Advocate



Dorsey is an international firm with over 550 lawyers in 19 offices throughout the U.S., Canada, Europe and Asia.



United States District Court

STATE AND DISTRICT OF MINNESOTA

In the Matter of the Search of
(Name, address or brief description of person or property to be searched)

Thomas Petters' Residence, 655 Bushaway Road, Wayzata,
Minnesota

**APPLICATION AND AFFIDAVIT
FOR SEARCH WARRANT**
Case Number: 08-MJ-364 (FLW)

I, Timothy Bisswurm, being duly sworn depose and say:

I am a(n) Special Agent, FBI and have reason to believe that on the person of or on the premises known as
(name, description and/or location)

Thomas Petters' Residence, 655 Bushaway Road, Wayzata, Minnesota

in the State and District of Minnesota there is now concealed a certain person or property,
namely (describe the person or property)

Please see Attached List of Items to be Seized.

which is (state one or more bases for search warrant and seizure set forth under Rule 41(b) of the Federal Rules of Criminal Procedure)

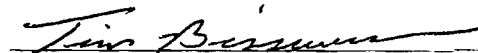
property that constitutes evidence of the commission of a crime, contraband, fruits of criminal activity, and/or means
of committing a crime

concerning a violation of Title 18, United States Code, Section(s) 1341, 1346, 1956 and 1957.

The facts to support a finding of Probable Cause are as follows:

See Affidavit attached hereto and incorporated herein by reference.

Continued on the attached sheet and made a part hereof. Yes No



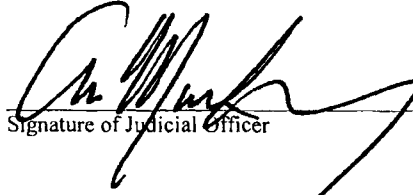
Signature of Affiant
TIMOTHY BISSWURM, Special Agent
FBI

Sworn to before me, and subscribed in my presence

September 19, 2008 12:11 pm.
Date and Time Issued

at Minneapolis, MN
City and State

The Honorable Ann D. Montgomery
UNITED STATES DISTRICT JUDGE
Name and Title of Judicial Officer


Signature of Judicial Officer

ATTACHMENT A - ITEMS TO BE SEIZED

Documents and items for the following persons and entities from the period 1995 to present:

1. Petters Company Inc. and affiliated entities (including but not limited to Edge One, LLC; MGC Finance Inc.; PAC Funding, LLC; Palm Beach Finance Holdings, Inc.; PC Funding, LLC; PL LTD, Inc.; Thousand Lakes, LLC); Enchanted Family Buying Company; and Nationwide International Resources.
2. Investors in PCI and its affiliated entities.
3. Thomas Joseph Petters; Deanna Coleman; Robert White; James Wehmhoff; Larry Reynolds; Michael Catain; and Frank Vennes.

To include but not limited to:

- Documents related to the solicitation and acquisition of funds for PCI and affiliated entities, including but not limited to promissory notes, security agreements, collateral agreements, prospectuses.
- Documents related to the disposition of investor funds, including but not limited to all accounting, banking, auditing, and tax records of PCI, its affiliated entities, and Thomas Petters.
- Documents related to compensation received by the individuals identified in Paragraph 3, above.
- Documents related to assets pledged as security for lending agreements, including but not limited to all invoices, bills of lading, bills of sale, and purchase orders.
- Documents related to the identities of associates or co-conspirators, or tending to identify the location or possession of criminally derived property.
- Documents tending show the expenditures of monies and the purpose for those expenditures, and other records related to liabilities or indebtedness.
- Monetary instruments and evidence of safe deposit boxes or remote storage locations, and the keys and rental agreements for these boxes and units.
- Mail and the contents of unopened envelopes which fall into the above categories.

"Document(s)" means writings or records of every kind or character, conveying information by mechanical, electronic, photographic, or other means, whether encarded, taped, stored or coded electrostatically, electromagnetically, or otherwise. "Documents" includes, but is not limited to: correspondence; memoranda; notes; drafts; records; letters; envelopes; telegrams; messages; electronic mail; mail; analyses; agreements; accounts; working papers; reports and summaries of investigations; trade letters; press releases; comparisons; books; notices; drawings; diagrams; instructions; manuals; calendars; diaries; articles; magazines; newspapers; internal and external newsletters; brochures; guidelines; notes or minutes of meetings or of other communications of any type; questionnaires; surveys; charts; graphs; photographs; films or videotapes; audiotapes; discs; data cells; microfiche; microfilm; telephone directories; bulletins; printouts of information stored or maintained by electronic data processing or word processing equipment; all other data compilations from which information can be obtained including electronically and optically sensitive stored media such as floppy discs, hard drives and discs, and magnetic media.

STATE OF MINNESOTA)
) ss. AFFIDAVIT OF TIMOTHY BISSWURM
COUNTY OF HENNEPIN)

I, Timothy Bisswurm, being duly sworn, state that the following is true and correct to the best of my knowledge and belief:

AFFIANT'S BACKGROUND & EXPERTISE

1. I am a Special Agent (SA) with the Federal Bureau of Investigation (FBI) and have been for approximately 12 years. As a Special Agent I have been involved in the investigations of money laundering, bank fraud, public corruption, mail fraud, wire fraud, and conspiracies to commit these crimes. My duties and responsibilities have included conducting criminal investigations of individuals and entities for possible violations of federal laws, particularly those laws found in Title 18 of the United States Code.
2. I have participated in arrests and searches, and have participated in the execution of numerous search warrants for documents, records, and proceeds from illegal activities, and have participated in the subsequent investigation and analysis of evidence seized pursuant to these warrants. I have not included each and every fact known to me regarding this investigation in this affidavit, but only those facts relating specifically to determining whether there is probable cause to believe that the items to be seized will be found in the places to be searched and whether those items are evidence of the offenses identified in this affidavit.

CURRENT INVESTIGATION

3. I am currently assigned to a joint federal investigation with the Internal Revenue Service - Criminal Investigation Division and the United States Postal Inspection Service which is focusing on the business and financing activities of PETERS COMPANY, INC (PCI), PCI affiliated entities and persons; NATIONWIDE INTERNATIONAL RESOURCES, INC. (NIR); and ENCHANTED FAMILY BUYING COMPANY (ENCHANTED).
4. THOMAS JOSEPH PETERS, the owner of PCI; employees of PCI and other PETERS' entities; and other businesses have created and are continuing to execute a scheme to fraudulently induce investors to provide funds for, and financing to, PCI. Based on the fraudulent scheme, over 20 identified investors and investment groups have currently provided well in excess of \$100 million, and possibly substantially more, in PCI and related entities.
5. This affidavit is submitted in support of an application for search warrants for nine premises and two vehicles identified below:

- a. Offices of Petters Company, Inc. and affiliated entities, 4400 Baker Road, Minnetonka, Minnesota
 - b. Offices of Enchanted Family Buying Company, 2nd Floor, 701 West Highway 7, Excelsior, Minnesota
 - c. Offices of Nationwide International Resource, 2346 Westwood Blvd, #6, Los Angeles, California
 - d. Residence of Thomas Petters, 655 Bushaway Road, Wayzata, Minnesota
 - e. Offices of Robert White, 4th floor, 4400 Baker Road, Minnetonka
 - f. Residence of Robert White, 538 Grace Street, Excelsior, Minnesota
 - g. Vehicle of Robert White, 2005 Porsche convertible, Minnesota license plate URT332
 - h. Vehicle of Robert White, 2005 Honda Element, Minnesota license plate PHA531
 - i. Residence and Offices of Frank Vennes, 27820 Island View Road, Shorewood, Minnesota
 - j. Residence of Michael Catain, 4550 Enchanted Point, Mound, Minnesota
 - k. Residence of Larry Reynolds, 15 Castle Oaks Court, Las Vegas, Nevada
6. The primary method of effectuating the fraud scheme involves PETERS, his employees, and his associates creating fictitious documents and then providing these documents to current and potential investors as evidence that PCI is buying and selling substantial goods and merchandise which PCI will then resell. In many instances, funds from investors are sent directly to the purported supplier of the merchandise, NIR or ENCHANTED. In turn, NIR or ENCHANTED direct the funds to PCI (less a commission) without any merchandise. PETERS and other persons then fraudulently pledge the non-existent goods and merchandise as security for the investments.

COOPERATING WITNESS

7. A Cooperating Witness (CW) who is currently associated with PETERS and PCI approached the government with documents and information establishing the fraud scheme. On September 8, 2008, during a proffer session with the CW and CW's counsel, the CW admitted to personal criminal culpability in the scheme, and agreed to cooperate in this investigation. In turn, the government agreed that it would accept a plea to a single count of conspiracy in violation of 18 U.S.C. § 371, with a maximum sentence of 5 years imprisonment and the potential for a cooperation agreement. During the proffer and in subsequent interviews the CW informed the government that:
- a. PCI is the venture capital arm of numerous PETERS enterprises. The money raised by PETERS through PCI is used by PETERS for his other business ventures and to support his extravagant lifestyle.
 - b. The fraudulent scheme was perpetrated by PETERS; DEANNA COLEMAN (PCI Vice President of Operations); ROBERT WHITE (former PCI officer and current

consultant to PCI), MICHAEL CATAIN (ENCHANTED), LARRY REYNOLDS (NIR), and other persons. The scheme began in the mid 1990's.

- c. PETERS has solicited investors to invest substantial sums in PCI. To induce the investors to invest, the investors were advised funds would be secured by transactions (which were fictitious). Investors were then provided with false documents relating to the purchase and resale of merchandise. The fraudulent documents purport to evidence PCI purchasing merchandise from vendors such as NIR, located in Los Angeles, California, and ENCHANTED, located in Excelsior, Minnesota. Additional purchase orders falsely detail PCI's sale of the same merchandise to stores such as BJ's Wholesale Club, Levittown, Pennsylvania and Sam's Club, Bentonville, Arkansas.
 - d. The purchase orders and other documents in support of the transactions are entirely fabricated. PCI does not buy merchandise from NIR or ENCHANTED. Nor does PCI sell merchandise as described in the purchase orders to BJ's Wholesale Club, Sam's Club or any other business. PETERS uses these documents to induce investors to invest money.
 - e. On occasion, investors wanted to wire funds directly to NIR and ENCHANTED as payment for the fictitious purchase orders that had been provided by PETERS and others to the investors. LARRY REYNOLDS (NIR) and MICHAEL CATAIN (ENCHANTED) have entered into agreements with PETERS to receive these funds from investors and then send these funds to PETERS, minus a percentage of the funds as compensation for their role in the scheme. This scheme tricked the investors into believing that PCI was actually reselling merchandise, when in fact PCI was not reselling merchandise.
 - f. COLEMAN created false purchase orders and invoices related to the purchase of merchandise from NIR and ENCHANTED. WHITE, who remains a consultant to PETERS, was responsible for creating the false purchase orders related to the fictitious sale of merchandise to BJ's Wholesale Club, Sam's Club, Costco, and Boscovs.
 - g. PETERS and others used the mail, FEDEX, and interstate wire communications in furtherance of the scheme, by sending documents via mail and interstate commercial carrier, and communicating in interstate commerce via wire transfer, by email and telephone.
8. The CW provided documents corroborating the allegations, including an itemized list of investors who are owed money by PCI, copies of numerous Promissory Notes, and copies of other lending documents that pertain to the scheme.

- a. A "Combined Balance Sheet" dated June 30, 2008, for PCI and affiliates indicates "total current liabilities" of \$3.5 billion. The balance sheet reflects current accounts receivable (net) of about \$1.9 billion. The CW advised that the accounts receivable are based on the false documents, and that actual accounts receivable are substantially less than that listed on the balance sheet.
- b. One example of a transaction identified by the CW as fraudulent, and corroborated by another agent's analysis of records provided by the CW, is as follows:
 - i. PCI has eight outstanding notes with the Fidelis Foundation reflecting an investment totaling \$27,620,000.
 - ii. One of those notes, number 042308-5045, dated April 23, 2008, reflects that PCI obtained \$4,350,000 from Fidelis Foundation, an agent for Minnesota Teen Challenge and Fidelis Foundation. Note number 042308-5045 bears the signature of PETERS. A Security Agreement, that also bears PETERS signature, reflects that Minnesota Teen Challenge and Fidelis Foundation will have a security interest in the following purchase orders which the CW indicated were fictitious:
 - (1) PCI's Purchase order, number 49663, dated 4/17/08, to ENCHANTED for the purchase of 2,800 Hitachi Presentation Projectors. PCI's purchase price is \$5,259,800.
 - (2) Sam's Club Purchase order, number 9209679210, order date 4/28/08, to PCI for the purchase of 2,800 Hitachi Presentation Projectors. Sam's Club's purchase price is \$5,838,364.

CORROBORATION OF COOPERATING WITNESS

- 9. Agents provided copies of four purchase orders provided by the CW to a security official for Wal-Mart Stores, Inc. (corporate owner of Sam's Club). The purchase orders purportedly depict PCI selling merchandise to Sam's Club. Based on an analysis of records provided by the CW, PCI purportedly purchased this merchandise from both NIR and ENCHANTED.
 - a. The Wal-Mart official reported that PCI's purported vendor number on the Sam's Club purchase order was fictitious. The official also stated that the purchase order numbers are not valid purchase order numbers for Wal-Mart stores or Sam's Club. These purchase orders reflect over \$10 million in merchandise purchases from PCI.
 - b. The internet site affiliated with Sam's Club states requirements for vendors seeking to do business with Sam's Club. One requirement is that vendors use EDI (Electronic Data Interchange) to exchange purchase orders, invoices, and all other

transactional documents electronically. Another requirement is that suppliers use "Retail Link," an internet based system that suppliers use to meet requirements. The purchase orders provided by the CW are not consistent with EDI documents, but appear to be manually prepared purchase orders.

10. Agents have learned that First Regional Bank, Century City, California, reports that NIR and REYNOLDS have been receiving in/out wire transfers in substantial amounts since 2003.
 - a. From January 2003 through March 2006, the bank reported \$11.6 billion of in/out wire transfers for the NIR account. This number includes both wires into and wires out of the account. The bank indicated that NIR informed the bank of the following:
 - i. NIR is a sales rep for PCI. NIR arranges for purchases of large quantities of merchandise from PCI to large retail stores. Settlement of these sales is handled through wire transfers. Incoming wires to NIR represent money for the product/merchandise that has been sold.
 - ii. The following business day, an outgoing wire (generally to PCI) represents the cost of the merchandise/product less commission to nationwide
 - b. The description provided by NIR to the bank explains the transactions, but is inconsistent with the actual NIR purchase orders (which NIR did not provide to the bank). These purchase orders reflect that NIR does not sell merchandise for PCI, but sells merchandise to PCI.
 - c. An analysis of the wires reported by the bank further corroborates the CW's description of this arrangement, in that the commission retained by NIR for receiving funds from investors, and then wiring the funds to PCI is approximately .05%. For example, from January 4, 2006 through January 10, 2006, NIR received \$51,330,775 in 8 incoming wires. The day after receiving each wire, NIR wired the funds (less a .05% commission) to PCI.
11. Agents also obtained financial records related to ENCHANTED. A preliminary analysis of bank statements indicates that this entity received \$35,013,540 in incoming wires from June 23, 2008 through July 14, 2008. From June 23, 2008 through July 18, 2008, ENCHANTED wired out \$35,022,144.90, with substantially most of the funds going to PCI. Approximately \$66,000 appears to have been sent to MICHAEL CATAIN. This also corroborates the CW's statement as to fees to CATAIN for re-wiring funds to conceal the existence of the fraud scheme.

RECORDINGS

12. In September 2008, the government obtained consensually monitored conversations involving PETTERS, DEANNA COLEMAN, ROBERT WHITE, JAMES WEHMHOFF, LARRY REYNOLDS and other persons. Your affiant and other agents have reviewed these recordings, which were obtained by providing recording devices to the CW, and then directing the CW to record telephone conversations and in-person conversations with persons identified in this investigation. Many of these conversations took place in the office spaces of PCI. The CW has identified the voices on these recordings. These identifications are corroborated by statements of identification on the recordings themselves as well as video recordings.
 - a. In these recordings, PETTERS repeatedly admits executing the fraud scheme by providing fraudulent information to investors. PETTERS repeatedly discusses the stressed financial condition of his company, as well as the need to find more capital. Although at times PETTERS tells COLEMAN that he doesn't want her to prepare false documents, he continues to ask her to prepare false documents, noting that he doesn't know what choice they have. PETTERS talks about fleeing the country and creating fabricated defenses if the fraud scheme is discovered.
 - b. PETTERS also attributes knowledge of, and participation in, the fraud scheme to COLEMAN, WHITE, VENNES (investor broker), and REYNOLDS (NIR). PETTERS states that VENNES told PETTERS that they are "a little paper manufacturing plant." On one occasion, PETTERS states that he and VENNES would be jointly implicated a scheme to defraud investors out of \$130 million.
 - c. WHITE admits that he, COLEMAN, and PETTERS are "co-conspirators," and that he maintains records related to the fraud scheme in an envelope that he at times keeps in his vehicle or takes home. WHITE further describes the fraud scheme as a "Ponzi scheme," and estimates that at least \$100 million of PCI's debt is fraudulent. WHITE discusses cleaning out his office because he is worried.
 - d. VENNES cautions that if investors send auditors out to visit warehouses where the merchandise is located, that the scheme would implode. VENNES also asks that COLEMAN prepare purchase orders to be submitted to investors so that the investors will extend the due dates on debt.
 - e. Accountant JIM WEHMHOFF tells PETTERS that federal auditors are examining his taxes, and will be examining PETTERS' expenses and deductions. PETTERS responds by admitting that he cheats on all those items. PETTERS and WEHMHOFF further discuss PETTERS illegally taking mortgage deductions on multiple residences.

- f. REYNOLDS admits that PETTERS told him about the fake purchase orders, and that REYNOLDS has known about this for many years. REYNOLDS estimates the amount of fraud as in excess of \$2 billion.

VENDORS - CONSPIRATORS

13. ENCHANTED FAMILY BUYING COMPANY

- a. ENCHANTED is affiliated with and operated by MICHAEL CATAIN. CATAIN resides on Enchanted Point in Mound, Minnesota. The CW advised that PETTERS and CATAIN jointly owned a music company in the mid-90's. The CW further advised that PETTERS, CATAIN and WHITE participated in a joint scheme to use false purchase orders to obtain \$20 million from a large commercial lending company.
- b. A public business journal reported that on August 18, 2003, PETTERS and CATAIN jointly owned a music and entertainment company called Liquid 8 Records & Entertainment, which was also affiliated with a holding company named "Enchanted Entertainment."
- c. As described earlier in this affidavit, the CW advised that ENCHANTED has on more than one occasion received money directly from investors in payment of fraudulent purchase orders provided by PCI to investors. ENCHANTED did not provide any merchandise to PCI or its affiliated entities. Shortly after receiving the funds directly from the investors, ENCHANTED paid those funds over to PETTERS and PCI. A review of documents provided by the CW confirms that PETTERS, on occasion, had investors make payments directly to ENCHANTED.
- d. The CW advised that several years ago CATAIN stated the he was no longer in the business of selling merchandise to PCI. The fabricated documents provided by the CW indicate that, purportedly, ENCHANTED annually buys and sells tens of millions of dollars of electronic merchandise. In a six month period in 2008, PCI purportedly bought \$23,142,459.50 in electronic goods from ENCHANTED that PCI then resold to Sam's Club.
- e. If, in fact, ENCHANTED sold merchandise, ENCHANTED will have purchase orders, bills of lading and other shipping, freight, and inventory records which correspond to the purported purchase, storage and resale of merchandise, whereas the absence of these records is further evidence of the fraud scheme. However, ENCHANTED should have financial records and communications related to payments and transactions with PETTERS and PCI. The absence of such records would be evidence of the fraud.

- f. Based on the evidence developed in this investigation, there is probable cause to believe that ENCHANTED is a sham business used by PETTERS and CATAIN solely to facilitate the fraudulent purchase order scheme. As noted below, visual inspection of the ENCHANTED offices corroborates that ENCHANTED is a sham entity.

14. NATIONWIDE INTERNATIONAL RESOURCES, INC.

- a. The CW advised that NIR is affiliated with LARRY REYNOLDS. REYNOLDS assists PETTERS in executing the fraudulent scheme in numerous ways, including:
 - i. REYNOLDS acts as a conduit for funds provided by investors directly to NIR, which REYNOLDS then delivers to PCI/PETTERS, less a percentage as a commission;
 - ii. At PETTERS' request, REYNOLDS meets with and speaks to PCI's investors, falsely representing that his company is selling PCI large amounts of merchandise as depicted in the fictitious purchase orders;
 - iii. REYNOLDS has arranged for representatives of insurance companies (insuring the fictitious goods) to tour warehouses of electronic goods owned by other companies, while representing that the goods are those sold to PCI; and
 - iv. REYNOLDS has discouraged auditors for investors from viewing the merchandise by stating that the goods were in warehouses that were not accessible.
- b. In recordings summarized above, REYNOLDS admits to his participation in the fraudulent scheme. An analysis of wires further confirms his receipt of substantial sums of money as a result of the fraud.
- c. If, in fact, NIR sold merchandise to PCI, NIR will have purchase orders, bills of lading and other shipping, freight, and inventory records which correspond to the purported purchase, storage and resale of merchandise, whereas the absence of these records is further evidence of the fraud scheme. However, NIR should have financial records and communications related to payments and transactions with PETTERS and PCI. The absence of such records would be evidence of the fraud.
- d. Based on the evidence developed in this investigation, there is probable cause to believe that NIR is used by PETTERS and REYNOLDS to facilitate the fraudulent investment scheme.

EXISTENCE OF RECORDS

15. Based on my training and experience, and information provided by other agents participating in this investigation, I know that persons and companies are required by law to maintain business and tax related records. Title 26, Part 1, Section 1.6001-1 of the Code of Federal Regulations states, in part, that "any person subject to tax under subtitle A of the Code, or any person required to file a return of information with respect to income, shall keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such persona in any return of such tax or information." The above section further states that "the books or records required by this section shall be kept at all times available for inspection by authorized internal revenue officers or employees, and shall be retained so long as the contents thereof may become material in the administration of any internal revenue law."
16. Individuals routinely maintain within their personal residence items which are evidence of income, assets and financial transactions. These items include receipts, bank statements and records, money order and cashier's check receipts, property records, investment records, correspondence, diaries, handwritten notes and personal tax returns and related records. These records are usually maintained for an extended time period, often years.
17. Businesses generally maintain or keep journals, ledgers, bank statements and records, receipts, invoices, and other documents evidencing the receipt and disbursement to funds, inventories, and assets of the business. These records are usually kept and maintained for extended periods of time, often years, at the place of business or residence of the proprietor, or both. These types of documents are maintained in both paper format and using computers or other electronic storage media.
18. Individuals often use personal computers at their residence to store personal and business records and financial data. Computers and computer peripherals are currently and have been an integral part of the operation of most businesses since the mid-1990's.
19. Individuals engaging in financial frauds routinely discard or hide items that may indicate income or their involvement in criminal activity. However, because of their failure to understand the incriminating nature of certain innocuous appearing items, their need for the records, or their carelessness, these individuals nevertheless will usually retain within their residence items of evidentiary value.
20. Individuals engaged in financial frauds use various methods by which to conceal their assets and income from the Government and other third parties, including the use of currency, whenever possible. They will also use nominee names to title assets in order to conceal the assets from the Government.

LOCATIONS TO BE SEARCHED

21. LOCATION 1: OFFICES OF PCI AND AFFILIATED ENTITIES

- a. The CW has advised, and your affiant's investigation and surveillance have corroborated, that PCI conducts business and maintains business records and computer equipment at 4400 Baker Road, Minnetonka, Minnesota. This building is occupied by PCI and affiliated entities associated with PETERS. The CW stated that PETERS and PCI have retained documents related to the fraud scheme, and that these documents are stored at this premises. In the recorded communications, PETERS, COLEMAN, and WHITE describe preparing fraudulent documents in the offices of PCI.
- b. Furthermore, the CW advises that PCI has a central computer server in this building, and that employees have assigned computers with access to the computer network. The CW provided your affiant with copies of email containing communications between PETERS, COLEMAN, WHITE, and investors which are related to the fraudulent scheme. Individuals identified as having records related to the business operations of PCI include PETERS, COLEMAN, WHITE, assistants for PETERS and COLEMAN, bookkeeper SANDY INDAHL, and accountant JAMES WEHMHOFF.

22. LOCATION 2: OFFICES OF ENCHANTED FAMILY BUYING COMPANY

- a. The address for ENCHANTED on its correspondence and business records is 701 West Highway 7, Excelsior, Minnesota. Minnesota Secretary of State records also reflect this address as the registered address. The CW advised that this location is a car wash. Agents who surveilled this address state that the first floor of this address is a paint store abutting a parking lot. Also abutting the parking lot is a car wash.
- b. The building has a side door with a stairway to a second floor that is not open to the public. A mailbox near this door has a sign that merely states "upstairs." There is no signage associated with ENCHANTED at this location.

23. LOCATION 3: OFFICES OF NATIONWIDE INTERNATIONAL RESOURCES, INC.

- a. Records provided by the CW indicate that NIR maintains an office at 2346 Westwood Blvd, #6, Los Angeles, California. FBI agents who surveilled this location describe it as an older two story complex. "Nationwide International" is shown on a sign on the street. The windows for suite 6 are closed up and there is a sign on unit 6 which asks to deliver the mail to unit 9 from July to August.

- b. The CW advised that the CW has caused items and things to be delivered to NIR at this address.
24. LOCATION 4: THOMAS J. PETERS' RESIDENCE
- a. The CW advised that PETERS routinely works at home, and takes documents to his residence at 655 Bushaway Road, Wayzata, Minnesota.
 - b. Furthermore, PETERS has access to the computer network supporting PCI. The CW advised that, on occasion, records related to the fraud scheme were delivered to PETERS at his residence.
25. LOCATIONS 5, 6, 7, and 8: ROBERT WHITE'S OFFICES, VEHICLES AND RESIDENCE
- a. The CW advised that ROBERT WHITE uses office space in the building occupied by PCI, on the 4th floor of 4400 Baker Road, Minnetonka. The CW further advises that WHITE also uses a laptop computer with access to the computer networks of PCI, and used the computer to prepare the false invoices related to fictitious purchases from Sam's Club and BJ's Wholesale Warehouse.
 - b. WHITE confirms in recorded communications that he maintains an office at this location.
 - c. The CW further advised that WHITE also recently acknowledged that he maintains records relating to the above described fraud scheme in his personal vehicles, a convertible and an SUV, in case the scheme collapses. Minnesota Driver Vehicle Service records indicate that the following vehicles are registered to WHITE:
 - i. 2005 Porsche convertible, Minnesota license plate URT332
 - ii. 2005 Honda Element, Minnesota license plate PHA531
 - d. Lastly, the CW confirms that WHITE resides at 538 Grace Street, Excelsior, Minnesota. This address was confirmed by postal inspectors and public record checks. This is a single family residence that abuts a lake.
 - e. I know, as more specifically set forth above, that WHITE is required to keep tax records, as well as records related to his income and books and records. Individuals also routinely maintain within their personal residence items which are evidence of income, assets and financial transactions. These records are usually maintained for an extended time period, often years.

- f. There is probable cause to believe that WHITE will maintain records related to the accretion and disposition of funds obtained from fraud, and that these records are located at his residence. Furthermore, WHITE has admitted in recorded communications and other communications to taking documents related to the fraud scheme to his home.

26. LOCATION 9: FRANK VENNES' RESIDENCE

- a. FRANK E. VENNES JR. is the broker for five investors who have provided financing to PCI, MGC Finance, and Palm Beach Finance Holdings, Inc. Currently the five investors are owed approximately \$1.2 billion by PETERS and his companies. As a broker, VENNES has earned commissions totaling around \$28 million related to delivering investors to PCI and PETERS
- b. VENNES was the subject of a prior federal prosecution. In about 1987, VENNES plead guilty to money laundering, and entered a nolo contendere plea to illegally selling a firearm and using a telephone to facilitate the distribution of cocaine. He was sentenced to 5 years imprisonment.
- c. In the recorded communications, PETERS, COLEMAN, and WHITE discuss providing false documents to VENNES related to Palm Beach Financial Holdings. The CW confirms that PETERS and PCI have provided false documents via email to VENNES at his offices in Minnesota and Florida.
- d. The CW advised that on January 1, 2008, VENNES closed his Minnesota office. On September 12, 2008, VENNES' son stated that VENNES keeps business records at VENNES' home. A review of public records confirms that VENNES lists his home address as 27820 Island View Road, Shorewood, Minnesota. The United States Postal Service confirms that Vennes is receiving mail at this address.
- e. In 2006 VENNES was interviewed as a witness in a separate investigation by Special Agents of IRS CID at this residence. The agents have informed me that VENNES has an office at this residence, and that VENNES retrieved records for the agents from that office.
- f. I know, as more specifically set forth above, that VENNES is required to keep tax records, as well as records related to his income and books and records. Individuals also routinely maintain within their personal residence items which are evidence of income, assets and financial transactions. These records are usually maintained for an extended time period, often years.

- g. There is probable cause to believe that VENNES will maintain records related to the accretion and disposition of funds obtained from fraud, and that these records are located at his residence.

27. LOCATION 10: MICHAEL CATAIN'S RESIDENCE.

- a. A search of public records indicate that CATAIN's residence is 4550 Enchanted Point, Mound, Minnesota. Postal Inspectors have confirmed that CATAIN is receiving mail at this address.
- b. Public records indicate that CATAIN bought this residence for \$1,500,000 in July, 2004. The home value is assessed as \$2 million. Agent surveillance identifies this as a large single family residence.
- c. I know, as more specifically set forth in paragraph 3 above, that CATAIN is required to keep tax records, as well as records related to his income and books and records. Individuals also routinely maintain within their personal residence items which are evidence of income, assets and financial transactions. These records are usually maintained for an extended time period, often years.
- d. There is probable cause to believe that CATAIN will maintain records related to the accretion and disposition of funds obtained from fraud, and that these records are located at his residence.

28. LOCATION 11: LARRY REYNOLDS' RESIDENCE

- a. Public records and postal inspectors confirm that REYNOLDS resides and is receiving mail at 15 Castle Oaks Court, Las Vegas, Nevada. This address was purchased as raw land in 2006 for \$515,000. The residence is now completed and the total market value was assessed at \$2.1 million in value in 2007.
- b. I know, as more specifically set forth in paragraph 3 above, that REYNOLDS is required to keep tax records, as well as records related to his income and books and records. Individuals also routinely maintain within their personal residence items which are evidence of income, assets and financial transactions. These records are usually maintained for an extended time period, often years.
- c. There is probable cause to believe that REYNOLDS will maintain records related to the accretion and disposition of funds obtained from fraud, and that these records are located at his residence.

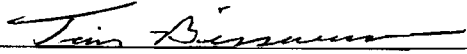
29. SEARCH/SEIZURE OF COMPUTERS AND ELECTRONIC DATA

- a. I know that computer hardware, software, documentation, passwords, and data security devices may be important to a criminal investigation in two distinct and important respects: (1) the objects themselves may be instrumentalities, fruits, or evidence of crime, and/or (2) the objects may have been used to collect and store information about crimes (in the form of electronic data). Rule 41 of the Federal Rules of Criminal Procedure permits the government to search and seize computer hardware, software, documentation, passwords, and data security devices which are (1) instrumentalities, fruits, or evidence of crime, or (2) storage devices for information about crime.
- b. Based on my knowledge, training, and experience in the execution of previous search warrants, I know that searching and seizing information from computers often requires agents to seize most or all electronic storage devices (along with related peripherals) to be searched later by a qualified computer expert in a laboratory or other controlled environment. This is true because of the following:
 - i. The volume of evidence. Computer storage devices (i.e., hard disks, diskettes, tapes, laser disks, Bernoulli drives) can store the equivalent of thousands of pages of information. Additionally, a suspect may try to conceal criminal evidence by storing it in random order or with deceptive file names. This may require searching authorities to examine all the stored data to determine which particular files are evidence or instrumentalities of crime. This sorting process can take weeks or months, depending on the volume of data stored, and it would be impractical to attempt this kind of data search on site.
 - ii. Technical requirements. Searching computer systems for criminal evidence is a highly technical process requiring expert skill and a properly controlled environment. The vast array of computer hardware and software available requires even computer experts to specialize in some systems and applications, so it is difficult to know before a search which expert is qualified to analyze the system and its data. In any event, data search protocols are exacting scientific procedures designed to protect the integrity of the evidence and to recover even "hidden," erased, compressed, password-protected, or encrypted files.
- c. Based on my knowledge, training, and experience, and consultations with FBI Computer Analysis Response Team (CART) examiners, I know that searching computerized information for evidence or instrumentalities of crime commonly requires agents to seize most or all of a computer system's input/output peripheral devices, related software, documentation, and data security devices (including

passwords) so that a qualified computer expert can accurately retrieve the system's data in a laboratory or other controlled environment. This is true because of the following: The peripheral devices which allow users to enter or retrieve data from the storage devices vary widely in their compatibility with other hardware and software. Many system storage devices require particular input/output (I/O) devices in order to read the data on the system. It is important that the analyst be able to properly reconfigure the system as it now operates in order to accurately retrieve the evidence listed below. In addition, the analyst needs the relevant system software, (operating systems, interfaces, and hardware drivers) and any application's software which may have been used to create the data (whether stored on hard drives or on external media), as well as all related instruction manuals or other documentation and data s security devices.

- d. Based on your affiant's consultation with agents who will conduct the search of computer and data equipment, the computers at business locations will be imaged on-site as long as circumstances permit. These agents utilize special software and equipment to capture the contents of hard drives and other forms of media. The goal of this team is to minimize the impact of this warrant on normal business operations. To accomplish this, the team will attempt to capture images of business computer servers as well as computer hard drives in specific computers considered to contain items of evidence in this investigation. These images will be verified on-site to insure the images are functional and access to the data can be gained. Also, the selected programs and data files may be copied from the servers for subsequent analysis. Further, in an effort to minimize the impact on the bank's customers, agents will attempt to work with the business's IT personnel in imaging the bank's computer system.
- e. If, upon arriving at the scene or while executing the search, the agents conclude that it would be impractical to search the computer hardware on-site for this evidence, the agents will remove the equipment for an off-site search. If after inspecting the computers, the analyst determines that some or all of this equipment is no longer necessary to retrieve and preserve the evidence, the government will return it within a reasonable time.

Further Affiant sayeth not.


TIMOTHY BISSWURM, Special Agent
Federal Bureau of Investigation

SUBSCRIBED and SWORN TO before me

on this 19 day of September, 2008.


ANN D. MONTGOMERY
United States District Judge




The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND
NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL
SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES
TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM:

Sally Quillian Yates 
Deputy Attorney General

SUBJECT:

Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group's discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should

memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.¹

I have directed that certain criminal and civil provisions in the United States Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 *et seq.*) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq.*), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive any consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*² Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

¹ The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

² Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. *See* U.S.S.G. USSG § 8C2.5(g), Application Note 13 (“A prime test of whether the organization has disclosed all pertinent information” necessary to receive a cooperation-related reduction in its offense level calculation “is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct”).

example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, *see* USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in

these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. *See* USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

The Department's civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person's misconduct was serious, whether

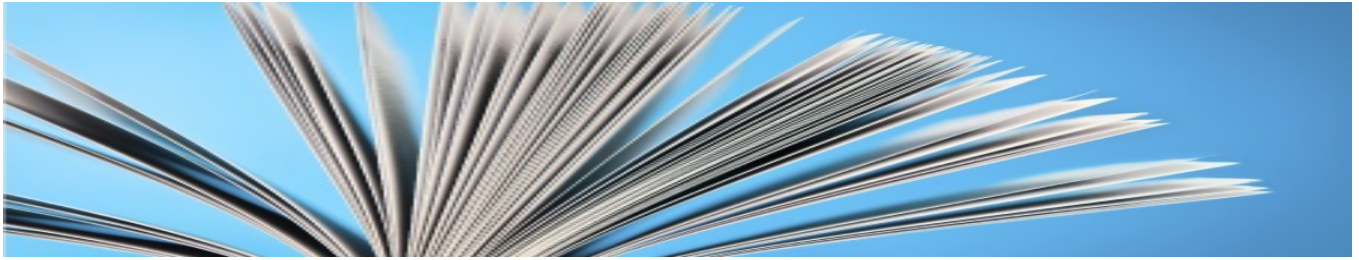
it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual's misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department's investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

Conclusion

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.



November 18, 2015

DOJ, SEC Change “Cooperation Credit” Process, Add Resources to Fight Corruption

J Jackson, Beth Forsythe, David Green

During recent speeches Deputy Attorney General Sally Yates and SEC Enforcement Division head Andrew Ceresney announced changes to the processes the DOJ and the SEC will use to decide if a company will receive “cooperation credit.” Both agencies have indicated that any decision regarding cooperation credit will hinge on whether the company has self-disclosed the violation and helped the government identify and hold accountable individual wrongdoers at the company.

The DOJ’s new process, set out in revisions to the United States Attorney’s Manual (USAM), raises the standard to receive cooperation credit. Reemphasizing the DOJ’s renewed focus on prosecuting individuals, Deputy Attorney General Yates announced updates to the “Filip factors,” formally known as the [“principles of federal prosecution of business organizations.”](#) The revised factors “emphasize the primacy in any corporate case of holding individual wrongdoers accountable ...” Yates said that the DOJ expects companies to conduct “timely, appropriately thorough, and independent” investigations. To receive *any* cooperation credit, a corporation must also disclose “all non-privileged information about individual wrongdoing” to the DOJ. Partial cooperation credit will no longer be available to companies that withhold information on individuals.

Deputy AG Yates urged companies to “come in as early as [they] possibly can, even if [they don’t] quite have all the facts yet,” because “the new USAM language makes plain that a company won’t be disqualified from receiving cooperation credit simply because it didn’t have all the facts lined up on the first day ...” Yates also explained that under the new rules “timely and voluntary disclosure” and “cooperation” are now considered “distinct factors to be given separate consideration in charging decisions.”

A day after Yates’s speech, the head of enforcement at the SEC, Andrew Ceresney, announced a cooperation policy that mirrors DOJ’s. He said that “a company must self-report misconduct in order to be eligible for the [Enforcement] Division to recommend a [deferred prosecution agreement or non-prosecution agreement] to the Commission in an FCPA case.” Ceresney said the goal of the new policy is to incentivize firms to “promptly report FCPA misconduct.” Ceresney believes that companies who fail to self-disclose are “gambling,” because their

violations may be disclosed to the SEC by whistleblowers or through the Commission's independent investigation.

Ceresney noted that the SEC has long rewarded cooperation, and said the Commission's handling of past cases should "send the message loud and clear that the SEC will reward self-reporting and cooperation with significant benefits." To support this proposition, Ceresney pointed out that this year for the first time the Commission agreed not to seek *any* penalty against a company, Goodyear, due to its "significant cooperation." Like the DOJ, Ceresney said the SEC will continue focusing on holding individuals accountable.

The speeches from Deputy Yates and Ceresney follow previous announcements that the DOJ is putting additional resources behind its effort to hold individuals accountable for corporate wrongdoing. The Federal Bureau of Investigation plans to establish three new "international corruption squads" with dozens of special agents in New York, Washington, and Los Angeles, and the DOJ has announced plans to increase the size of its FCPA unit 50% by adding approximately a dozen prosecutors.

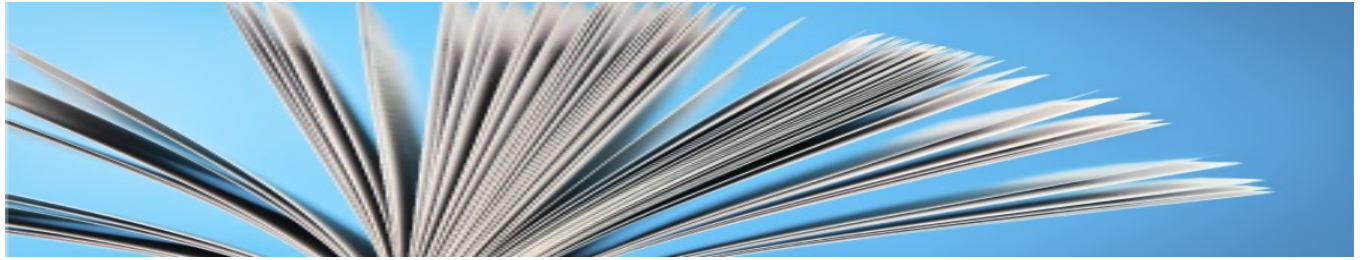
The changes to the USAM that Deputy AG Yates announced may lead to longer investigations with more individuals demanding their own counsel paid for by the company. Following Delaware law, most companies' bylaws reimburse corporate officers for legal fees incurred representing them in investigations or civil litigation. These changes may also affect companies' and individuals' decisions regarding entry into joint defense agreements.

Read the full text of Deputy Attorney General Yates's speech at <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0>; read the full text of SEC Director of Enforcement Andrew Ceresney's speech at <http://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html>.

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April 2, 2015

SEC Fines KBR \$130,000 for Using Employee Confidentiality Agreement that Violates Dodd-Frank Whistleblower Protections

RJ Zayed, Edward B. Magarian, Beth Forsythe

The Securities and Exchange Commission (“SEC”) has brought its first-ever enforcement action against a company for using language in confidentiality agreements that prohibits employees from speaking with the SEC without prior approval from company officials, in violation of Rule 21F-17 of the Securities Exchange Act of 1934 (17 C.F.R. 240.21F-17). Rule 21F-17, enacted under the Dodd-Frank Act, prohibits any action that would “impede an individual from communicating directly with the [SEC] staff about a possible securities law violations, including enforcing, or threatening to enforce, a confidentiality agreement. . .with respect to such communications.”

Houston-based technology and engineering firm KBR Inc. required employees interviewed in internal investigations, including investigations of possible securities law violations, to sign confidentiality statements which warned that they could be disciplined or fired if they discussed the fact or substance of the interviews with third parties without prior approval of KBR’s legal department. Although the SEC found no “apparent instances in which KBR specifically prevented employees from communicating with the SEC about specific securities law violations,” it nevertheless charged KBR with a Rule 21F-17 violation on the basis that a “blanket prohibition against witnesses discussing the substance of [an] interview has a potential chilling effect on whistleblowers’ willingness to report illegal conduct to the SEC.”

Under the terms of the settlement, KBR agreed to pay a \$130,000 penalty and amend its confidentiality statement.

The language at issue in KBR’s confidentiality statement said,

I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.

As part of the SEC settlement, KBR agreed to amend its confidentiality statement to include the following:

Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such report or disclosures and I am not required to notify the company that I have made such reports or disclosures.

In announcing the action, the SEC warned, “SEC rules prohibit employers from taking measures through confidentiality, employment, severance, or other type of agreements that may silence potential whistleblowers before they can reach out to the SEC. We will vigorously enforce this provision.” The SEC’s press release is available at <http://www.sec.gov/news/pressrelease/2015-54.html#.VR1OMvnF98G> and the order is available at <http://www.sec.gov/litigation/admin/2015/34-74619.pdf>.

This action is a poignant reminder to regulated firms of the importance of conducting a thorough review of their codes of conduct, employment agreements, severance agreements, and any other documents that contain confidentiality or non-disparagement covenants, to ensure compliance with Rule 21F-17. Firms that currently use broadly worded confidentiality or non-disparagement clauses should discuss with legal counsel how to achieve compliance with Rule 21F-17, including by adding language that expressly allows for regulatory reporting, similar to the regulatory reporting exception KBR amended to its confidentiality statement.

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