# Managing The First 90 Days In A Bet-The-Company Case

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## The Crisis Erupts

- Regulators inform the Company of an investigation
- Whistleblower initiates internal or external complaint
- Market conditions cause sharp drop in valuations
- Class action filed against company and/or officers
- Criminal investigation or indictment
- Adverse publicity in print or electronic media
- Solicitation of cases by plaintiffs' counsel

First objective: build a crisis management strategy, get a handle on the facts from an internal investigation

## Proper Use of an Internal Investigation

- Who directs the investigation: management, audit committee, independent directors?
- Who conducts the investigation: inside counsel, outside counsel, outside auditors?
- Maintaining appearance of impartiality is critical
- Preservation of the attorney client privilege
- *In re: Kellogg Brown & Root, Inc.,* 2014 WL 2895939 (June 27, 2014)
- "[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies ..."

## Objectives of the Internal Investigation

- Understand the factual background that led to the event in question
- Identify key witnesses and documents
- Formulate strategy for going forward
- Anticipate and plan for litigation and regulatory investigations
- Document retention and litigation holds
- Retention of electronic files.

## The Decision to Self-Report

- SEC and DOJ have long encouraged self-reporting and cooperation
- SEC: “Seaboard Release”, DOJ “McNulty Memorandum”
- Self-reporting may be required in certain instances (notification of illegal act by auditor, Sarbanes-Oxley requirements)
- FINRA Rule 4530: member firms must self-report any internal investigation that finds a violation of any financial or investment related law, rule or regulation
- Certain events trigger Form 8-K reporting, net capital charges, litigation reserves

## Management of Information and Witnesses

- Early interaction with management and employees concerning the crisis
- Prohibition of internal e-mails discussing the event
- Identify key witnesses and assign an attorney
- Ensure use of *Upjohn* warnings
- Problems with disgruntled employees or "turncoats"
- Whistleblower protection, anti-retaliation laws under Dodd Frank and Sarbanes-Oxley
- Reporting issues relating to individuals (FINRA's Central Registration Depository, Certified Financial Planning Board)

## Retention of Experts and Consultants

- Public relations to interface with press
- Issues with shareholder, investor communications (avoid creation of documents that later become exhibits)
- Early retention of "consulting experts" covered by privilege
- Clear communication of budget constraints and objectives
- Creation of demonstratives to explain the Company's side of the story
- Early preparation of witnesses likely to testify

## Preparation for Follow on Civil litigation

- Coordination between litigation and regulatory counsel
- Early identification of key responsive documents
- Oppose discovery of regulatory productions
- Creation of uniform pleadings and discovery responses
- Use of extranet to store and make available documents and pleadings
- Create library of testimony by key witnesses and experts
- Weekly conference calls to craft a unified defense

ABA WCCC WORKING GROUP, July 17, 2009

# UPJOHN WARNINGS: RECOMMENDED BEST PRACTICES WHEN CORPORATE COUNSEL INTERACTS WITH CORPORATE EMPLOYEES

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## I. EXECUTIVE SUMMARY

This Report and Recommended Best Practices are the product of a Task Force established in early-2008 by the White Collar Crime Committee of the American Bar Association's Criminal Justice Section. They are intended to address an increasingly-common question associated with the attorney-client privilege: What best practices should corporate counsel follow when interacting with corporate employees while conducting internal investigations on behalf of the corporate entity? In particular, what advice or warnings – commonly referred to as Upjohn warnings, or corporate Miranda warnings – should corporate counsel (attorneys for any legal entity that is distinct from its members) provide to corporate officers, employees, shareholders, directors and trustees (collectively referred to as "Constituents"[1/]) and how should counsel give those warnings?

Upjohn warnings are named after *Upjohn v. United States*, 449 U.S. 383 (1981), the case in which the Supreme Court made clear that the corporate attorney-client privilege applied to a much wider group of Constituents than the corporation's "control group." Although *Upjohn*, itself, does not reach the issue of warnings, the case confirmed that communications between corporate counsel and corporate employees were potentially privileged. Out of the *Upjohn* decision, issues arose as to who held the privilege (the corporation, the corporate employee, or both) and who could waive the privilege associated with such communications.

Whether the corporation, the Constituent, or the corporation and the Constituent hold the attorney-client privilege has taken on special significance with the promulgation of federal corporate prosecution guidelines that have incentivized corporations under investigation to waive the privilege in order to gain cooperation credit. In the typical case, a corporation that is alleged

[1/] "Officers, directors, employees, and shareholders are the constituents of the corporate organizational client." MODEL RULES OF PROF'L CONDUCT R. 1.13(a) cmt. 1 (2004).

to have committed wrongdoing will retain counsel to conduct an internal investigation to assess the allegations and provide legal advice. Corporate counsel will, in turn, interview the relevant Constituents who possess knowledge about the allegations. Those interviews – involving only corporate counsel and the Constituent – are usually subject to a legitimate claim of attorney-client privilege.

But if the corporation later comes under investigation, especially federal investigation, it may seek to obtain cooperation credit – to mitigate criminal or civil regulatory exposure – by waiving the privilege and producing to the government the statements made by Constituents to corporate counsel during the internal investigation. Upjohn warnings have therefore emerged as the mechanism for making clear to Constituents that the corporation, and the corporation alone, is the holder of the privilege. In the absence of such warnings, Constituents may be able to assert that they, too, hold the privilege: that, as privilege holders, they elect not to waive the privilege, and that the corporation may not produce their statements to government investigators. By providing unambiguous warnings, corporate counsel may be able to limit later disputes over the extent and nature of the attorney-client relationship, and Constituents are better able to assess their own risks.

## II. RECOMMENDED BEST PRACTICES

The following "best practices" are intended to provide guidance to corporate counsel. As "best practices," they sometimes go beyond what may be required by model rules and applicable case law. The objective is not to impose additional burdens on corporate counsel, but to make sure that investigations are conducted in a way that abides by the operative principles, and simultaneously protects the attorney-client privilege between counsel and the corporation.

### A. Suggested Upjohn Warning

I am a lawyer for or from Corporation A. I represent only Corporation A, and I do not represent you personally.

I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.

Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.

In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss *this* discussion.

Do you have any questions?

Are you willing to proceed?

### B. Recommended Procedures to Follow

Although the facts of the particular situation may call for different warnings, a number of general principles should guide Upjohn warning practices:

First, counsel should provide the warnings to the Constituent before the interview is conducted.

Second, counsel should orally advise the Constituent of the Upjohn warnings, and should utilize a prepared written statement to ensure that the warnings are consistently and accurately given in each interview.

Third, counsel should make a record that the warnings have been provided through, at minimum, handwritten notes or the creation of a contemporaneous memorandum of the interview.

### C. Counsel Interviewing Constituents

The following is suggested for the typical situation where corporate counsel seeks to interview a Constituent.

1. Upjohn warnings should inform the Constituent that the investigating attorney is representing the corporation and is not representing the Constituent.

2. The warnings should be explicit and unambiguous to ensure that the Constituent does not believe that the Constituent has formed an attorney-client relationship with the investigating attorney.

3. The purpose of the interview should be made clear so it is apparent that counsel is acting on behalf of the corporation, and that counsel is gathering information for the corporation in order to provide legal advice to the corporation.

4. Counsel should give the Constituent the opportunity to ask questions about the Upjohn warnings and counsel's role. This helps ensure that the Constituent understands the Constituent's relationship with counsel.

5. The warnings should inform the Constituent that the interview is subject to the attorney-client privilege and, as such, the interview is regarded by the corporation as confidential and the Constituent may not disclose the substance of the interview – questions asked by counsel and answers given to those questions – to third parties outside the corporation because that could effectively waive the privilege.

6. The warnings should further inform the Constituent that, while the interview is subject to the attorney-client privilege, the privilege belongs only to the corporation, not the Constituent. That means it is up to the corporation – and the corporation alone – to decide if or

when the substance of the interview should be disclosed to third parties (*i.e.*, without the consent of the Constituent).

### D. Other Issues for Consideration

#### 1. Constituents Approaching Counsel

The propriety, necessity and strategic advantage of providing Upjohn warnings are less apparent when a Constituent approaches corporate counsel. Indeed, the analysis will be fact-specific, with a particular focus on whether the Constituent is approaching counsel to self-report misconduct or to report alleged misconduct by others. This analysis is further complicated by whether the events being reported present a risk of criminal or civil exposure for the corporation. Factors that guide this analysis include, but are not limited to, the following: whether there is an apparent conflict of interest between the Constituent and the corporation; whether the Constituent is reporting facts that place the corporation and/or Constituent at risk of prosecution; whether the Constituent is a whistleblower as defined by the Sarbanes-Oxley Act and therefore subject to certain protections; and, finally, whether the Constituent is reporting events that question the integrity of the corporation's management or its public filings. The existence of a conflict at minimum necessitates counsel notifying the Constituent that counsel does not represent the Constituent. Moreover, as a best practice, counsel should provide Upjohn warnings whenever a likely conflict of interest exists.

#### 2. Supplementing Oral Warnings

Counsel may wish to consider supplementing oral warnings by giving the Constituent Upjohn warnings in writing. Counsel may go even further by having the Constituent sign a written acknowledgment of the warnings.

Although using a written warning is not a common practice, they reduce the risk of later challenge to the warnings provided. On the other hand, handing out a written warning and asking someone to sign a statement can have a chilling effect on the Constituent's willingness to share information, which defeats the fact-finding purpose of the interview, especially if the Constituent has no reason to believe that counsel personally represents the Constituent.

One approach to this issue would be to provide written Upjohn warnings to all Constituents at the onset of a formal relationship with the corporation, such as when an employee is hired, or when the investigation is about to commence. That approach could have the benefit of setting Constituent expectations before any issue arises. On the other hand, those expectations may lead to the unintended consequence that Constituents are less cooperative and candid across a wide range of activities than they otherwise might be in the absence of such blanket warnings.

**3. "Do I need a lawyer?"**

If, as is often the case, the Constituent asks whether the Constituent needs separate counsel, counsel should advise the Constituent that counsel cannot provide advice on that issue but that the Constituent has the right to have separate counsel. Given the prevalence of the issue, counsel may wish to advise that the Constituent has the right to have separate counsel as part of the Upjohn warning, without waiting for the Constituent to ask the question. If applicable, counsel may also consider advising the Constituent that the corporation has a policy of paying for the Constituent's counsel.

**4. "What is my status? Is there a conflict of interest?"**

Related to the preceding question, it is common for counsel and the Constituent to discuss whether a conflict of interest exists between the corporation and the Constituent. If counsel believes a conflict of interest currently exists, counsel should consider advising the

Constituent of that belief. If conflicts of interest are discussed, counsel should emphasize that facts and circumstances can change, that the interests of the Constituent and the corporation could come into conflict with each other, that counsel will alert the Constituent of such a conflict if and when counsel learns of one, and that the Constituent should do the same.

### 5. Separate Counsel for Constituents

Even when no conflict of interest is apparent, the corporation should consider, when feasible, hiring separate counsel for employees and entering into a joint defense relationship with that counsel. The advantage of such an approach is that separate "pool counsel" will have an undivided interest in representing employees, which may facilitate the fact finding process. On the other hand, such a course may pose risks for the corporation because corporate prosecution guidelines have been known to penalize corporations that enter into joint defense arrangements with other parties.

### 6. "What if I refuse to cooperate in this investigation?"

In cases where the Constituent inquires about the consequences of not cooperating in the investigation, the Constituent should be informed of the pertinent corporate policies applicable to internal investigations. In particular, most corporate policies will discipline employees who refuse to cooperate in internal investigations, and such discipline can include termination of employment.

### 7. Third Party Uses of Information

Counsel may wish to advise the Constituent that third parties to whom the corporation may elect to disclose information include federal or state government agencies, who might ask the corporation for such information, and who might regard false statements provided to counsel

as a prosecutable offense. In addition, counsel may wish to consider advising the Constituent that the corporation presently has no position on the matter because the factual investigation is still under way.

### 8. Confidentiality of Communications Between Counsel and the Constituent

Counsel may further wish to provide to the Constituent further elaboration on the aspect of counsel's interaction with the Constituent that should be regarded as confidential. As a general matter, in order to preserve the attorney-client privilege only the actual questions asked and the actual answers given should be treated as confidential. This means that the actual underlying facts known to the Constituent are not necessarily confidential, and the Constituent is not precluded from, for instance, appropriately reporting allegations of wrongdoing based on those underlying facts to law enforcement authorities. On the other hand, some of the underlying facts known to the Constituent could include proprietary business and/or trade secret information that could be subject to a legitimate assertion of confidentiality by the corporation. To reconcile these competing concerns, counsel may wish to consider advising the Constituent to seek further legal advice should the issue arise.

### 9. Joint Representation of the Corporation and the Individual

There will inevitably be instances where the interests of the corporation and the Constituent appear, in the first instance, to be aligned. In that context, the corporation sometimes consents to having its corporate counsel represent both the corporation and the Constituent, provided no conflict of interest arises. There are, however, potential risks associated with the situation, which are discussed in more detail in Section VI of this Report, "Current Upjohn Warning Practices."

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The remainder of this Report provides the rationale for the foregoing Recommended Best Practices. Section III explores the establishment, history, and elements of the attorney-client privilege; Section IV reviews the United States Supreme Court's decision in *Upjohn v. United States*, and explains how it shaped Upjohn warnings; Section V reviews the codification of the warnings, in particular by the ABA; and Section VI describes current practices.

## III. THE ATTORNEY-CLIENT PRIVILEGE

### A. Introduction

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."[2/] Indeed, as even the Department of Justice recognizes, it "is one of the oldest and most sacrosanct privileges under the law."[3/] The privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."[4/] While the purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients," it also "promote[s] broader public interests in the observance of law and administration of justice."[5/] As such, it is "perhaps, the most sacred of all legally recognized privileges, . . . essential to the just and orderly operation of our legal system."[6/] While

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[2/] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The attorney-client privilege can be traced back to the Roman legal tradition. EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 6.2.4, at 471 (2002). However, the earliest known cases referencing the attorney-client privilege date back to the 1570s and do not question the existence of the privilege. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (John T. McNaughton ed., 1961).

[3/] United States Attorneys' Manual, Principles of Federal Prosecution of Business Organizations § 9-28.710 (Attorney-Client and Work Product Protections) (2008), citing *Upjohn Co. v. United States*.

[4/] *Trammel v. United States*, 445 U.S. 40, 51 (1980).

[5/] *Upjohn Co. v. United States*, 449 U.S. at 389.

[6/] *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997); EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 6.2.4, at 471 (2002).

commentators have argued the merits of the attorney-client privilege for centuries,[7] no other aspect of the privilege has prompted more controversy than its application to corporations.[8]

The Supreme Court, in *Upjohn v. United States*, acknowledged that "complications in the application of the privilege arise when the client is a corporation, an artificial creature of the law, and not an individual."[9] It is from these complications that Upjohn warnings have evolved.

While a corporation may only speak through its Constituent, typically when in-house counsel, or outside counsel represent a corporation, the corporation itself is counsel's only client.

Upjohn warnings should set appropriate expectations between the Constituent and the corporation. The warnings are intended: (1) to inform the Constituent that the Constituent is not a client; (2) to warn the Constituent that the corporation's counsel is not bound to keep the Constituent's information confidential; and (3) to explain that the corporation alone, not the Constituent, may choose to reveal to outside parties what transpired during the interview between the Constituent and corporate counsel.

### B. Relevant Principles Underlying the Attorney-Client Privilege

The attorney-client privilege and associated legal duty of confidentiality protect communications between an attorney and client. The attorney-client privilege applies only to private client communications, whereas the duty of confidentiality applies to all information gained from the representation. In the corporate context, an important consideration often is who qualifies as a client that may invoke the privilege. Typically, the client is the corporation, though Constituents may believe that they also are clients and later attempt to invoke the privilege over statements made to the attorney.

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[7] BLACKSTONE'S COMMENTARIES ON THE LAW 683 (Bernard C. Gavit ed., Washington Law Book Co. 1941) (1892).

[8] Gerald F. Lutkus, Note, *The Implications of* Upjohn, 56 NOTRE DAME L. REV. 887, 887 (1981); *see also* John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443 (1982).

[9] *Upjohn Co. v. United States*, 449 U.S. at 389–90.

For example, a Constituent interviewed by corporate counsel as part of an internal investigation – undertaken so that counsel can learn pertinent facts and competently advise the corporation – may later claim that the statements provided to corporate counsel were subject to an attorney-client privilege held by the Constituent and the corporation. The Constituent may then assert that, as a holder of the privilege, it is up to the Constituent, not the corporation, to decide whether to waive the privilege to allow third parties – such as government investigators or members of the media – to obtain the statements.[10/] To defeat such a claim, corporations seeking to establish that they, and they alone, are the holders of the privilege have required that Upjohn warnings be provided to Constituents prior to any interview by corporate counsel.

### 1. What Is the Privilege?

The attorney-client privilege is an evidentiary privilege,[11/] that protects the client from disclosures of private communications made by the client while seeking legal advice.[12/]

### 2. Elements

The privilege itself covers only *client* communication made *in confidence*. The historical elements of the attorney-client privilege are as follows: "(a) Where legal advice of any kind is sought (b) from a professional legal adviser in his capacity as such, (c) the communications relating to that purpose, (d) made in confidence (e) *by the client*, (f) are at his insistence permanently protected (g) from disclosure by himself or by the legal adviser, (h) except the protection be waived."[13/] In the corporate context, the identity of the client is of greatest concern

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[10/] *See, e.g., In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. 2005) (corporate employees subject to criminal prosecution based on statements made to corporate counsel sought to suppress those statements based on the alleged inadequacy of Upjohn warnings provided by the corporate counsel).

[11/] STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 28 (7th ed. 2005).

[12/] *Id.*

[13/] 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (emphasis added).

and was the focus of the *Upjohn* case.[14] Therefore, determining when an attorney-client relationship is created informs the analysis of privilege in the corporate context.

### 3. Formation of the Attorney-Client Relationship

"A relationship of client and lawyer arises when: a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services."[15]

#### a. Client Intent

A prospective client's reasonable belief about the formation of an attorney-client relationship is critical to determining when the relationship arises. For instance, courts have found a relationship when the client reasonably relied on the attorney's advice, even though the lawyer declined the representation.[16] On the other hand, other courts have observed that "a party's mere expectation that an attorney will represent him or her is insufficient to create an attorney-client relationship."[17]

While "most client-lawyer relationships are still formed the old-fashioned way," a relationship may arise in a more casual manner.[18] Formal indicia of the relationship are sufficient to show a relationship, but they are not prerequisites. A prospective client's argument that a relationship has been initiated is bolstered when there is an exchange of personal

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[14] *Upjohn Co. v. United States*, 449 U.S. at 389–97.

[15] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000); *see also Miller v. Mooney*, 725 N.E.2d 545, 549 (Mass. 2000); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542.

[16] *See, e.g., Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).

[17] *Gramling v. Memorial Blood Ctrs.*, 601 N.W.2d 457, 459–60 (Minn. Ct. App. 1999); *see also Catizone v. Wolff*, 71 F.Supp.2d 365 (S.D.N.Y. 1999).

[18] STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 19 (7th ed. 2005).

confidential information between the client and the attorney.[19] A relationship can arise without a written contract.[20] Furthermore, the client need not pay or agree to pay the lawyer.[21] However, in addition to the client's reasonable belief, the attorney's actions must be considered in determining whether an attorney-client relationship is formed.

**b. Attorney Intent**

The attorney need not expressly consent to the representation in order for an attorney-client relationship to arise.[22] Rather, if the attorney fails to deny the relationship and the attorney reasonably should know that the prospective client may rely on the attorney, a relationship may be formed.[23] Specifically, where an attorney "knowingly obtains material [personal] confidential information from the client and renders legal advice or services as a result," the attorney assents to the representation.[24] Any conveyance of advice could trigger the formation of a relationship.

**4. Application to the Corporate Context**

As mentioned previously, application of the attorney-client privilege to corporations raises issues not present when the client is an individual. While corporations have a separate legal identity, they are also made up of individuals – employees, officers, directors, trustees, and shareholders (*e.g.*, Constituents) –who may, depending upon the circumstances, speak on behalf of and legally bind the corporation. The issue that then arises is who is the client for privilege purposes – exactly who does corporate counsel represent? Only the corporation? Only the

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[19] *See, e.g., Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983).

[20] ABA/BNA, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 31:101.

[21] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14.

[22] *Id.*

[23] *Id.*

[24] *Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 980 P.2d 371 (Cal. 1999).

Constituent? The corporation and the Constituent? Resolution of these issues is fact-specific, but the principles that serve as a guide are well known.

**a. Client Identity**

Typically, an attorney for a corporation represents the entity and not its Constituents.[25] "A [corporation's] lawyer . . . owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."[26] For example, when a corporation learns of an allegation of wrongdoing within the corporation, the corporation – in the guise of its senior management, board of directors, or committees of the board (such as the audit committee or a special litigation committee) – may call upon attorneys representing the corporation to conduct an internal investigation to determine whether the allegation can be substantiated and to provide legal advice to the corporation on an appropriate course of action. Under such circumstances, the attorney involved in the internal investigation will typically engage with the corporation's Constituents to obtain the facts necessary to advise the corporation, and that is when Upjohn warnings typically will be given. Indeed, the Model Rules make clear that the corporation's lawyer is responsible for clarifying the identity of the client to the Constituent whenever it appears that the Constituent has interests adverse to the entity.[27]

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[25] MODEL RULES OF PROF'L CONDUCT R. 1.13(a) & cmt. 1.

[26] *Bobbitt v. Victorian House, Inc.*, 545 F.Supp. 1124, 1126 (Ill. Dist. Ct. 1982); *see also Rosman v. Shapiro*, 653 F.Supp. 1441, 1445 (S.D.N.Y. 1987) ("[I]n the ordinary corporate situation, corporate counsel does not necessarily become counsel for the corporation's shareholders and directors . . . .").

[27] MODEL RULES OF PROF'L CONDUCT R. 1.13(f).

### b. When Joint or Concurrent Representation May Arise

Under certain circumstances, an attorney representing the corporation may also take on a joint or concurrent representation of the entity's Constituents.[28/] For example, if the Constituent approached the corporation's lawyer for advice and "[i]f the [Constituent] . . . makes it clear when he is consulting the corporation lawyer that he personally is consulting the lawyer and the lawyer sees fit to accept and give communication knowing the possible conflicts that could arise, [the Constituent] may have a privilege."[29/] Similarly, there may be situations where a corporation and its Constituents choose to be represented by the same attorney. Whether the attorney represents the corporation alone or also represents a Constituent is a question of fact, determined by the reasonable expectations of the parties under the circumstances.[30/]

The formation of an attorney-client relationship between the Constituent and corporate counsel hinges on the reasonable belief of the Constituent and the attorney's actions in light of that belief. The Constituent must have "manifested [his] intention to seek professional legal advice."[31/] For instance, the Constituent may approach the attorney to seek advice about his personal liability. Alternatively, the attorney may approach the Constituent to investigate possible wrongdoing, during which the Constituent may seek personal legal advice from the attorney as to the Constituent's own liability. In either instance, "due consideration" should be given to the unreasonableness of the Constituent's belief that the attorney is his personal representative, especially in instances where a "readily apparent conflict of interest exists

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[28/] *Id.*

[29/] *In re Grand Jury Proceedings*, 434 F.Supp. 648 (E.D. Mich. 1977).

[30/] *See Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978).

[31/] *Id.* at 1319.

between the organization and the Constituent claimed to be a co-client."[32] The more actions the attorney takes to discount the presence of an attorney-client relationship, the more unlikely it is that the Constituent has a reasonable belief that the Constituent is a client.

If counsel does not expressly discount a relationship with the Constituent, the counsel's actions could implicitly assent to concurrent representation of the entity and Constituent. First, conversations between the attorney and the Constituent about the latter's personal liability may imply a concurrent representation.[33] Courts have imposed relationships when the Constituent conveys confidential information to the corporate counsel,[34] and the attorney promises the Constituent confidentiality.[35] However, the attorney does not enter into a relationship solely because the Constituent communicates with the attorney about issues relevant to the entity that are also relevant to the Constituent personally.[36] "Normally a corporate director talking to corporate counsel should understand anything he told that attorney was 'known by the corporation.'"[37]

Second, when the attorney provides personal legal services for the Constituent, a concurrent representation is more likely established. For instance, courts have found a concurrent representation when the attorney appears on behalf of both the Constituent and the

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[32] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. f; *see also Bobbitt v. Victorian House, Inc.*, 545 F.Supp. at 1126 ("[I]t is clear that the firm was representing the corporation and thus [the officer] could not have reasonably believed or expected that any information given to the firm would be kept confidential from the shareholders or from the corporation as an entity.").

[33] *United States v. Walters*, 913 F.2d 388 (7th Cir. 1990); *Montgomery Academy v. Kohn*, 50 F.Supp.2d 344 (D.N.J. 1999) (finding an attorney-client relationship when the director consulted the organization's attorney about investment losses for which the director was later found responsible).

[34] *Home Care Indus. v. Murray*, 154 F.Supp.2d 861 (D.N.J. 2001).

[35] *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991).

[36] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14. *But see Montgomery Academy v. Kohn*, 50 F.Supp.2d 344 (D.N.J. 1999) (finding an attorney-client relationship when the director consulted the organization's attorney about investment losses for which the director was later found responsible).

[37] *Bobbitt v. Victorian House, Inc.*, 545 F.Supp. at 1126.

corporation.[38] Likewise, a court has determined that relationship exists when the Constituent identifies the lawyer as his counsel to outsiders and the attorney does not clarify his role.[39] Some affirmative action on the part of the attorney to implicitly create a relationship is necessary.

A pattern of dealing between the Constituent and the corporate counsel may support both the Constituent's belief that a relationship exists and the attorney's assent to that relationship. The corporate form is often disregarded in closely-held corporations and the interest of the shareholder may merge with that of the entity. In a "close corporation consisting of only two shareholders with equal interests in the corporation, it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own individual attorney."[40] However, even in these instances, a concurrent representation will be unlikely if the attorney never purports to represent the Constituent.[41] A longstanding personal relationship between the corporate counsel and a Constituent does not, by itself, show a reasonable belief by the client or implied assent by the attorney.[42]

The American Bar Association's Committee on Ethics and Professional Responsibility issued a Formal Opinion, in 1991, that identified a number of factors that may help determine when a concurrent relationship is established: "(a) whether the attorney affirmatively assumed a duty of representation to the constituent, (b) whether the constituent was separately represented by other counsel in connection with his affairs, (c) whether the attorney had represented the constituent before undertaking to represent the organization, and (d) whether there was evidence

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[38] *E.F. Hutton & Co. v. Brown*, 305 F.Supp. 371 (S.D. Tex. 1969).

[39] *Advanced Mfg. Techs., Inc. v. Motorola, Inc.*, 2002 WL 1446953 (D. Ariz. 2002).

[40] *Rosman v. Shapiro*, 653 F.Supp. 1441, 1445 (S.D.N.Y. 1987).

[41] *Bowen v. Smith*, 838 P.2d 186 (Wyo. 1992).

[42] *Telectronics Proprietary, Ltd. v. Medtronic, Inc.*, 836 F.2d 1332 (Fed. Cir. 1988).

of reliance by the Constituent on the attorney as his or her separate counsel, or of the Constituent's expectation of personal representation."[43/]

### B. Duty of Confidentiality to Prospective Clients

Even if the corporation does not consent to counsel's concurrent representation of the corporation and the Constituent, the counsel interacting with a Constituent may have a duty of confidentiality to the Constituent as a prospective client.

#### 1. Elements

Attorneys are governed both by the evidentiary attorney-client privilege and by the broader duty of confidentiality to all clients and potential clients.[44/] "Even when no [attorney-client] relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation."[45/] Even if the attorney expressly denies the establishment of a relationship, the attorney remains bound by this duty.

#### 2. Application to the Corporate Context

In order for the duty of confidentiality to attach, the Constituent must be a prospective client. Therefore, the Constituent must seek personal representation from corporate counsel.[46/] For instance, a Constituent might approach corporate counsel about the Constituent's personal liability for actions taken during the Constituent's employment. Even if the corporate counsel clarifies that the counsel does not represent the Constituent individually, but rather only the corporation, corporate counsel still could be obligated to keep the Constituent's information confidential.

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[43/] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991).

[44/] GILLERS, REGULATION OF LAWYERS: 27–28.

[45/] MODEL RULES OF PROF'L CONDUCT R. 1.8(b); *see also Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978).

[46/] *See Montgomery Academy v. Kohn*, 50 F.Supp.2d 344 (D.N.J. 1999).

Whether a duty of confidentiality arises would again hinge on whether the Constituent reasonably believed that the Constituent was seeking legal advice from the Constituent's personal attorney. In the corporate context, the reasonableness of that belief may be questioned, as the Constituent usually knows that the Constituent is speaking to the corporation when speaking to corporate counsel.[47] However, if the Constituent's belief was reasonable, corporate counsel would be bound by the duty of confidentiality and could not reveal the information learned from the Constituent to the entity itself.[48] Whether or not this is truly an issue will depend on the facts and circumstances.

The foregoing helps to explain why it behooves corporate counsel to provide clear warnings to Constituents, lest counsel find themselves in a position where Constituents who claim the privilege and/or a right to confidential treatment prevent them from using the facts they have gathered to represent the corporation effectively.

## IV. *UPJOHN* AND ITS IMPACT ON THE ATTORNEY-CLIENT PRIVILEGE

While many of the principles behind formation of the attorney-client relationship are clear, their application to corporations can be difficult. Before *Upjohn*, circuits were split over which Constituents were considered clients and, therefore, were covered by the privilege. The *Upjohn* decision extended the privilege to communication between corporate counsel and Constituents, but made it clear that the corporation is the client and the holder of the privilege. The corporation can waive the privilege to the detriment of the Constituent. Due to this conflict of interest, corporate counsel began giving warnings to prevent Constituents from asserting the privilege for themselves.

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[47] *Bobbitt v. Victorian House, Inc.*, 545 F.Supp. at 1126.

[48] *Cf. Montgomery Academy v. Kohn*, 50 F.Supp. 2d 344 (D.N.J. 1999); *Gilmore v. Goedecke Co.*, 954 F.Supp. 187 (E.D. Mo. 1996) (disqualifying a corporation's long-standing law firm from representing the corporation in a lawsuit brought by a Constituent who had consulted with a member of the firm before filing suit).

### A. The Corporate Attorney-Client Privilege Prior to *Upjohn*

Corporations have invoked the attorney-client privilege in cases dating back almost one-hundred years.[49] For the greater part of the twentieth century, the Supreme Court "accepted tacitly the proposition that the attorney-client privilege available to individuals also was available to corporations, but it never had delineated the scope and meaning of the corporate attorney-client privilege."[50] Over time, however, a significant circuit split developed, and various federal courts of appeal adopted conflicting standards.[51] Some courts extended the privilege to all communications between the attorney and members of the "control group" of the corporation.[52] Other courts opted for the more restrictive "subject matter" test, extending the privilege to communications based on the "nature and purpose of the information imparted to the lawyer, not merely the identity of the source."[53] The split among the circuits was resolved in *Upjohn*, when the Supreme Court held that the attorney-client privilege extends beyond a comparatively small group of senior employees. Rather, it encompasses all employees who act within the scope of their employment and who are in a position to legally bind the corporation through such acts.[54]

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[49] *See, e.g., United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915).

[50] John E. Sexton, *A Post*-Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 443 (1982).

[51] *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc) (applying a "subject matter" test for confidential communications made to secure legal advice); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1971) (applying a "subject matter" standard for communication in the scope of the employee's duties); *General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962) (applying a "control group" test); Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443; *see also Upjohn Co. v. United States*, 449 U.S. at 390–92 (describing the different standards espoused by the circuits).

[52] *See, e.g., General Elec. Co. v. Kirkpatrick*, 312 F.2d 742 (3d Cir. 1962); *see also* GILLERS, REGULATION OF LAWYERS 32.

[53] GILLERS, REGULATION OF LAWYERS 32; *see also, e.g., Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1971); *see also* Lutkus, Note, *The Implications of* Upjohn, 56 NOTRE DAME L. REV. 887.

[54] *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

### B. The *Upjohn* Decision

In *Upjohn*, the Supreme Court rejected the control-group test, opting instead for a broader rule that expanded the application of the privilege to certain lower level employees.[55] *Upjohn* involved an internal corporate investigation into improper payments by Upjohn managers to foreign government officials.[56] Upjohn's general counsel and outside attorneys sent questionnaires to all foreign managers and interviewed the recipients of the questionnaires and other employees.[57] In response to an IRS summons and on attorney-client privilege grounds, the corporation refused to produce the questionnaires, and the issue proceeded to litigation.[58] The district court concluded that the privilege was waived.[59] But on appeal, the Sixth Circuit found no waiver, holding instead that because the communications were outside the "control group," the communications were not the "client's" and no privilege attached.[60]

The Supreme Court disagreed and reversed. First, it concluded that the control group test articulated by the Sixth Circuit frustrated a major purpose of the attorney-client privilege: full and frank communication of relevant information by employees of the client corporation to attorneys who are seeking to render legal advice.[61] Second, the control-group test lacked certainty, resulting in disparate decisions regarding the employees to which the privilege applied.[62] Finally, the test created a "Hobson's choice," by which the counsel had to choose

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[55] *Id.* at 396–97.

[56] *Id.* at 386–87.

[57] *Id.* at 387.

[58] *Id.* at 388.

[59] *Id.*

[60] *Upjohn Co. v. United States*, 600 F.2d 1223, 1226–28 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981).

[61] *Upjohn Co. v. United States*, 449 U.S. at 390–91. The Court recognized that lower level employees, who would not otherwise fall within the control group, often possess the information needed by the corporation's lawyers. *Id.*

[62] *Id.* at 390–93 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

interviewing lower-level employees (and risking disclosure of unprivileged information) or avoiding those interviews (and risking failing to gather sufficient facts).[63]

To preserve the purposes behind the attorney-client privilege, the Court expanded its application beyond the "control group." That led the Court to find a valid attorney-client privilege where: (a) the communications were made by Upjohn employees; (b) to counsel for Upjohn acting as such; (c) at the direction of corporate superiors; (d) in order to secure legal advice from counsel; (e) concerning matters within the scope of the employees' duties; and (f) the employees "were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice."[64]

Although the Court did not expressly endorse any particular test to determine the circumstances under which the corporate attorney-client privilege existed, commentators believe *Upjohn* accepted the so-called "Weinstein Test,"[65] espoused by Judge Jack Weinstein and discussed by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith*.[66] But *Upjohn* made one noticeable addition: the employee's subjective awareness of the legal purpose of the communication.[67] The Court explained this element through the following discussion of case-specific facts:

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[63] *Id.* at 390–91.

[64] *Id.* at 394.

[65] John E. Sexton, *A Post*-Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 461 (1982); Lutkus, Note, *The Implications of* Upjohn, 56 NOTRE DAME L. REV. 892; *see also* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(b)(04) (1975). The Weinstein Test required that (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

[66] 572 F.2d 596, 609 (8th Cir. 1977) (en banc).

[67] *Upjohn Co. v. United States*, 449 U.S. at 394–95.

> A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation." It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel."[68/]

## V. FORMALIZING UPJOHN WARNINGS

### A. Codification through the ABA Model Rules

ABA Model Rules of Professional Conduct 1.13(f) and 4.3 appear to be logical extensions of the *Upjohn* decision, and were adopted after the decision was handed down.[69/] Both rules provide guidance with respect to an attorney's obligation to provide warnings to Constituents.

#### 1. ABA Rule 1.13(f)

Rule 1.13 governs instances where a lawyer has an organization as a client. Section (f) of the Rule requires an attorney representing the corporation to identify to Constituents the attorney's representation of the corporation alone "when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents."[70]

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[68/] *Id.*

[69/] The Rules were adopted by the ABA House of Delegates in 1983, replacing the Model Code of Professional Responsibility. Although the Model Rules were adopted almost two years after the *Upjohn* case was decided, the Commission on Evaluation of Professional Standards (the Kutak Commission) began circulating proposed drafts of the Model Rules as early as 1980. Differences between the proposed draft of the Rules in 1980 and the Model Rules adopted in 1983 indicate that the Commission recognized the impact of the *Upjohn* decision on an attorney's ethical obligations. Thus, while the legislative history of Rules 4.3 and 1.13 do not specifically reference the *Upjohn* decision, it is likely the decision was considered in revising the Rules. Regardless, the Rules are consistent with the purpose and scope of the attorney-client privilege as expressed by the Supreme Court in *Upjohn*.

[70] "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Model Rules of Prof'l Conduct R. 1.13. Under the predecessor ABA Model Code, there was no direct counterpart to Rule 1.13(f). While there are some Model Code provisions that track the language of other subsections of Rule 1.13, there is no counterpart to Rule 1.13(f). The original version of Rule 1.13(f) (formerly 1.13(d)), provided that "[i]n dealing with

Comments to Rule 1.13 shed additional light on the topic. Specifically, Comment [2] explains:

> When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, *if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6* [dealing with confidentiality]. (Emphasis added).[71]

In addition, Comment [10] provides the following guidance for situations where the interests of an organization and one of its Constituents become potentially adverse:

> Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal

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an organization's directors, officers, employees, members, shareholders or other constituents, a lawyers shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstandings on their part." In 1983, the Rule was amended to replace the last phrase with "when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." In 2002, "it is apparent" was replaced with "the lawyer knows or reasonably should know," and subsection (d) became subsection (f).

[71] Rule 1.6 provides as follows:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
> (4) to secure legal advice about the lawyer's compliance with these Rules;
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (6) to comply with other law or a court order.
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> Model Rules of Prof'l Conduct R. 1.6.

representation for that constituent individual, and that discussion between the lawyer for that organization and the individual may not be privileged.[72]

These comments address issues associated with Upjohn warnings.[73]

### 2. ABA Rule 4.3

Rule 4.3 is more general in scope, but has application here as well. It provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that an unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.3 is also similar to Disciplinary Rule ("DR") 7-104(A)(2), which provides that that during the course of a lawyer's representation of a client, a lawyer shall not "[g]ive advice to a person who is not represented by a lawyer, other than the advice to secure counsel . . . ."[74]

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[72] On the other hand, Comment [11] acknowledges that these are fact-specific situations, stating that "[w]hether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case." Comments [3], [8], and [9] to the original Rule, which address the issues decided in Upjohn, became Comments [2], [10], and [11] of the current Rule, respectively.

[73] As also discussed at note 69, *supra*, while the *Upjohn* decision is not specifically referenced in either the annotations to the ABA Rule or the legislative history, the language of the Rule itself and the Comments to the Rule essentially restate the Court's holding in *Upjohn*.

[74] MODEL RULES OF PROF'L CONDUCT DR 7-104(A)(2). The original version of Rule 4.3, adopted in 1983, did not contain a prohibition on providing advice to an unrepresented person in the text of the Rule itself. That prohibition on providing advice was contained in the Comment to the original rule. In 2002, the prohibition on giving legal advice to unrepresented persons was moved from the Comment to the main text of Rule 4.3, consistent with the practice of the majority of states in restricting the prohibition to situations where the lawyer "knows or reasonably should know" that the interests of the unrepresented person are in conflict with the interests of his or her client. Other changes were also made to the Comment in 2002. In particular, "[i]n order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d) [now Rule 1.13(f)]." Model Rules of Prof'l Conduct R. 4.3 cmt. 1. Based on the cross-reference, it seems that Rule 4.3 was intended to be construed in conjunction with Rule 1.13(f) in determining what ethical guidelines an attorney should consider when representing a corporation.

### 3. The Relevance of the Model Rules to Upjohn Warnings

Read together, 1.13(f) and Rules 4.3 clearly impose a duty on an attorney, during the course of his representation of a corporate client, to clarify his role when dealing with the corporation's Constituents if there is a conflict between the Constituent and the corporation and to correct any misunderstandings that may arise. This duty likely extends to former Constituents under Rule 4.3, insofar as they are "unrepresented."[75] While the Rules provide general guidance regarding a corporate counsel's ethical duties, they are silent with respect to the standards and procedures that should govern when and how to give an Upjohn warning.[76]

### 4. Adoption of the Model Rules by Various Jurisdictions

According to an ABA survey,[77] the Model Rules have been adopted to date in forty-nine jurisdictions: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. California, Maine, and New York are the only states that do not have professional conduct rules that follow the ABA Model Rules.

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[75] *See Upjohn Co. v. United States*, 449 U.S. at 394 & n.3 (declining to decide whether the attorney-client privilege should apply to communications with former employees); Annotation to Model Rules of Prof'l Conduct R. 43.

[76] For instance, Comment [11] to Rule 1.13(f), which provides that whether a warning is to be given will depend on the facts of each case, leaves an attorney with no more clarity than was provided in the *Upjohn* decision.

[77] *Available at* http://www.abanet.org/cpr/mrpc/alpha_states.html.

### B. Illustrative Post-*Upjohn* Cases

Discussed here are four cases, decided after *Upjohn*, which shed added light regarding the standards for determining when Upjohn warnings are necessary and the contents of such warnings.

In *United States v. Stein*, the KPMG tax shelter case that was affirmed by the Second Circuit, the district court addressed an employee's claim that corporate counsel was personally representing her.[78/] In that case, a partner at KPMG was questioned by counsel hired by the accounting firm in the course of an IRS investigation. The court noted that the partner did not recall receiving Upjohn warnings.[79/] The court stressed that the question of whether a personal attorney-client relationship existed "could be avoided if counsel in these situations routinely made clear to employees that they represent the employer alone and that the employee has no attorney-client privilege with respect to his or her communications with employer-retained counsel."[80/] Even without adequate warnings, however, the court concluded that no personal attorney-client relationship existed between the employee and corporate counsel.[81/]

The Second Circuit addressed a similar issue in a case involving whether a campaign manager for the International Brotherhood of Teamsters had formed a personal attorney-client relationship with outside counsel hired to investigate the organization's fundraising activities.[82/] The court highlighted counsel's failure to clarify that they did not represent the employee. The court then reminded outside counsel that "attorneys in all cases are required to clarify exactly whom they represent, and to highlight potential conflicts of interest to all concerned as early as

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[78/] 463 F.Supp.2d 459 (S.D.N.Y. 2006).

[79/] *Id.* at 460.

[80/] *Id.*

[81/] *Id.* at 466.

[82/] *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 217 (2d Cir. 1997).

possible."[83] As in *Stein*, even without adequate Upjohn warnings, the court in this case determined that the employee could not assert a personal attorney-client privilege to prevent the disclosure of information obtained during the investigation.[84]

In *In re Grand Jury Subpoena*,[85] the Fourth Circuit emphasized the importance of clear Upjohn warnings. In that case, after performing an internal investigation that included employee interviews, America Online ("AOL") agreed to cooperate with the government and produce privileged documents related to the investigation.[86] After their indictment on various federal criminal charges, three of the interviewed employees sought to prevent the disclosure by claiming that they had an attorney-client relationship with AOL's investigating attorneys and that they were unwilling to waive the resulting attorney-client privilege. AOL, by contrast, waived the privilege and was prepared to turn over the employee interview memoranda in order to secure cooperation credit with the Department of Justice.

To determine if the attorney-client privilege was held by the employees, the court analyzed whether the investigators' Upjohn warnings were adequate to prevent a reasonable person from believing that an attorney-client relationship existed.[87] AOL's outside counsel, the investigators in the case, provided similar Upjohn warnings to each of the three employees who were interviewed. One of the warnings was as follows:

> We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to

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[83] *Id.*

[84] *Id.*

[85] 415 F.3d 333 (4th Cir. 2005).

[86] *Id.* at 337.

[87] *Id.* at 339.

> waive it. If there is a conflict, the attorney-client privilege belongs to the company.[88]

Further, the AOL outside counsel conducting that interview mentioned that "counsel 'could' represent [the employee] as well, 'as long as no conflict appeared.'"[89] After analyzing the warnings, which the court characterized as "watered down," the court nonetheless rejected the employees' argument that they could have reasonably believed that an attorney-client relationship with AOL's counsel had been formed. In reaching this conclusion, the court relied, in part, on the fact that the statements warned the employees that the corporation had the sole discretion to disclose the information.[90] The court also emphasized that the statement, "'we *can* represent you' is distinct from 'we *do* represent you.'"[91] Because the warnings, understood in context, prevented the employees from forming a reasonable belief that the investigating attorneys were representing them, the court ruled that AOL alone, not the employees, could elect to waive the privilege.[92]

Most recently, in *United States v. Nicholas*,[93] the district court in the Central District of California suppressed statements made by the Chief Financial Officer of Broadcom Corp. to outside company attorneys conducting an internal investigation on behalf of the company.[94] The investigation, which concerned allegations of illegal stock option backdating, was conducted by

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[88] *Id.* at 336.

[89] *Id.*

[90] *Id.* at 340.

[91] *Id.*

[92] *Id.*

[93] 606 F.Supp.2d 1109 (C.D.Cal. 2009), *appeal pending*, No. 09-50161 (9th Cir.).

[94] *See also* Friedman, *Judge Slams Irell Firm for Ethics Lapses*, Los Angeles Daily Journal, Feb. 26, 2009, available at http://meetings.abanet.org/webupload/commupload/ CR301000/newsletterpubs/Court.pdf. and http://www.laobserved.com/biz/2009/02/sad_day_for_justice.php; Lyster, *Former Broadcom CFO Wins Round in Early Trial Jockeyin*, Orange County Business J., Feb. 27, 2009, available at http://www.ocbj.com/article.asp?aid=134715.

an outside law firm whose lawyers had represented the CFO personally in related and unrelated shareholder litigation. Broadcom later turned the CFO's interview by two law firm lawyers over to third parties – the Company's outside auditors, the SEC and the Department of Justice – without seeking the CFO's authorization. Following his indictment on federal securities fraud charges related to the backdating scheme, the CFO moved to suppress his interview contending that Broadcom and breached the attorney-client privilege through the unauthorized disclosure of his statements to third parties.

The district court, after conducting three days of hearings, agreed and ruled that the law firm had breached the CFO's attorney-client privilege. The court found that the facts demonstrated that the CFO was a client of the law firm because the firm had represented the CFO in his personal capacity, that the outside law firm therefore had two clients (Broadcom and the CFO), that the California Rules of Professional Responsibility[95] required that the law firm obtain the CFO's informed written consent before proceeding with its dual representation, that no such written consent had been obtained, and that the remedy for violating the Rules was the suppression of the interview and the referral of the law firm to the California State Bar for disciplinary proceedings.

The court rejected the argument that oral Upjohn Warnings supposedly provided to the CFO by the law firm's attorneys at the outset of the interview cured the dual representation issue. First, the court expressed its "serious doubts" whether Upjohn Warnings had ever been given to the CFO – based on the fact that the CFO did not remember being given the Warnings, that the Warnings were not memorialized in the lawyers' notes, and that no written record of the

[95] Cal. R. Prof Conduct 3-310(C).

Warnings existed.[96] Second, the court further noted that, even if Upjohn Warnings had been given, they were "woefully inadequate under the circumstances" because the lawyers never told the CFO that they were not the CFO's lawyers or that the CFO should consult with another lawyer.[97] And, "[m]ost importantly, neither [law firm lawyer] ever told [the CFO] that any statements he made to them could be shared with third parties, including the Government in a criminal investigation of him."[98] Finally, the court ruled that Upjohn Warnings contention was "irrelevant in light of the undisputed attorney-client relationship" between the CFO and the law firm. The court noted that the Warnings are:

> given to a non-client to advise the employee that he is not communicating with his personal lawyer, no attorney-client relationship exists, and any communication may be revealed to third parties if disclosure is in the best interest of the corporation.[99]

*Nicholas* supports a number of inferences: that the Warnings will not take the place of state and local ethics rules; that (when they work) they need to be complete; that they should disclose that information gathered during the interview may be disclosed to third parties; and that making a good record and following consistent practices when giving the Warnings can be critical.

But *Nicholas* does not create a requirement for written Upjohn Warnings, or that counsel obtain written acknowledgement that the Warnings have been provided. Rather, the case appears to be limited by its unique facts, which led that court to find that the law firm represented both the CFO and Broadcom, thereby obligating counsel to obtain the CFO's informed written

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[96] *United States v. Nicholas*, 606 F.Supp.2d at 1116.

[97] *Id.* at 1117.

[98] *Id.*

[99] *Id.*

consent under the applicable state ethics rule. Seen in this context, the case does not establish a new rule applicable in all situations when Upjohn Warnings are provided.

## VI. CURRENT UPJOHN WARNING PRACTICES

Based on recent cases and applicable ethics rules, it is not altogether surprising that attorneys involved in internal investigations, or matters arising out of internal investigations, use different variations of Upjohn warnings, depending on the facts presented by the particular matter. Nonetheless, given the frequency of use of Upjohn warnings, a set of guidelines may be helpful.

The practices of attorneys who conduct internal investigations reveal several trends in the area of Upjohn warnings. First, some practitioners interviewed by the Association of Corporate Counsel seem concerned that the Upjohn warnings may discourage Constituent candor during an interview or harm the relationship between the Constituent and the corporation. In some cases, these concerns may lead the attorney to give a watered-down warning. Despite these fears, experiences of practitioners suggest that the Upjohn warning rarely causes a Constituent to refuse to answer questions. Most Constituents cooperate with the investigation even when it is against their interest to do so because the immediate consequence they face – potential termination for lack of cooperation – is regarded as the more immediate risk.

Second, Constituents typically ask counsel whether they need their own attorney. While views on this issue vary, most agree that counsel should not assure Constituents that they do not need their own counsel. Rather, counsel typically advise Constituents that counsel represents the corporation, and that the choice of counsel is a decision for the Constituent to make. According to recent commentary on the issue, "While many lawyers believe that employees, if given the opportunity, would almost always choose their own counsel, in fact the opposite is often the

case. Employees in an investigation often begin with a view that their interests are aligned with the corporation and want to be viewed as team players."[100/]

Third, in some situations, corporate counsel advise Constituents whether counsel believe the interests of the corporation and the Constituent are aligned. But such advice necessarily depends on counsel's current knowledge of the facts, and counsel typically advise Constituents that the facts may change.

Fourth, practitioners seldom use written or formalized warnings (unless the issue of joint representation arises, as discussed in more detail below). Although written acknowledgment of the Upjohn warnings could eliminate Constituent confusion and rebut subsequent claims regarding privilege, a practice that may be invoked with greater frequency following the recent *Nicholas* case (discussed above) in cases where counsel have personally represented the Constituent, most corporate counsel use oral rather than written warnings. This choice is likely connected to ensuring Constituent cooperation.

Many corporate counsel believe that written warnings are too formal. Counsel do not want internal investigations to turn into a law enforcement interrogation, lest employee candor be stifled and the fact-finding process hindered. Constituents may be able to claim that they received inadequate warnings whenever the formalized warning is not followed precisely.

Fifth, situations also arise when corporate counsel advise Constituents that they jointly represent the corporation and the Constituent. A joint representation may be ethically possible when the facts show the absence of a conflict of interest between the corporation and the Constituent. The typical joint representation occurs following the completion of an internal investigation when the facts are better understood and when a regulatory inquiry has

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[100/] *See* David B. Bayless, *Untangling the Ethical Issues of Internal Investigations*, GC CALIFORNIA MAGAZINE, Aug. 12, 2008, *available at* http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202423698079.

commenced. In that context, the corporation sometimes consents to having its corporate counsel represent both the corporation and its Constituents, provided no known conflict of interest exists.

The benefits of joint representation include the fact that both the company and the Constituent signal each other that they do not believe the employee's interests to be at odds with the company's interests. But known facts invariably change during the course of internal investigations; counsel cannot jointly represent parties with conflicting interests and must withdraw from representing one or both parties. To address this situation and to reduce the chances for ambiguity or confusion, corporate counsel typically advise Constituents, in writing, of the terms of the joint representation, and include Upjohn warnings as well.

One of the more common problems involving joint representations arises when one of the clients (usually the corporation) wants to waive the privilege and the Constituent does not. For instance, corporations have attempted to garner cooperation credit from government agencies through privilege waivers. To address the issue, the corporation sometimes seeks and secures approval from the Constituent at the commencement of the joint representation that the corporation can waive the privilege, and can choose to reveal information to third parties, including allowing information obtained from the Constituent to be revealed.

On the other hand, depending on the nature of the matter and the resources available to the corporation, some corporations seek to avoid the joint representation issue by arranging for separate counsel to represent one or more Constituents. In such cases, counsel for the corporation and the Constituents have entered into formal or informal joint defense arrangements to facilitate the sharing of information. The risk of such approach is that some government

agencies have regarded the arrangement as evidencing a lack of cooperation by the corporations.[101/]

## VII. CONCLUSION

Internal investigations are fact-specific exercises. That means that no single set of Upjohn warnings will apply to all situations. Nevertheless, Upjohn warnings have value in creating reasonable expectations for corporations and their Constituents as to the scope and application of the attorney-client privilege.

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[101/] The Memorandum issued by then-Deputy Attorney General Thompson in 2003 was explicit on that point. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003). The more recent Principles of Federal Prosecution of Business Organizations issued by the Department of Justice on August 28, 2008 now provide, at Section 9-28.730 (Obstructing the Investigation), a somewhat more nuanced view of the issue. They state:

> [T]he mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements. Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired. Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate.

*Available at* http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf.

## ACKNOWLEDGEMENTS

This Report and Recommended Best Practices represent the combined efforts of lawyers from across the nation. The Task Force gratefully acknowledges the contributions of the following individuals who contributed to the Report and Recommendations: David Conrad, Paul Foley, Karen Seifert, and Laurie Martindale.

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# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued May 7, 2014 Decided June 27, 2014

No. 14-5055

IN RE: KELLOGG BROWN & ROOT, INC., ET AL.,
PETITIONERS

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On Petition for Writ of Mandamus
(No. 1:05-cv-1276)

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*John P. Elwood* argued the cause for petitioners. With him on the petition for writ of mandamus and the reply were *John M. Faust*, *Craig D. Margolis*, *Jeremy C. Marwell*, and *Joshua S. Johnson*.

*Rachel L. Brand*, *Steven P. Lehotsky*, *Quentin Riegel*, *Carl Nichols*, *Elisebeth C. Cook*, *Adam I. Klein*, *Amar Sarwal*, and *Wendy E. Ackerman* were on the brief for amicus curiae Chamber of Commerce of the United States of America, et al. in support of petitioners.

*Stephen M. Kohn* argued the cause for respondent. With him on the response to the petition for writ of mandamus were *David K. Colapinto* and *Michael Kohn*.

Before: GRIFFITH, KAVANAUGH, and SRINIVASAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*: More than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business's internal investigation led by company lawyers. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). In this case, the District Court denied the protection of the privilege to a company that had conducted just such an internal investigation. The District Court's decision has generated substantial uncertainty about the scope of the attorney-client privilege in the business setting. We conclude that the District Court's decision is irreconcilable with *Upjohn*. We therefore grant KBR's petition for a writ of mandamus and vacate the District Court's March 6 document production order.

## I

Harry Barko worked for KBR, a defense contractor. In 2005, he filed a False Claims Act complaint against KBR and KBR-related corporate entities, whom we will collectively refer to as KBR. In essence, Barko alleged that KBR and certain subcontractors defrauded the U.S. Government by inflating costs and accepting kickbacks while administering military contracts in wartime Iraq. During discovery, Barko sought documents related to KBR's prior internal investigation into the alleged fraud. KBR had conducted that internal investigation pursuant to its Code of Business Conduct, which is overseen by the company's Law Department.

KBR argued that the internal investigation had been conducted for the purpose of obtaining legal advice and that

the internal investigation documents therefore were protected by the attorney-client privilege. Barko responded that the internal investigation documents were unprivileged business records that he was entitled to discover. *See generally* Fed. R. Civ. P. 26(b)(1).

After reviewing the disputed documents *in camera*, the District Court determined that the attorney-client privilege protection did not apply because, among other reasons, KBR had not shown that "the communication would not have been made 'but for' the fact that legal advice was sought." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, at *2 (D.D.C. Mar. 6, 2014) (quoting *United States v. ISS Marine Services, Inc.*, 905 F. Supp. 2d 121, 128 (D.D.C. 2012)). KBR's internal investigation, the court concluded, was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at *3.

KBR vehemently opposed the ruling. The company asked the District Court to certify the privilege question to this Court for interlocutory appeal and to stay its order pending a petition for mandamus in this Court. The District Court denied those requests and ordered KBR to produce the disputed documents to Barko within a matter of days. *See United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 929430 (D.D.C. Mar. 11, 2014). KBR promptly filed a petition for a writ of mandamus in this Court. A number of business organizations and trade associations also objected to the District Court's decision and filed an amicus brief in support of KBR. We stayed the District Court's document production order and held oral argument on the mandamus petition.

The threshold question is whether the District Court's privilege ruling constituted legal error. If not, mandamus is of course inappropriate. If the District Court's ruling was erroneous, the remaining question is whether that error is the kind that justifies mandamus. *See Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380-81 (2004). We address those questions in turn.

## II

We first consider whether the District Court's privilege ruling was legally erroneous. We conclude that it was.

Federal Rule of Evidence 501 provides that claims of privilege in federal courts are governed by the "common law – as interpreted by United States courts in the light of reason and experience." Fed. R. Evid. 501. The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As relevant here, the privilege applies to a confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client. *See* 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68-72 (2000); *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007); *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.").

In *Upjohn*, the Supreme Court held that the attorney-client privilege applies to corporations. The Court explained that the attorney-client privilege for business organizations

was essential in light of "the vast and complicated array of regulatory legislation confronting the modern corporation," which required corporations to "constantly go to lawyers to find out how to obey the law, . . . particularly since compliance with the law in this area is hardly an instinctive matter." 449 U.S. at 392 (internal quotation marks and citation omitted). The Court stated, moreover, that the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390. That is so, the Court said, because the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390-91. In *Upjohn*, the communications were made by company employees to company attorneys during an attorney-led internal investigation that was undertaken to ensure the company's "compliance with the law." *Id.* at 392; *see id.* at 394. The Court ruled that the privilege applied to the internal investigation and covered the communications between company employees and company attorneys.

KBR's assertion of the privilege in this case is materially indistinguishable from Upjohn's assertion of the privilege in that case. As in *Upjohn*, KBR initiated an internal investigation to gather facts and ensure compliance with the law after being informed of potential misconduct. And as in *Upjohn*, KBR's investigation was conducted under the auspices of KBR's in-house legal department, acting in its legal capacity. The same considerations that led the Court in *Upjohn* to uphold the corporation's privilege claims apply here.

The District Court in this case initially distinguished *Upjohn* on a variety of grounds. But none of those purported distinctions takes this case out from under *Upjohn*'s umbrella.

*First*, the District Court stated that in *Upjohn* the internal investigation began after in-house counsel conferred with outside counsel, whereas here the investigation was conducted in-house without consultation with outside lawyers. But *Upjohn* does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply. On the contrary, the general rule, which this Court has adopted, is that a lawyer's status as in-house counsel "does not dilute the privilege." *In re Sealed Case*, 737 F.2d at 99. As the Restatement's commentary points out, "Inside legal counsel to a corporation or similar organization . . . is fully empowered to engage in privileged communications." 1 RESTATEMENT § 72, cmt. c, at 551.

*Second*, the District Court noted that in *Upjohn* the interviews were conducted by attorneys, whereas here many of the interviews in KBR's investigation were conducted by non-attorneys. But the investigation here was conducted at the direction of the attorneys in KBR's Law Department. And communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege. *See FTC v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980); *see also* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 7:18, at 1230-31 (2013) ("If internal investigations are conducted by agents of the client at the behest of the attorney, they are protected by the attorney-client privilege to the same extent as they would be had they been conducted by the attorney who was consulted."). So that fact, too, is not a basis on which to distinguish *Upjohn*.

*Third*, the District Court pointed out that in *Upjohn* the interviewed employees were expressly informed that the purpose of the interview was to assist the company in obtaining legal advice, whereas here they were not. The District Court further stated that the confidentiality agreements signed by KBR employees did not mention that the purpose of KBR's investigation was to obtain legal advice. Yet nothing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here as in *Upjohn* employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected. *Cf. Upjohn*, 449 U.S. at 387 (Upjohn's managers were "instructed to treat the investigation as 'highly confidential'"). KBR employees were also told not to discuss their interviews "without the specific advance authorization of KBR General Counsel." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 1016784, at *3 n.33 (D.D.C. Mar. 6, 2014).

In short, none of those three distinctions of *Upjohn* holds water as a basis for denying KBR's privilege claim.

More broadly and more importantly, the District Court also distinguished *Upjohn* on the ground that KBR's internal investigation was undertaken to comply with Department of Defense regulations that require defense contractors such as KBR to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. The District Court therefore concluded that the purpose of KBR's internal investigation was to comply with those regulatory requirements rather than to obtain or provide legal advice. In our view, the District Court's analysis rested on a false dichotomy. So long as obtaining or providing legal advice

was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.

The District Court began its analysis by reciting the "primary purpose" test, which many courts (including this one) have used to resolve privilege disputes when attorney-client communications may have had both legal and business purposes. *See id.* at *2; *see also In re Sealed Case*, 737 F.2d at 98-99. But in a key move, the District Court then said that the primary purpose of a communication is to obtain or provide legal advice only if the communication would not have been made "but for" the fact that legal advice was sought. 2014 WL 1016784, at *2. In other words, if there was any other purpose behind the communication, the attorney-client privilege apparently does not apply. The District Court went on to conclude that KBR's internal investigation was "undertaken pursuant to regulatory law and corporate policy rather than for the purpose of obtaining legal advice." *Id.* at *3; *see id.* at *3 n.28 (citing federal contracting regulations). Therefore, in the District Court's view, "the primary purpose of" the internal investigation "was to comply with federal defense contractor regulations, not to secure legal advice." *United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 929430, at *2 (D.D.C. Mar. 11, 2014); *see id.* ("Nothing suggests the reports were prepared to obtain legal advice. Instead, the reports were prepared to try to comply with KBR's obligation to report improper conduct to the Department of Defense.").

The District Court erred because it employed the wrong legal test. The but-for test articulated by the District Court is not appropriate for attorney-client privilege analysis. Under

the District Court's approach, the attorney-client privilege apparently would not apply unless the sole purpose of the communication was to obtain or provide legal advice. That is not the law. We are aware of no Supreme Court or court of appeals decision that has adopted a test of this kind in this context. The District Court's novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege. And the District Court's novel approach would eradicate the attorney-client privilege for internal investigations conducted by businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry. In turn, businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would "limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392. We reject the District Court's but-for test as inconsistent with the principle of *Upjohn* and longstanding attorney-client privilege law.

Given the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find *the* one primary purpose in cases where a

given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication? As the Reporter's Note to the Restatement says, "In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." 1 RESTATEMENT § 72, Reporter's Note, at 554. We agree with and adopt that formulation – "one of the significant purposes" – as an accurate and appropriate description of the primary purpose test. Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication.

In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy. *Cf.* Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure*, 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) ("Helping a corporation comply with a statute or regulation – although required by law – does not transform quintessentially legal advice into business advice.").

In this case, there can be no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice. In denying KBR's privilege claim on the ground that the internal investigation was conducted in order to comply with regulatory requirements and corporate policy and not just to obtain or provide legal

advice, the District Court applied the wrong legal test and clearly erred.

III

Having concluded that the District Court's privilege ruling constituted error, we still must decide whether that error justifies a writ of mandamus. *See* 28 U.S.C. § 1651. Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)). In keeping with that high standard, the Supreme Court in *Cheney* stated that three conditions must be satisfied before a court grants a writ of mandamus: (1) the mandamus petitioner must have "no other adequate means to attain the relief he desires," (2) the mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable," and (3) the court, "in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* at 380-81 (quoting and citing *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 403 (1976)). We conclude that all three conditions are satisfied in this case.

A

First, a mandamus petitioner must have "no other adequate means to attain the relief he desires." *Cheney*, 542 U.S. at 380. That initial requirement will often be met in cases where a petitioner claims that a district court erroneously ordered disclosure of attorney-client privileged documents. That is because (i) an interlocutory appeal is not available in attorney-client privilege cases (absent district court certification) and (ii) appeal after final judgment will

come too late because the privileged communications will already have been disclosed pursuant to the district court's order.

The Supreme Court has ruled that an interlocutory appeal under the collateral order doctrine is not available in attorney-client privilege cases. *See Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106-13 (2009); *see also* 28 U.S.C. § 1291. To be sure, a party in KBR's position may ask the district court to certify the privilege question for interlocutory appeal. *See* 28 U.S.C. § 1292(b). But that avenue is available only at the discretion of the district court. And here, the District Court denied KBR's request for certification. *See United States ex rel. Barko v. Halliburton Co.*, No. 05-cv-1276, 2014 WL 929430, at *1-3 (D.D.C. Mar. 11, 2014). It is also true that a party in KBR's position may defy the district court's ruling and appeal if the district court imposes contempt sanctions for non-disclosure. But as this Court has explained, forcing a party to go into contempt is not an "adequate" means of relief in these circumstances. *See In re Sealed Case*, 151 F.3d 1059, 1064-65 (D.C. Cir. 1998); *see also In re City of New York*, 607 F.3d 923, 934 (2d Cir. 2010) (same).

On the other hand, appeal after final judgment will often come too late because the privileged materials will already have been released. In other words, "the cat is out of the bag." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998). As this Court and others have explained, post-release review of a ruling that documents are unprivileged is often inadequate to vindicate a privilege the very purpose of which is to prevent the release of those confidential documents. *See id.*; *see also In re Sims*, 534 F.3d 117, 129 (2d Cir. 2008) ("a remedy after final judgment cannot unsay the confidential

information that has been revealed") (quoting *In re von Bulow*, 828 F.2d 94, 99 (2d Cir. 1987)).

For those reasons, the first condition for mandamus – no other adequate means to obtain relief – will often be satisfied in attorney-client privilege cases. Barko responds that the Supreme Court in *Mohawk*, although addressing only the availability of interlocutory appeal under the collateral order doctrine, in effect also barred the use of mandamus in attorney-client privilege cases. According to Barko, *Mohawk* means that the first prong of the mandamus test cannot be met in attorney-client privilege cases because of the availability of post-judgment appeal. That is incorrect. It is true that *Mohawk* held that attorney-client privilege rulings are not appealable under the collateral order doctrine because "postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege." 558 U.S. at 109. But at the same time, the Court repeatedly and expressly reaffirmed that *mandamus* – as opposed to the collateral order doctrine – remains a "useful safety valve" in some cases of clear error to correct "some of the more consequential attorney-client privilege rulings." *Id.* at 110-12 (internal quotation marks and alteration omitted). It would make little sense to read *Mohawk* to implicitly preclude mandamus review in all cases given that *Mohawk* explicitly preserved mandamus review in some cases. Other appellate courts that have considered this question have agreed. *See Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010); *In re Whirlpool Corp.*, 597 F.3d 858, 860 (7th Cir. 2010); *see also In re Perez*, 749 F.3d 849 (9th Cir. 2014) (granting mandamus after *Mohawk* on informants privilege ruling); *City of New York*, 607 F.3d at 933 (same on law enforcement privilege ruling).

B

Second, a mandamus petitioner must show that his right to the issuance of the writ is "clear and indisputable." *Cheney*, 542 U.S. at 381. Although the first mandamus requirement is often met in attorney-client privilege cases, this second requirement is rarely met. An erroneous district court ruling on an attorney-client privilege issue by itself does not justify mandamus. The error has to be clear. As a result, appellate courts will often deny interlocutory mandamus petitions advancing claims of error by the district court on attorney-client privilege matters. In this case, for the reasons explained at length in Part II, we conclude that the District Court's privilege ruling constitutes a clear legal error. The second prong of the mandamus test is therefore satisfied in this case.

C

Third, before granting mandamus, we must be "satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. As its phrasing suggests, that is a relatively broad and amorphous totality of the circumstances consideration. The upshot of the third factor is this: Even in cases of clear district court error on an attorney-client privilege matter, the circumstances may not always justify mandamus.

In this case, considering all of the circumstances, we are convinced that mandamus is appropriate. The District Court's privilege ruling would have potentially far-reaching consequences. In distinguishing *Upjohn*, the District Court relied on a number of factors that threaten to vastly diminish the attorney-client privilege in the business setting. Perhaps most importantly, the District Court's distinction of *Upjohn*

on the ground that the internal investigation here was conducted pursuant to a compliance program mandated by federal regulations would potentially upend certain settled understandings and practices. Because defense contractors are subject to regulatory requirements of the sort cited by the District Court, the logic of the ruling would seemingly prevent any defense contractor from invoking the attorney-client privilege to protect internal investigations undertaken as part of a mandatory compliance program. *See* 48 C.F.R. § 52.203-13 (2010). And because a variety of other federal laws require similar internal controls or compliance programs, many other companies likewise would not be able to assert the privilege to protect the records of their internal investigations. *See, e.g.*, 15 U.S.C. §§ 78m(b)(2), 7262; 41 U.S.C. § 8703. As KBR explained, the District Court's decision "would disable *most public companies* from undertaking confidential internal investigations." KBR Pet. 19. As amici added, the District Court's novel approach has the potential to "work a sea change in the well-settled rules governing internal corporate investigations." Br. of Chamber of Commerce et al. as Amici Curaie 1; *see* KBR Reply Br. 1 n.1 (citing commentary to same effect); Andy Liu et al., *How To Protect Internal Investigation Materials from Disclosure*, 56 GOVERNMENT CONTRACTOR ¶ 108 (Apr. 9, 2014) (assessing broad impact of ruling on government contractors).

To be sure, there are limits to the impact of a single district court ruling because it is not binding on any other court or judge. But prudent counsel monitor court decisions closely and adapt their practices in response. The amicus brief in this case, which was joined by numerous business and trade associations, convincingly demonstrates that many organizations are well aware of and deeply concerned about the uncertainty generated by the novelty and breadth of the District Court's reasoning. That uncertainty matters in the

privilege context, for the Supreme Court has told us that an "uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). More generally, this Court has long recognized that mandamus can be appropriate to "forestall future error in trial courts" and "eliminate uncertainty" in important areas of law. *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975). Other courts have granted mandamus based on similar considerations. *See In re Sims*, 534 F.3d 117, 129 (2d Cir. 2008) (granting mandamus where "immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege") (quotation omitted); *In re Seagate Technology, LLC*, 497 F.3d 1360, 1367 (Fed. Cir. 2007) (en banc) (same). The novelty of the District Court's privilege ruling, combined with its potentially broad and destabilizing effects in an important area of law, convinces us that granting the writ is "appropriate under the circumstances." *Cheney*, 542 U.S. at 381. In saying that, we do not mean to imply that all of the circumstances present in this case are necessary to meet the third prong of the mandamus test. But they are sufficient to do so here. We therefore grant KBR's petition for a writ of mandamus.

## IV

We have one final matter to address. At oral argument, KBR requested that if we grant mandamus, we also reassign this case to a different district court judge. *See* Tr. of Oral Arg. at 17-19; 28 U.S.C. § 2106. KBR grounds its request on the District Court's erroneous decisions on the privilege claim, as well as on a letter sent by the District Court to the Clerk of this Court in which the District Court arranged to transfer the record in the case and identified certain

documents as particularly important for this Court's review. *See* KBR Reply Br. App. 142. KBR claims that the letter violated Federal Rule of Appellate Procedure 21(b)(4), which provides that in a mandamus proceeding the "trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals."

In its mandamus petition, KBR did not request reassignment. Nor did KBR do so in its reply brief, even though the company knew by that time of the District Court letter that it complains about. Ordinarily, we do not consider a request for relief that a party failed to clearly articulate in its briefs. To be sure, appellate courts on rare occasions will reassign a case sua sponte. *See Ligon v. City of New York*, 736 F.3d 118, 129 & n.31 (2d Cir. 2013) (collecting cases), *vacated in part*, 743 F.3d 362 (2d Cir. 2014). But whether requested to do so or considering the matter sua sponte, we will reassign a case only in the exceedingly rare circumstance that a district judge's conduct is "so extreme as to display clear inability to render fair judgment." *Liteky v. United States*, 510 U.S. 540, 551 (1994); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 107 (D.C. Cir. 2001) (en banc). Nothing in the District Court's decisions or subsequent letter reaches that very high standard. Based on the record before us, we have no reason to doubt that the District Court will render fair judgment in further proceedings. We will not reassign the case.

* * *

In reaching our decision here, we stress, as the Supreme Court did in *Upjohn*, that the attorney-client privilege "only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United*

*States*, 449 U.S. 383, 395 (1981). Barko was able to pursue the facts underlying KBR's investigation. But he was not entitled to KBR's own investigation files. As the *Upjohn* Court stated, quoting Justice Jackson, "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Id.* at 396 (quoting *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring)).

Although the attorney-client privilege covers only communications and not facts, we acknowledge that the privilege carries costs. The privilege means that potentially critical evidence may be withheld from the factfinder. Indeed, as the District Court here noted, that may be the end result in this case. But our legal system tolerates those costs because the privilege "is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn*, 449 U.S. at 389).

We grant the petition for a writ of mandamus and vacate the District Court's March 6 document production order. To the extent that Barko has timely asserted other arguments for why these documents are not covered by either the attorney-client privilege or the work-product protection, the District Court may consider such arguments.

*So ordered.*

| OMB APPROVAL |
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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

# FORM 8-K

## CURRENT REPORT
## Pursuant to Section 13 OR 15(d) of The Securities Exchange Act of 1934

Date of Report (Date of earliest event reported) _____

_____
(Exact name of registrant as specified in its charter)

| (State or other jurisdiction of incorporation) | (Commission File Number) | (IRS Employer Identification No.) |
| --- | --- | --- |

_____
(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code _____

_____
(Former name or former address, if changed since last report.)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below):

[ ] Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

[ ] Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

[ ] Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

[ ] Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

### GENERAL INSTRUCTIONS

**A. Rule as to Use of Form 8-K.**

1. Form 8-K shall be used for current reports under Section 13 or 15(d) of the Securities Exchange Act of 1934, filed pursuant to Rule 13a-11 or Rule 15d-11 and for reports of nonpublic information required to be disclosed by Regulation FD (17 CFR 243.100 and 243.101).

2. Form 8-K may be used by a registrant to satisfy its filing obligations pursuant to Rule 425 under the Securities Act, regarding written communications related to business combination transactions, or Rules 14a-12(b) or Rule 14d-2(b) under the Exchange Act, relating to soliciting materials and pre-commencement communications pursuant to tender offers, respectively, provided that the Form 8-K filing satisfies all the substantive requirements of those rules (other than the Rule 425(c) requirement to include certain specified information in any prospectus filed pursuant to such rule). Such filing is also deemed to be filed pursuant to any rule for which the box is checked. A registrant is not required to check the box in connection with Rule 14a-12(b) or Rule 14d-2(b) if the communication is filed pursuant to Rule 425. Communications filed pursuant to Rule 425 are deemed filed under the other applicable sections. See Note 2 to Rule 425, Rule 14a-12(b) and Instruction 2 to Rule 14d-2(b)(2).

**B. Events to be Reported and Time for Filing of Reports.**

1. A report on this form is required to be filed or furnished, as applicable, upon the occurrence of any one or more of the events specified in the items in Sections 1 - 6 and 9 of this form. Unless otherwise specified, a report is to be filed or furnished within four business days after occurrence of the event. If the event occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the four business day period shall begin to run on, and include, the first business day thereafter. A registrant either furnishing a report on this form under Item 7.01 (Regulation FD Disclosure) or electing to file a report on this form under Item 8.01 (Other Events) solely to satisfy its obligations under Regulation FD (17 CFR 243.100 and 243.101) must furnish such report or make such filing, as applicable, in accordance with the requirements of Rule 100(a) of Regulation FD (17 CFR 243.100(a)), including the deadline for furnishing or filing such report. A report pursuant to Item 5.08 is to be filed within four business days after the registrant determines the anticipated meeting date.

2. The information in a report furnished pursuant to Item 2.02 (Results of Operations and Financial Condition) or Item 7.01 (Regulation FD Disclosure) shall not be deemed to be "filed" for purposes of Section 18 of the Exchange Act or otherwise subject to the liabilities of that section, unless the registrant specifically states that the information is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act. If a report on Form 8-K contains disclosures under Item 2.02 or Item 7.01, whether or not the report contains disclosures regarding other items, all exhibits to such report relating to Item 2.02 or Item 7.01 will be deemed furnished, and not filed, unless the registrant specifies, under Item 9.01 (Financial Statements and Exhibits), which exhibits, or portions of exhibits, are intended to be deemed filed rather than furnished pursuant to this instruction.

3. If the registrant previously has reported substantially the same information as required by this form, the registrant need not make an additional report of the information on this form. To the extent that an item calls for disclosure of developments concerning a previously reported event or transaction, any information required in the new report or amendment about the previously reported event or transaction may be provided by incorporation by reference to the previously filed report. The term previously reported is defined in Rule 12b-2 (17 CFR 240.12b-2).

4. Copies of agreements, amendments or other documents or instruments required to be filed pursuant to Form 8-K are not required to be filed or furnished as exhibits to the Form 8-K unless specifically required to be filed or furnished by the applicable Item. This instruction does not affect the requirement to otherwise file such agreements, amendments or other documents or instruments, including as exhibits to registration statements and periodic reports pursuant to the requirements of Item 601 of Regulation S-K.

5. When considering current reporting on this form, particularly of other events of material importance pursuant to Item 7.01 (Regulation FD Disclosure) and Item 8.01(Other Events), registrants should have due regard for the accuracy, completeness and currency of the information in registration statements filed under the Securities Act which incorporate by reference information in reports filed pursuant to the Exchange Act, including reports on this form.

6. A registrant's report under Item 7.01 (Regulation FD Disclosure) or Item 8.01 (Other Events) will not be deemed an admission as to the materiality of any information in the report that is required to be disclosed solely by Regulation FD.

**C. Application of General Rules and Regulations.**

1. The General Rules and Regulations under the Act (17 CFR Part 240) contain certain general requirements which are applicable to reports on any form. These general requirements should be carefully read and observed in the preparation and filing of reports on this form.

2. Particular attention is directed to Regulation 12B (17 CFR 240.12b-1 et seq.) which contains general requirements regarding matters such as the kind and size of paper to be used, the legibility of the report, the information to be given whenever the title of securities is required to be stated, and the filing of the report. The definitions contained in Rule 12b-2 should be especially noted. See also Regulations 13A (17 CFR 240.13a-1 et seq.) and 15D (17 CFR 240.15d-1 et seq.).

**D. Preparation of Report.**

This form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report on paper meeting the requirements of Rule 12b-12 (17 CFR 240.12b-12). The report shall contain the number and caption of the applicable item, but the text of such item may be omitted, provided the answers thereto are prepared in the manner specified in Rule 12b-13 (17 CFR 240.12b-13). To the extent that Item 1.01 and one or more other items of the form are applicable, registrants need not provide the number and caption of Item 1.01 so long as the substantive disclosure required by Item 1.01 is disclosed in the report and the number and caption of the other applicable item(s) are provided. All items that are not required to be answered in a particular report may be omitted and no reference thereto need be made in the report. All instructions should also be omitted.

**E. Signature and Filing of Report.**

Three complete copies of the report, including any financial statements, exhibits or other papers or documents filed as a part thereof, and five additional copies which need not include exhibits, shall be filed with the Commission. At least one complete copy of the report, including any financial statements, exhibits or other papers or documents filed as a part thereof, shall be filed, with each exchange on which any class of securities of the registrant is registered. At least one complete copy of the report filed with the Commission and one such copy filed with each exchange shall be manually signed. Copies not manually signed shall bear typed or printed signatures.

**F. Incorporation by Reference.**

If the registrant makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a press release or other document or statement containing information meeting some or all of the requirements of this form, the information called for may be incorporated by reference to such published document or statement, in answer or partial answer to any item or items of this form, provided copies thereof are filed as an exhibit to the report on this form.

**G. Use of this Form by Asset-Backed Issuers.**

The following applies to registrants that are asset-backed issuers. Terms used in this General Instruction G. have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

1. *Reportable Events That May Be Omitted.*

The registrant need not file a report on this Form upon the occurrence of any one or more of the events specified in the following:

(a) Item 2.01, Completion of Acquisition or Disposition of Assets;

(b) Item 2.02, Results of Operations and Financial Condition;

(c) Item 2.03, Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant;

(d) Item 2.05, Costs Associated with Exit or Disposal Activities;

(e) Item 2.06, Material Impairments;

(f) Item 3.01, Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing;

(g) Item 3.02, Unregistered Sales of Equity Securities;

(h) Item 4.01, Changes in Registrant's Certifying Accountant;

(i) Item 4.02, Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review;

(j) Item 5.01, Changes in Control of Registrant;

(k) Item 5.02, Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers;

(*l*) Item 5.04, Temporary Suspension of Trading Under Registrant's Employee Benefit Plans; and

(m) Item 5.05, Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.

2. *Additional Disclosure for the Form 8-K Cover Page.*

Immediately after the name of the issuing entity on the cover page of the Form 8-K, as separate line items, identify the exact name of the depositor as specified in its charter and the exact name of the sponsor as specified in its charter.

3. *Signatures.*

The Form 8-K must be signed by the depositor. In the alternative, the Form 8-K may be signed on behalf of the issuing entity by a duly authorized representative of the servicer. If multiple servicers are involved in servicing the pool assets, a duly authorized representative of the master servicer (or entity performing the equivalent function) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

## INFORMATION TO BE INCLUDED IN THE REPORT

### Section 1 - Registrant's Business and Operations

**Item 1.01 Entry into a Material Definitive Agreement.**

(a) If the registrant has entered into a material definitive agreement not made in the ordinary course of business of the registrant, or into any amendment of such agreement that is material to the registrant, disclose the following information:

(1) the date on which the agreement was entered into or amended, the identity of the parties to the agreement or amendment and a brief description of any material relationship between the registrant or its affiliates and any of the parties, other than in respect of the material definitive agreement or amendment; and

(2) a brief description of the terms and conditions of the agreement or amendment that are material to the registrant.

(b) For purposes of this Item 1.01, a material definitive agreement means an agreement that provides for obligations that are material to and enforceable against the registrant, or rights that are material to the registrant and enforceable by the registrant against one or more other parties to the agreement, in each case whether or not subject to conditions.

Instructions.

1. Any material definitive agreement of the registrant not made in the ordinary course of the registrant's business must be disclosed under this Item 1.01. An agreement is deemed to be not made in the ordinary course of a registrant's business even if the agreement is such as ordinarily accompanies the kind of business conducted by the registrant if it involves the subject matter identified in Item 601(b)(10)(ii)(A) - (D) of Regulation S-K (17 CFR 229.601(b)(10)(ii)(A) - (D)). An agreement involving the subject matter identified in Item 601(b)(10)(iii)(A) or (B) need not be disclosed under this Item.

2. A registrant must provide disclosure under this Item 1.01 if the registrant succeeds as a party to the agreement or amendment to the agreement by assumption or assignment (other than in connection with a merger or acquisition or similar transaction).

3. With respect to asset-backed securities, as defined in Item 1101 of Regulation AB (17 CFR 229.1101), disclosure is required under this Item 1.01 regarding the entry into or an amendment to a definitive agreement that is material to the asset-backed securities transaction, even if the registrant is not a party to such agreement (*e.g.*, a servicing agreement with a servicer contemplated by Item 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)).

**Item 1.02 Termination of a Material Definitive Agreement.**

(a) If a material definitive agreement which was not made in the ordinary course of business of the registrant and to which the registrant is a party is terminated otherwise than by expiration of the agreement on its stated termination date, or as a result of all parties completing their obligations under such agreement, and such termination of the agreement is material to the registrant, disclose the following information:

(1) the date of the termination of the material definitive agreement, the identity of the parties to the agreement and a brief description of any material relationship between the registrant or its affiliates and any of the parties other than in respect of the material definitive agreement;

(2) a brief description of the terms and conditions of the agreement that are material to the registrant;

(3) a brief description of the material circumstances surrounding the termination; and

(4) any material early termination penalties incurred by the registrant.

(b) For purposes of this Item 1.02, the term material definitive agreement shall have the same meaning as set forth in Item 1.01(b).

Instructions.

1. No disclosure is required solely by reason of this Item 1.02 during negotiations or discussions regarding termination of a material definitive agreement unless and until the agreement has been terminated.

2. No disclosure is required solely by reason of this Item 1.02 if the registrant believes in good faith that the material definitive agreement has not been terminated, unless the registrant has received a notice of termination pursuant to the terms of agreement.

3. With respect to asset-backed securities, as defined in Item 1101 of Regulation AB (17 CFR 229.1101), disclosure is required under this Item 1.02 regarding the termination of a definitive agreement that is material to the asset-backed securities transaction (otherwise than by expiration of the agreement on its stated termination date or as a result of all parties completing their obligations under such agreement), even if the registrant is not a party to such agreement (*e.g.*, a servicing agreement with a servicer contemplated by Item 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)).

**Item 1.03 Bankruptcy or Receivership.**

(a) If a receiver, fiscal agent or similar officer has been appointed for a registrant or its parent, in a proceeding under the U.S. Bankruptcy Code or in any other proceeding under state or federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the registrant or its parent, or if such jurisdiction has been assumed by leaving the existing directors and officers in possession but subject to the supervision and orders of a court or governmental authority, disclose the following information:

(1) the name or other identification of the proceeding;

(2) the identity of the court or governmental authority;

(3) the date that jurisdiction was assumed; and

(4) the identity of the receiver, fiscal agent or similar officer and the date of his or her appointment.

(b) If an order confirming a plan of reorganization, arrangement or liquidation has been entered by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the registrant or its parent, disclose the following;

(1) the identity of the court or governmental authority;

(2) the date that the order confirming the plan was entered by the court or governmental authority;

(3) a summary of the material features of the plan and, pursuant to Item 9.01 (Financial Statements and Exhibits), a copy of the plan as confirmed;

(4) the number of shares or other units of the registrant or its parent issued and outstanding, the number reserved for future issuance in respect of claims and interests filed and allowed under the plan, and the aggregate total of such numbers; and

(5) information as to the assets and liabilities of the registrant or its parent as of the date that the order confirming the plan was entered, or a date as close thereto as practicable.

Instructions.

1. The information called for in paragraph (b)(5) of this Item 1.03 may be presented in the form in which it was furnished to the court

or governmental authority.

2. With respect to asset-backed securities, disclosure also is required under this Item 1.03 if the depositor (or servicer if the servicer signs the report on Form 10-K (17 CFR 249.310) of the issuing entity) becomes aware of any instances described in paragraph (a) or (b) of this Item with respect to the sponsor, depositor, servicer contemplated by Item 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)), trustee, significant obligor, enhancement or support provider contemplated by Items 1114(b) or 1115 of Regulation AB (17 CFR 229.1114(b) or 229.1115) or other material party contemplated by Item 1101(d)(1) of Regulation AB (17 CFR 1101(d)(1)). Terms used in this Instruction 2 have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

**Item 1.04 Mine Safety – Reporting of Shutdowns and Patterns of Violations.**

(a) If the registrant or a subsidiary of the registrant has received, with respect to a coal or other mine of which the registrant or a subsidiary of the registrant is an operator

• an imminent danger order issued under section 107(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 817(a));

• a written notice from the Mine Safety and Health Administration that the coal or other mine has a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

• a written notice from the Mine Safety and Health Administration that the coal or other mine has the potential to have such a pattern,disclose the following information:

(1) The date of receipt by the issuer or a subsidiary of such order or notice.

(2) The category of the order or notice.

(3) The name and location of the mine involved.

*Instructions to Item 1.04.*

1. The term "coal or other mine" means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 et seq).
2. The term "operator" has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

**Section 2 - Financial Information**

**Item 2.01 Completion of Acquisition or Disposition of Assets.**

If the registrant or any of its majority-owned subsidiaries has completed the acquisition or disposition of a significant amount of assets, otherwise than in the ordinary course of business, disclose the following information:

(a) the date of completion of the transaction;

(b) a brief description of the assets involved;

(c) the identity of the person(s) from whom the assets were acquired or to whom they were sold and the nature of any material relationship, other than in respect of the transaction, between such person(s) and the registrant or any of its affiliates, or any director or officer of the registrant, or any associate of any such director or officer;

(d) the nature and amount of consideration given or received for the assets and, if any material relationship is disclosed pursuant to paragraph (c) of this Item 2.01, the formula or principle followed in determining the amount of such consideration;

(e) if the transaction being reported is an acquisition and if a material relationship exists between the registrant or any of its affiliates and the source(s) of the funds used in the acquisition, the identity of the source(s) of the funds unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined by Section 3(a)(6) of the Act, in which case the identity of such bank may be omitted provided the registrant:

(1) has made a request for confidentiality pursuant to Section 13(d)(1)(B) of the Act; and

(2) states in the report that the identity of the bank has been so omitted and filed separately with the Commission;and

(f) if the registrant was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before the transaction, the information that would be required if the registrant were filing a general form for registration of securities on Form 10 under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of Section 13 (15 U.S.C. 78m) or Section

15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the transaction. Notwithstanding General Instruction B.3. to Form 8-K, if any disclosure required by this Item 2.01(f) is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

Instructions.

1. No information need be given as to:

(i) any transaction between any person and any wholly-owned subsidiary of such person;

(ii) any transaction between two or more wholly-owned subsidiaries of any person; or

(iii) the redemption or other acquisition of securities from the public, or the sale or other disposition of securities to the public, by the issuer of such securities or by a wholly-owned subsidiary of that issuer.

2. The term acquisition includes every purchase, acquisition by lease, exchange, merger, consolidation, succession or other acquisition, except that the term does not include the construction or development of property by or for the registrant or its subsidiaries or the acquisition of materials for such purpose. The term disposition includes every sale, disposition by lease, exchange, merger, consolidation, mortgage, assignment or hypothecation of assets, whether for the benefit of creditors or otherwise, abandonment, destruction, or other disposition.

3. The information called for by this Item 2.01 is to be given as to each transaction or series of related transactions of the size indicated. The acquisition or disposition of securities is deemed the indirect acquisition or disposition of the assets represented by such securities if it results in the acquisition or disposition of control of such assets.

4. An acquisition or disposition shall be deemed to involve a significant amount of assets:

(i) if the registrant's and its other subsidiaries' equity in the net book value of such assets or the amount paid or received for the assets upon such acquisition or disposition exceeded 10% of the total assets of the registrant and its consolidated subsidiaries; or

(ii) if it involved a business (see 17 CFR 210.11-01(d)) that is significant (see 17 CFR 210.11-01(b)).

Acquisitions of individually insignificant businesses are not required to be reported pursuant to this Item 2.01 unless they are related businesses (see 17 CFR 210.3-05(a)(3)) and are significant in the aggregate.

5. Attention is directed to the requirements in Item 9.01 (Financial Statements and Exhibits) with respect to the filing of:

(i) financial statements of businesses acquired;

(ii) pro forma financial information; and

(iii) copies of the plans of acquisition or disposition as exhibits to the report.

**Item 2.02 Results of Operations and Financial Condition.**

(a) If a registrant, or any person acting on its behalf, makes any public announcement or release (including any update of an earlier announcement or release) disclosing material non-public information regarding the registrant's results of operations or financial condition for a completed quarterly or annual fiscal period, the registrant shall disclose the date of the announcement or release, briefly identify the announcement or release and include the text of that announcement or release as an exhibit.

(b) A Form 8-K is not required to be furnished to the Commission under this Item 2.02 in the case of disclosure of material non-public information that is disclosed orally, telephonically, by webcast, by broadcast, or by similar means if:

(1) the information is provided as part of a presentation that is complementary to, and initially occurs within 48 hours after, a related, written announcement or release that has been furnished on Form 8-K pursuant to this Item 2.02 prior to the presentation;

(2) the presentation is broadly accessible to the public by dial-in conference call, by webcast, by broadcast or by similar means;

(3) the financial and other statistical information contained in the presentation is provided on the registrant's website, together with any information that would be required under 17 CFR 244.100; and

(4) the presentation was announced by a widely disseminated press release, that included instructions as to when and how to access the presentation and the location on the registrant's website where the information would be available.

Instructions.

1. The requirements of this Item 2.02 are triggered by the disclosure of material non-public information regarding a completed fiscal year or quarter. Release of additional or updated material non-public information regarding a completed fiscal year or quarter would trigger an additional Item 2.02 requirement.

2. The requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K (17 CFR 229.10(e)(1)(i)) shall apply to disclosures under this Item 2.02.

3. Issuers that make earnings announcements or other disclosures of material non-public information regarding a completed fiscal year or quarter in an interim or annual report to shareholders are permitted to specify which portion of the report contains the information required to be furnished under this Item 2.02.

4. This Item 2.02 does not apply in the case of a disclosure that is made in a quarterly report filed with the Commission on Form 10-Q (17 CFR 249.308a) or an annual report filed with the Commission on Form 10-K (17 CFR 249.310).

**Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.**

(a) If the registrant becomes obligated on a direct financial obligation that is material to the registrant, disclose the following information:

(1) the date on which the registrant becomes obligated on the direct financial obligation and a brief description of the transaction or agreement creating the obligation;

(2) the amount of the obligation, including the terms of its payment and, if applicable, a brief description of the material terms under which it may be accelerated or increased and the nature of any recourse provisions that would enable the registrant to recover from third parties; and

(3) a brief description of the other terms and conditions of the transaction or agreement that are material to the registrant.

(b) If the registrant becomes directly or contingently liable for an obligation that is material to the registrant arising out of an off-balance sheet arrangement, disclose the following information:

(1) the date on which the registrant becomes directly or contingently liable on the obligation and a brief description of the transaction or agreement creating the arrangement and obligation;

(2) a brief description of the nature and amount of the obligation of the registrant under the arrangement, including the material terms whereby it may become a direct obligation, if applicable, or may be accelerated or increased and the nature of any recourse provisions that would enable the registrant to recover from third parties;

(3) the maximum potential amount of future payments (undiscounted) that the registrant may be required to make, if different; and

(4) a brief description of the other terms and conditions of the obligation or arrangement that are material to the registrant.

(c) For purposes of this Item 2.03, direct financial obligation means any of the following:

(1) a long-term debt obligation, as defined in Item 303(a)(5)(ii)(A) of Regulation S-K (17 CFR 229.303(a)(5)(ii)(A));

(2) a capital lease obligation, as defined in Item 303(a)(5)(ii)(B) of Regulation S-K (17 CFR 229.303(a)(5)(ii)(B));

(3) an operating lease obligation, as defined in Item 303(a)(5)(ii)(C) of Regulation S-K (17 CFR 229.303(a)(5)(ii)(C)); or

(4) a short-term debt obligation that arises other than in the ordinary course of business.

(d) For purposes of this Item 2.03, off-balance sheet arrangement has the meaning set forth in Item 303(a)(4)(ii) of Regulation S-K (17 CFR 229.303(a)(4)(ii)).

(e) For purposes of this Item 2.03, short-term debt obligation means a payment obligation under a borrowing arrangement that is scheduled to mature within one year, or, for those registrants that use the operating cycle concept of working capital, within a registrant's operating cycle that is longer than one year, as discussed in Accounting Research Bulletin No. 43, Chapter 3A, Working Capital.

Instructions.

1. A registrant has no obligation to disclose information under this Item 2.03 until the registrant enters into an agreement enforceable against the registrant, whether or not subject to conditions, under which the direct financial obligation will arise or be created or issued. If there is no such agreement, the registrant must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the direct financial obligation arises or is created.

2. A registrant must provide the disclosure required by paragraph (b) of this Item 2.03 whether or not the registrant is also a party to the transaction or agreement creating the contingent obligation arising under the off-balance sheet arrangement. In the event that neither the registrant nor any affiliate of the registrant is also a party to the transaction or agreement creating the contingent obligation arising under the off-balance sheet arrangement in question, the four business day period for reporting the event under this Item 2.03 shall begin on the earlier of (i) the fourth business day after the contingent obligation is created or arises, and (ii) the day on which an executive officer, as defined in 17 CFR 240.3b-7, of the registrant becomes aware of the contingent obligation.

3. In the event that an agreement, transaction or arrangement requiring disclosure under this Item 2.03 comprises a facility, program or similar arrangement that creates or may give rise to direct financial obligations of the registrant in connection with multiple transactions, the registrant shall:

(i) disclose the entering into of the facility, program or similar arrangement if the entering into of the facility is material to the registrant; and

(ii) as direct financial obligations arise or are created under the facility or program, disclose the required information under this Item 2.03 to the extent that the obligations are material to the registrant (including when a series of previously undisclosed individually immaterial obligations become material in the aggregate).

4. For purposes of Item 2.03(b)(3), the maximum amount of future payments shall not be reduced by the effect of any amounts that may possibly be recovered by the registrant under recourse or collateralization provisions in any guarantee agreement, transaction or arrangement.

5. If the obligation required to be disclosed under this Item 2.03 is a security, or a term of a security, that has been or will be sold pursuant to an effective registration statement of the registrant, the registrant is not required to file a Form 8-K pursuant to this Item 2.03, provided that the prospectus relating to that sale contains the information required by this Item 2.03 and is filed within the required time period under Securities Act Rule 424 (§230.424 of this chapter).

**Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.**

(a) If a triggering event causing the increase or acceleration of a direct financial obligation of the registrant occurs and the consequences of the event, taking into account those described in paragraph (a)(4) of this Item 2.04, are material to the registrant, disclose the following information:

(1) the date of the triggering event and a brief description of the agreement or transaction under which the direct financial obligation was created and is increased or accelerated;

(2) a brief description of the triggering event;

(3) the amount of the direct financial obligation, as increased if applicable, and the terms of payment or acceleration that apply; and

(4) any other material obligations of the registrant that may arise, increase, be accelerated or become direct financial obligations as a result of the triggering event or the increase or acceleration of the direct financial obligation.

(b) If a triggering event occurs causing an obligation of the registrant under an off-balance sheet arrangement to increase or be accelerated, or causing a contingent obligation of the registrant under an off-balance sheet arrangement to become a direct financial obligation of the registrant, and the consequences of the event, taking into account those described in paragraph (b)(4) of this Item 2.04, are material to the registrant, disclose the following information:

(1) the date of the triggering event and a brief description of the off-balance sheet arrangement;

(2) a brief description of the triggering event;

(3) the nature and amount of the obligation, as increased if applicable, and the terms of payment or acceleration that apply; and

(4) any other material obligations of the registrant that may arise, increase, be accelerated or become direct financial obligations as a result of the triggering event or the increase or acceleration of the obligation under the off-balance sheet arrangement or its becoming a direct financial obligation of the registrant.

(c) For purposes of this Item 2.04, the term direct financial obligation has the meaning provided in Item 2.03 of this form, but shall also include an obligation arising out of an off-balance sheet arrangement that is accrued under FASB Statement of Financial Accounting Standards No. 5 Accounting for Contingencies (SFAS No. 5) as a probable loss contingency.

(d) For purposes of this Item 2.04, the term off-balance sheet arrangement has the meaning provided in Item 2.03 of this form.

(e) For purposes of this Item 2.04, a triggering event is an event, including an event of default, event of acceleration or similar event, as a result of which a direct financial obligation of the registrant or an obligation of the registrant arising under an off-balance sheet arrangement is increased or becomes accelerated or as a result of which a contingent obligation of the registrant arising out of an off-balance sheet arrangement becomes a direct financial obligation of the registrant.

Instructions.

1. Disclosure is required if a triggering event occurs in respect of an obligation of the registrant under an off-balance sheet arrangement and the consequences are material to the registrant, whether or not the registrant is also a party to the transaction or agreement under which the triggering event occurs.

2. No disclosure is required under this Item 2.04 unless and until a triggering event has occurred in accordance with the terms of the relevant agreement, transaction or arrangement, including, if required, the sending to the registrant of notice of the occurrence of a triggering event pursuant to the terms of the agreement, transaction or arrangement and the satisfaction of all conditions to such occurrence, except the passage of time.

3. No disclosure is required solely by reason of this Item 2.04 if the registrant believes in good faith that no triggering event has occurred, unless the registrant has received a notice described in Instruction 2 to this Item 2.04.

4. Where a registrant is subject to an obligation arising out of an off-balance sheet arrangement, whether or not disclosed pursuant to Item 2.03 of this form, if a triggering event occurs as a result of which under that obligation an accrual for a probable loss is required under SFAS No. 5, the obligation arising out of the off-balance sheet arrangement becomes a direct financial obligation as defined in this Item 2.04. In that situation, if the consequences as determined under Item 2.04(b) are material to the registrant, disclosure is required under this Item 2.04.

5. With respect to asset-backed securities, as defined in 17 CFR 229.1101, disclosure also is required under this Item 2.04 if an early amortization, performance trigger or other event, including an event of default, has occurred under the transaction agreements for the asset-backed securities that would materially alter the payment priority or distribution of cash flows regarding the asset-backed securities or the amortization schedule for the asset-backed securities. In providing the disclosure required by this Item, identify the changes to the payment priorities, flow of funds or asset-backed securities as a result. Disclosure is required under this Item whether or not the registrant is a party to the transaction agreement that results in the occurrence identified.

**Item 2.05 Costs Associated with Exit or Disposal Activities.**

If the registrant's board of directors, a committee of the board of directors or the officer or officers of the registrant authorized to take such action if board action is not required, commits the registrant to an exit or disposal plan, or otherwise disposes of a long-lived asset or terminates employees under a plan of termination described in paragraph 8 of FASB Statement of Financial Accounting

Standards No. 146 Accounting for Costs Associated with Exit or Disposal Activities (SFAS No. 146), under which material charges will be incurred under generally accepted accounting principles applicable to the registrant, disclose the following information:

(a) the date of the commitment to the course of action and a description of the course of action, including the facts and circumstances leading to the expected action and the expected completion date;

(b) for each major type of cost associated with the course of action (for example, one-time termination benefits, contract termination costs and other associated costs), an estimate of the total amount or range of amounts expected to be incurred in connection with the action;

(c) an estimate of the total amount or range of amounts expected to be incurred in connection with the action; and

(d) the registrant's estimate of the amount or range of amounts of the charge that will result in future cash expenditures, provided, however, that if the registrant determines that at the time of filing it is unable in good faith to make a determination of an estimate required by paragraphs (b), (c) or (d) of this Item 2.05, no disclosure of such estimate shall be required; provided further, however, that in any such event, the registrant shall file an amended report on Form 8-K under this Item 2.05 within four business days after it makes a determination of such an estimate or range of estimates.

**Item 2.06 Material Impairments.**

If the registrant's board of directors, a committee of the board of directors or the officer or officers of the registrant authorized to take such action if board action is not required, concludes that a material charge for impairment to one or more of its assets, including, without limitation, impairments of securities or goodwill, is required under generally accepted accounting principles applicable to the registrant, disclose the following information:

(a) the date of the conclusion that a material charge is required and a description of the impaired asset or assets and the facts and circumstances leading to the conclusion that the charge for impairment is required;

(b) the registrant's estimate of the amount or range of amounts of the impairment charge; and

(c) the registrant's estimate of the amount or range of amounts of the impairment charge that will result in future cash expenditures, provided, however, that if the registrant determines that at the time of filing it is unable in good faith to make a determination of an estimate required by paragraphs (b) or (c) of this Item 2.06, no disclosure of such estimate shall be required; provided further, however, that in any such event, the registrant shall file an amended report on Form 8-K under this Item 2.06 within four business days after it makes a determination of such an estimate or range of estimates.

Instruction.

No filing is required under this Item 2.06 if the conclusion is made in connection with the preparation, review or audit of financial statements required to be included in the next periodic report due to be filed under the Exchange Act, the periodic report is filed on a timely basis and such conclusion is disclosed in the report.

**Section 3 - Securities and Trading Markets**

**Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing.**

(a) If the registrant has received notice from the national securities exchange or national securities association (or a facility thereof) that maintains the principal listing for any class of the registrant's common equity (as defined in Exchange Act Rule 12b-2 (17 CFR 240.12b-2)) that:

- the registrant or such class of the registrant's securities does not satisfy a rule or standard for continued listing on the exchange or association;
- the exchange has submitted an application under Exchange Act Rule 12d2-2 (17 CFR 240.12d2-2) to the Commission to delist such class of the registrant's securities; or
- the association has taken all necessary steps under its rules to delist the security from its automated inter-dealer quotation system,

the registrant must disclose:

(i) the date that the registrant received the notice;

(ii) the a rule or standard for continued listing on the national securities exchange or national securities association that the registrant fails, or has failed to, satisfy; and

(iii) any action or response that, at the time of filing, the registrant has determined to take in response to the notice.

(b) If the registrant has notified the national securities exchange or national securities association (or a facility thereof) that maintains the principal listing for any class of the registrant's common equity (as defined in Exchange Act Rule 12b-2 (17 CFR 240.12b-2) that the registrant is aware of any material noncompliance with a rule or standard for continued listing on the exchange or association, the registrant must disclose:

(i) the date that the registrant provided such notice to the exchange or association;

(ii) the rule or standard for continued listing on the exchange or association that the registrant fails, or has failed, to satisfy; and

(iii) any action or response that, at the time of filing, the registrant has determined to take regarding its noncompliance.

(c) If the national securities exchange or national securities association (or a facility thereof) that maintains the principal listing for any class of the registrant's common equity (as defined in Exchange Act Rule 12b-2 (17 CFR 240.12b-2)), in lieu of suspending trading in or delisting such class of the registrant's securities, issues a public reprimand letter or similar communication indicating that the registrant has violated a rule or standard for continued listing on the exchange or association, the registrant must state the date, and summarize the contents of the letter or communication.

(d) If the registrant's board of directors, a committee of the board of directors or the officer or officers of the registrant authorized to take such action if board action is not required, has taken definitive action to cause the listing of a class of its common equity to be withdrawn from the national securities exchange, or terminated from the automated inter-dealer quotation system of a registered national securities association, where such exchange or association maintains the principal listing for such class of securities, including by reason of a transfer of the listing or quotation to another securities exchange or quotation system, describe the action taken and state the date of the action.

Instructions.

1. The registrant is not required to disclose any information required by paragraph (a) of this Item 3.01 where the delisting is a result of one of the following:

- the entire class of the security has been called for redemption, maturity or retirement; appropriate notice thereof has been given; if required by the terms of the securities, funds sufficient for the payment of all such securities have been deposited with an agency authorized to make such payments; and such funds have been made available to security holders;
- the entire class of the security has been redeemed or paid at maturity or retirement;
- the instruments representing the entire class of securities have come to evidence, by operation of law or otherwise, other securities in substitution therefor and represent no other right, except, if true, the right to receive an immediate cash payment (the right of dissenters to receive the appraised or fair value of their holdings shall not prevent the application of this provision); or
- all rights pertaining to the entire class of the security have been extinguished; provided, however, that where such an event occurs as the result of an order of a court or other governmental authority, the order shall be final, all applicable appeal periods shall have expired and no appeals shall be pending.

2. A registrant must provide the disclosure required by paragraph (a) or (b) of this Item 3.01, as applicable, regarding any failure to satisfy a rule or standard for continued listing on the national securities exchange or national securities association (or a facility thereof) that maintains the principal listing for any class of the registrant's common equity (as defined in Exchange Act Rule 12b-2 (17 CFR 240.12b-2)) even if the registrant has the benefit of a grace period or similar extension period during which it may cure the deficiency that triggers the disclosure requirement.

3. Notices or other communications subsequent to an initial notice sent to, or by, a registrant under Item 3.01(a), (b) or (c) that continue to indicate that the registrant does not comply with the same rule or standard for continued listing that was the subject of the initial notice are not required to be filed, but may be filed voluntarily.

4. Registrants whose securities are quoted exclusively (i.e., the securities are not otherwise listed on an exchange or association) on automated inter-dealer quotation systems are not subject to this Item 3.01 and such registrants are thus not required to file a Form 8-K pursuant to this Item 3.01 if the securities are no longer quoted on such quotation system. If a security is listed on an exchange or association and is also quoted on an automated inter-dealer quotation system, the registrant is subject to the disclosure obligations of Item 3.01 if any of the events specified in Item 3.01 occur.

**Item 3.02 Unregistered Sales of Equity Securities.**

(a) If the registrant sells equity securities in a transaction that is not registered under the Securities Act, furnish the information set forth in paragraphs (a) and (c) through (e) of Item 701 of Regulation S-K (17 CFR 229.701(a) and (c) through (e). For purposes of determining the required filing date for the Form 8-K under this Item 3.02(a), the registrant has no obligation to disclose information under this Item 3.02 until the registrant enters into an agreement enforceable against the registrant, whether or not subject to conditions, under which the equity securities are to be sold. If there is no such agreement, the registrant must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the equity securities are to be sold.

(b) No report need be filed under this Item 3.02 if the equity securities sold, in the aggregate since its last report filed under this Item 3.02 or its last periodic report, whichever is more recent, constitute less than 1% of the number of shares outstanding of the class of equity securities sold. In the case of a smaller reporting company, no report need be filed if the equity securities sold, in the aggregate since its last report filed under this Item 3.02 or its last periodic report, whichever is more recent, constitute less than 5% of the number of shares outstanding of the class of equity securities sold.

Instructions.

1. For purposes of this Item 3.02, "the number of shares outstanding" refers to the actual number of shares of equity securities of the class outstanding and does not include outstanding securities convertible into or exchangeable for such equity securities.

2. A smaller reporting company is defined under Item 10(f)(1) of Regulation S-K (17 CFR 229.10(f)(1)).

**Item 3.03 Material Modification to Rights of Security Holders.**

(a) If the constituent instruments defining the rights of the holders of any class of registered securities of the registrant have been materially modified, disclose the date of the modification, the title of the class of securities involved and briefly describe the general effect of such modification upon the rights of holders of such securities.

(b) If the rights evidenced by any class of registered securities have been materially limited or qualified by the issuance or modification of any other class of securities by the registrant, briefly disclose the date of the issuance or modification, the general effect of the issuance or modification of such other class of securities upon the rights of the holders of the registered securities.

Instruction.

Working capital restrictions and other limitations upon the payment of dividends must be reported pursuant to this Item 3.03.

**Section 4 - Matters Related to Accountants and Financial Statements**

**Item 4.01 Changes in Registrant's Certifying Accountant.**

(a) If an independent accountant who was previously engaged as the principal accountant to audit the registrant's financial statements, or an independent accountant upon whom the principal accountant expressed reliance in its report regarding a significant subsidiary, resigns (or indicates that it declines to stand for re-appointment after completion of the current audit) or is dismissed, disclose the information required by Item 304(a)(1) of Regulation S-K (17 CFR 229.304(a)(1) of this chapter), including compliance with Item 304(a)(3) of Regulation S-K (17 CFR 229.304(a)(3) of this chapter).

(b) If a new independent accountant has been engaged as either the principal accountant to audit the registrant's financial statements or as an independent accountant on whom the principal accountant is expected to express reliance in its report regarding a significant subsidiary, the registrant must disclose the information required by Item 304(a)(2) of Regulation S-K (17 CFR 229.304(a)(2)).

Instruction.

The resignation or dismissal of an independent accountant, or its refusal to stand for re-appointment, is a reportable event separate from the engagement of a new independent accountant. On some occasions, two reports on Form 8-K are required for a single change in accountants, the first on the resignation (or refusal to stand for re-appointment ) or dismissal of the former accountant and the second when the new accountant is engaged. Information required in the second Form 8-K in such situations need not be provided to the extent that it has been reported previously in the first Form 8-K.

**Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review.**

(a) If the registrant's board of directors, a committee of the board of directors or the officer or officers of the registrant authorized to take such action if board action is not required, concludes that any previously issued financial statements, covering one or more years or interim periods for which the registrant is required to provide financial statements under Regulation S-X (17 CFR 210) should no longer be relied upon because of an error in such financial statements as addressed in Accounting Principles Board Opinion No. 20, as may be modified, supplemented or succeeded, disclose the following information:

(1) the date of the conclusion regarding the non-reliance and an identification of the financial statements and years or periods covered that should no longer be relied upon;

(2) a brief description of the facts underlying the conclusion to the extent known to the registrant at the time of filing; and

(3) a statement of whether the audit committee, or the board of directors in the absence of an audit committee, or authorized officer or officers, discussed with the registrant's independent accountant the matters disclosed in the filing pursuant to this Item 4.02(a).

(b) If the registrant is advised by, or receives notice from, its independent accountant that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review related to previously issued financial statements, disclose the following information:

(1) the date on which the registrant was so advised or notified;

(2) identification of the financial statements that should no longer be relied upon;

(3) a brief description of the information provided by the accountant; and

(4) a statement of whether the audit committee, or the board of directors in the absence of an audit committee, or authorized officer or officers, discussed with the independent accountant the matters disclosed in the filing pursuant to this Item 4.02(b).

(c) If the registrant receives advisement or notice from its independent accountant requiring disclosure under paragraph (b) of this Item 4.02, the registrant must:

(1) provide the independent accountant with a copy of the disclosures it is making in response to this Item 4.02 that the independent accountant shall receive no later than the day that the disclosures are filed with the Commission;

(2) request the independent accountant to furnish to the registrant as promptly as possible a letter addressed to the Commission stating whether the independent accountant agrees with the statements made by the registrant in response to this Item 4.02 and, if not, stating the respects in which it does not agree; and

(3) amend the registrant's previously filed Form 8-K by filing the independent accountant's letter as an exhibit to the filed Form 8-K no later than two business days after the registrant's receipt of the letter.

**Section 5 - Corporate Governance and Management**

**Item 5.01 Changes in Control of Registrant.**

(a) If, to the knowledge of the registrant's board of directors, a committee of the board of directors or authorized officer or officers of the registrant, a change in control of the registrant has occurred, furnish the following information:

(1) the identity of the person(s) who acquired such control;

(2) the date and a description of the transaction(s) which resulted in the change in control;

(3) the basis of the control, including the percentage of voting securities of the registrant now beneficially owned directly or indirectly by the person(s) who acquired control;

(4) the amount of the consideration used by such person(s);

(5) the source(s) of funds used by the person(s), unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined by Section 3(a)(6) of the Act, in which case the identity of such bank may be omitted provided the person who acquired control:

(i) has made a request for confidentiality pursuant to Section 13(d)(1)(B) of the Act; and

(ii) states in the report that the identity of the bank has been so omitted and filed separately with the Commission.

(6) the identity of the person(s) from whom control was assumed;

(7) any arrangements or understandings among members of both the former and new control groups and their associates with respect to election of directors or other matters; and

(8) if the registrant was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before the change in control, the information that would be required if the registrant were filing a general form for registration of securities on Form 10 under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of Section 13 (15 U.S.C. 78m) or Section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the change in control, with such information reflecting the registrant and its securities upon consummation of the transaction. Notwithstanding General Instruction B.3. to Form 8-K, if any disclosure required by this Item 5.01(a)(8) is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

(b) Furnish the information required by Item 403(c) of Regulation S-K (17 CFR 229.403(c)).

**Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.**

(a)(1) If a director has resigned or refuses to stand for re-election to the board of directors since the date of the last annual meeting of shareholders because of a disagreement with the registrant, known to an executive officer of the registrant, as defined in 17 CFR 240.3b-7, on any matter relating to the registrant's operations, policies or practices, or if a director has been removed for cause from the board of directors, disclose the following information:

(i) the date of such resignation, refusal to stand for re-election or removal;

(ii) any positions held by the director on any committee of the board of directors at the time of the director's resignation, refusal to stand for re-election or removal; and

(iii) a brief description of the circumstances representing the disagreement that the registrant believes caused, in whole or in part, the director's resignation, refusal to stand for re-election or removal.

(2) If the director has furnished the registrant with any written correspondence concerning the circumstances surrounding his or her resignation, refusal or removal, the registrant shall file a copy of the document as an exhibit to the report on Form 8-K.

(3) The registrant also must:

(i) provide the director with a copy of the disclosures it is making in response to this Item 5.02 no later than the day the registrant file the disclosures with the Commission;

(ii) provide the director with the opportunity to furnish the registrant as promptly as possible with a letter addressed to the registrant stating whether he or she agrees with the statements made by the registrant in response to this Item 5.02 and, if not, stating the respects in which he or she does not agree; and

(iii) file any letter received by the registrant from the director with the Commission as an exhibit by an amendment to the previously filed Form 8-K within two business days after receipt by the registrant.

(b) If the registrant's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions, or any named executive officer, retires, resigns or is terminated from that position, or if a director retires, resigns, is removed, or refuses to stand for re-election (except in circumstances described in paragraph (a) of this Item 5.02), disclose the fact that the event has occurred and the date of the event.

(c) If the registrant appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or person performing similar functions, disclose the following information with respect to the

newly appointed officer:

(1) the name and position of the newly appointed officer and the date of the appointment;

(2) the information required by Items 401(b), (d), (e) and Item 404(a) of Regulation S-K (17 CFR 229.401(b), (d), (e) and 229.404(a)); and

(3) a brief description of any material plan, contract or arrangement (whether or not written) to which a covered officer is a party or in which he or she participates that is entered into or material amendment in connection with the triggering event or any grant or award to any such covered person or modification thereto, under any such plan, contract or arrangement in connection with any such event.

Instruction to paragraph (c).

If the registrant intends to make a public announcement of the appointment other than by means of a report on Form 8-K, the registrant may delay filing the Form 8-K containing the disclosures required by this Item 5.02(c) until the day on which the registrant otherwise makes public announcement of the appointment of such officer.

(d) If the registrant elects a new director, except by a vote of security holders at an annual meeting or special meeting convened for such purpose, disclose the following information:

(1) the name of the newly elected director and the date of election;

(2) a brief description of any arrangement or understanding between the new director and any other persons, naming such persons, pursuant to which such director was selected as a director;

(3) the committees of the board of directors to which the new director has been, or at the time of this disclosure is expected to be, named; and

(4) the information required by Item 404(a) of Regulation S-K (17 CFR 229.404(a)).

(5) a brief description of any material plan, contract or arrangement (whether or not written) to which the director is a party or in which he or she participates that is entered into or material amendment in connection with the triggering event or any grant or award to any such covered person or modification thereto, under any such plan, contract or arrangement in connection with any such event.

(e) If the registrant enters into, adopts, or otherwise commences a material compensatory plan, contract or arrangement (whether or not written), as to which the registrant's principal executive officer, principal financial officer, or a named executive officer participates or is a party, or such compensatory plan, contract or arrangement is materially amended or modified, or a material grant or award under any such plan, contract or arrangement to any such person is made or materially modified, then the registrant shall provide a brief description of the terms and conditions of the plan, contract or arrangement and the amounts payable to the officer thereunder.

Instructions to paragraph (e).

1. Disclosure under this Item 5.02(e) shall be required whether or not the specified event is in connection with events otherwise triggering disclosure pursuant to this Item 5.02.

2. Grants or awards (or modifications thereto) made pursuant to a plan, contract or arrangement (whether involving cash or equity), that are materially consistent with the previously disclosed terms of such plan, contract or arrangement, need not be disclosed under this Item 5.02(e), provided the registrant has previously disclosed such terms and the grant, award or modification is disclosed when Item 402 of Regulation S-K (17 CFR 229.402) requires such disclosure.

(f) If the salary or bonus of a named executive officer cannot be calculated as of the most recent practicable date and is omitted from the Summary Compensation Table as specified in Instruction 1 to Item 402(c)(2)(iii) and (iv) of Regulation S-K, disclose the appropriate information under this Item 5.02(f) when there is a payment, grant, award, decision or other occurrence as a result of which such amounts become calculable in whole or part. Disclosure under this Item 5.02(f) shall include a new total compensation figure for the named executive officer, using the new salary or bonus information to recalculate the information that was previously provided with respect to the named executive officer in the registrant's Summary Compensation Table for which the salary and bonus information was omitted in reliance on Instruction 1 to Item 402(c)(2)(iii) and (iv) of Regulation S-K (17 CFR 229.402(c)(2)(iii) and (iv)).

Instructions to Item 5.02.

1. The disclosure requirements of this Item 5.02 do not apply to a registrant that is a wholly-owned subsidiary of an issuer with a class of securities registered under Section 12 of the Exchange Act (15 U.S.C. 78l), or that is required to file reports under Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)).

2. To the extent that any information called for in Item 5.02(c)(3) or Item 5.02(d)(3) or Item 5.02(d)(4) is not determined or is unavailable at the time of the required filing, the registrant shall include a statement this effect in the filing and then must file an amendment to its Form 8-K filing under this Item 5.02 containing such information within four business days after the information is determined or becomes available.

3. The registrant need not provide information with respect to plans, contracts, and arrangements to the extent they do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

4. For purposes of this Item, the term "named executive officer" shall refer to those executive officers for whom disclosure was required in the registrant's most recent filing with the Commission under the Securities Act (15 U.S.C. 77a et seq.) or Exchange Act (15 U.S.C. 78a et seq.) that required disclosure pursuant to Item 402(c) of Regulation S-K (17 CFR 229.402(c)).

**Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.**

(a) If a registrant with a class of equity securities registered under Section 12 of the Exchange Act (15 U.S.C. 78l) amends its articles of incorporation or bylaws and a proposal for the amendment was not disclosed in a proxy statement or information statement filed by the registrant, disclose the following information:

(1) the effective date of the amendment; and

(2) a description of the provision adopted or changed by amendment and, if applicable, the previous provision.

(b) If the registrant determines to change the fiscal year from that used in its most recent filing with the Commission other than by means of:

(1) a submission to a vote of security holders through the solicitation of proxies or otherwise; or

(2) an amendment to its articles of incorporation or bylaws,

disclose the date of such determination, the date of the new fiscal year end and the form (for example, Form 10-K or Form 10-Q) on which the report covering the transition period will be filed.

Instructions to Item 5.03.

1. Refer to Item 601(b)(3) of Regulation S-K (17 CFR 229.601(b)(3) regarding the filing of exhibits to this Item 5.03.

2. With respect to asset-backed securities, as defined in 17 CFR 229.1101, disclosure is required under this Item 5.03 regarding any amendment to the governing documents of the issuing entity, regardless of whether the class of asset-backed securities is reporting under Section 13 or 15(d) of the Exchange Act.

**Item 5.04 Temporary Suspension of Trading Under Registrant's Employee Benefit Plans.**

(a) No later than the fourth business day after which the registrant receives the notice required by section 101(i)(2)(E) of the Employment Retirement Income Security Act of 1974 (29 U.S.C. 1021(i)(2)(E)), or, if such notice is not received by the registrant, on the same date by which the registrant transmits a timely notice to an affected officer or director within the time period prescribed by Rule 104(b)(2)(i)(B) or 104(b)(2)(ii) of Regulation BTR (17 CFR 245.104(b)(2)(i)(B) or 17 CFR 245.104(b)(2)(ii)), provide the information specified in Rule 104(b) (17 CFR 245.104(b)) and the date the registrant received the notice required by section 101(i)(2)(E) of the Employment Retirement Income Security Act of 1974 (29 U.S.C. 1021(i)(2)(E)), if applicable.

(b) On the same date by which the registrant transmits a timely updated notice to an affected officer or director, as required by the time period under Rule 104(b)(2)(iii) of Regulation BTR (17 CFR 245.104(b)(2)(iii)), provide the information specified in Rule 104(b)(3)(iii) (17 CFR 245.104(b)(2)(iii)).

**Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.**

(a) Briefly describe the date and nature of any amendment to a provision of the registrant's code of ethics that applies to the registrant's principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions and that relates to any element of the code of ethics definition enumerated in Item 406(b) of Regulations S-K (17 CFR 228.406(b)).

(b) If the registrant has granted a waiver, including an implicit waiver, from a provision of the code of ethics to an officer or person described in paragraph (a) of this Item 5.05, and the waiver relates to one or more of the elements of the code of ethics definition referred to in paragraph (a) of this Item 5.05, briefly describe the nature of the waiver, the name of the person to whom the waiver was granted, and the date of the waiver.

(c) The registrant does not need to provide any information pursuant to this Item 5.05 if it discloses the required information on its Internet website within four business days following the date of the amendment or waiver and the registrant has disclosed in its most recently filed annual report its Internet address and intention to provide disclosure in this manner. If the registrant elects to disclose the information required by this Item 5.05 through its website, such information must remain available on the website for at least a 12-month period. Following the 12-month period, the registrant must retain the information for a period of not less than five years. Upon request, the registrant must furnish to the Commission or its staff a copy of any or all information retained pursuant to this requirement.

Instructions.

1. The registrant does not need to disclose technical, administrative or other non-substantive amendments to its code of ethics.

2. For purposes of this Item 5.05:

(i) The term waiver means the approval by the registrant of a material departure from a provision of the code of ethics; and

(ii) The term implicit waiver means the registrant's failure to take action within a reasonable period of time regarding a material departure from a provision of the code of ethics that has been made known to an executive officer, as defined in Rule 3b-7 (17 CFR 240.3b-7) of the registrant.

**Section 5.06 - Change in Shell Company Status.**

If a registrant that was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), has completed a transaction that has the effect of causing it to cease being a shell company, as defined in Rule 12b-2, disclose the material terms of the transaction. Notwithstanding General Instruction B.3. to Form 8-K, if any disclosure required by this Item 5.06 is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

**Item 5.07 Submission of Matters to a Vote of Security Holders.**

If any matter was submitted to a vote of security holders, through the solicitation of proxies or otherwise, provide the following information:

(a) The date of the meeting and whether it was an annual or special meeting. This information must be provided only if a meeting of security holders was held.

(b) If the meeting involved the election of directors, the name of each director elected at the meeting, as well as a brief description of each other matter voted upon at the meeting; and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each nominee for office. For the vote on the frequency of shareholder advisory votes on executive compensation required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1) and §240.14a-21(b), state the number of votes cast for each of 1 year, 2 years, and 3 years, as well as the number of abstentions.

(c) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (17 CFR 240.14a-101)) terminating any solicitation subject to Rule 14a-12(c), including the cost or anticipated cost to the registrant.

(d) No later than one hundred fifty calendar days after the end of the annual or other meeting of shareholders at which

shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1), but in no event later than sixty calendar days prior to the deadline for submission of shareholder proposals under §240.14a-8, as disclosed in the registrant's most recent proxy statement for an annual or other meeting of shareholders relating to the election of directors at which shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1(a)(2)), by amendment to the most recent Form 8-K filed pursuant to (b) of this Item, disclose the company's decision in light of such vote as to how frequently the company will include a shareholder vote on the compensation of executives in its proxy materials until the next required vote on the frequency of shareholder votes on the compensation of executives.

Instruction 1 to Item 5.07. The four business day period for reporting the event under this Item 5.07, other than with respect to Item 5.07(d), shall begin to run on the day on which the meeting ended. The registrant shall disclose on Form 8-K under this Item 5.07 the preliminary voting results. The registrant shall file an amended report on Form 8-K under this Item 5.07 to disclose the final voting results within four business days after the final voting results are known. However, no preliminary voting results need be disclosed under this Item 5.07 if the registrant has disclosed final voting results on Form 8-K under this Item.

Instruction 2 to Item 5.07. If any matter has been submitted to a vote of security holders otherwise than at a meeting of such security holders, corresponding information with respect to such submission shall be provided. The solicitation of any authorization or consent (other than a proxy to vote at a stockholders' meeting) with respect to any matter shall be deemed a submission of such matter to a vote of security holders within the meaning of this item.

Instruction 3 to Item 5.07. If the registrant did not solicit proxies and the board of directors as previously reported to the Commission was re-elected in its entirety, a statement to that effect in answer to paragraph (b) will suffice as an answer thereto regarding the election of directors.

Instruction 4 to Item 5.07. If the registrant has furnished to its security holders proxy soliciting material containing the information called for by paragraph (c), the paragraph may be answered by reference to the information contained in such material.

Instruction 5 to Item 5.07. A registrant may omit the information called for by this Item 5.07 if, on the date of the filing of its report on Form 8-K, the registrant meets the following conditions:

1. All of the registrant's equity securities are owned, either directly or indirectly, by a single person which is a reporting company under the Exchange Act and which has filed all the material required to be filed pursuant to Section 13, 14 or 15(d) thereof, as applicable; and

2. During the preceding thirty-six calendar months and any subsequent period of days, there has not been any material default in the payment of principal, interest, a sinking or purchase fund installment, or any other material default not cured within thirty days, with respect to any indebtedness of the registrant or its subsidiaries, and there has not been any material default in the payment of rentals under material long-term leases.

**Item 5.08 Shareholder Director Nominations**

(a) If the registrant did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's meeting, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice on Schedule 14N (§ 240.14n–101) required pursuant to § 240.14a–11(b)(10), which date shall be a reasonable time before the registrant mails its proxy materials for the meeting. Where a registrant is required to include shareholder director nominees in the registrant's proxy materials pursuant to either an applicable state or foreign law provision, or a provision in the registrant's governing documents, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice on Schedule 14N required pursuant to § 240.14a–18.

(b) If the registrant is a series company as defined in Rule 18f–2(a) under the Investment Company Act of 1940 (§ 270.18f–2 of this chapter), then the registrant is required to disclose in connection with the election of directors at an annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) the total number of shares of the registrant outstanding and entitled to be voted (or if the votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) on the election of directors at such meeting of shareholders as of the end of the most recent calendar quarter.

**Section 6 -Asset-Backed Securities**

The Items in this Section 6 apply only to asset-backed securities. Terms used in this Section 6 have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

**Item 6.01 ABS Informational and Computational Material.**

Report under this Item any ABS informational and computational material filed in, or as an exhibit to, this report.

**Item 6.02 Change of Servicer or Trustee.**

If a servicer contemplated by Item 1108(a)(2) of Regulation AB (17 CFR 229.1108(a)(2)) or a trustee has resigned or has been removed, replaced or substituted, or if a new servicer contemplated by Item 1108(a)(2) of Regulation AB or trustee has been appointed, state the date the event occurred and the circumstances surrounding the change. In addition, provide the disclosure required by Item 1108(d) of Regulation AB (17 CFR 229.1108(c)), as applicable, regarding the servicer or trustee change. If a new servicer contemplated by Item 1108(a)(3) of this Regulation AB or a new trustee has been appointed, provide the information required by Item 1108(b) through (d) of Regulation AB regarding such servicer or Item 1109 of Regulation AB (17 CFR 229.1109) regarding such trustee, as applicable.

*Instruction.*

To the extent that any information called for by this Item regarding such servicer or trustee is not determined or is unavailable at the time of the required filing, the registrant shall include a statement to this effect in the filing and then must file an amendment to its Form 8-K filing under this Item 6.02 containing such information within four business days after the information is determined or becomes available.

**Item 6.03 Change in Credit Enhancement or Other External Support.**

(a) *Loss of existing enhancement or support.* If the depositor (or servicer if the servicer signs the report on Form 10-K (17 CFR 249.310) of the issuing entity) becomes aware that any material enhancement or support specified in Item 1114(a)(1) through (3) of Regulation AB (17 CFR 229.1114(a)(1) through (3)) or Item 1115 of Regulation AB (17 CFR 229.1115) that was previously applicable regarding one or more classes of the asset-backed securities has terminated other than by expiration of the contract on its stated termination date or as a result of all parties completing their obligations under such agreement, then disclose:

(1) the date of the termination of the enhancement;

(2) the identity of the parties to the agreement relating to the enhancement or support;

(3) a brief description of the terms and conditions of the enhancement or support that are material to security holders;

(4) a brief description of the material circumstances surrounding the termination; and

(5) any material early termination penalties paid or to be paid out of the cash flows backing the asset-backed securities.

(b) *Addition of new enhancement or support.* If the depositor (or servicer if the servicer signs the report on Form 10-K (17 CFR 249.310) of the issuing entity) becomes aware that any material enhancement specified in Item 1114(a)(1) through (3) of Regulation AB (17 CFR 229.1114(a)(1) through (3)) or Item 1115 of Regulation AB (17 CFR 229.1115) has been added with respect to one or more classes of the asset-backed securities, then provide the date of addition of the new enhancement or support and the disclosure required by Items 1114 or 1115 of Regulation AB, as applicable, with respect to such new enhancement or support.

(c) *Material change to enhancement or support.* If the depositor (or servicer if the servicer signs the report on Form 10-K (17 CFR 249.310) of the issuing entity) becomes aware that any existing material enhancement or support specified in Item 1114(a)(1) through (3) of Regulation AB or Item 1115 of Regulation AB with respect to one or more classes of the asset-backed securities has been materially amended or modified, disclose:

(1) the date on which the agreement or agreements relating to the enhancement or support was amended or modified;

(2) the identity of the parties to the agreement or agreements relating to the amendment or modification; and

(3) a brief description of the material terms and conditions of the amendment or modification.

*Instructions.*

1. Disclosure is required under this Item whether or not the registrant is a party to any agreement regarding the enhancement or support if the loss, addition or modification of such enhancement or support materially affects, directly or indirectly, the asset-backed securities, the pool assets or the cash flow underlying the asset-backed securities.

2. To the extent that any information called for by this Item regarding the enhancement or support is not determined or is unavailable at the time of the required filing, the registrant shall include a statement to this effect in the filing and then must file an amendment to its Form 8-K filing under this Item 6.03 containing such information within four business days after the information is determined or becomes available.

3. The instructions to Items 1.01 and 1.02 of this Form apply to this Item.

4. Notwithstanding Items 1.01 and 1.02 of this Form, disclosure regarding changes to material enhancement or support is to be reported under this Item 6.03 in lieu of those Items.

**Item 6.04 Failure to Make a Required Distribution.**

If a required distribution to holders of the asset-backed securities is not made as of the required distribution date under the transaction documents, and such failure is material, identify the failure and state the nature of the failure to make the timely distribution.

**Item 6.05 Securities Act Updating Disclosure.**

Regarding an offering of asset-backed securities registered on Form S-3 (17 CFR 239.13), if any material pool characteristic of the actual asset pool at the time of issuance of the asset-backed securities differs by 5% or more (other than as a result of the pool assets converting into cash in accordance with their terms) from the description of the asset pool in the prospectus filed for the offering pursuant to Securities Act Rule 424 (17 CFR 230.424), disclose the information required by Items 1111 and 1112 of Regulation AB (17 CFR 229.1111 and 17 CFR 229.1112) regarding the characteristics of the actual asset pool. If applicable, also provide information required by Items 1108 and 1110 of Regulation AB (17 CFR 229.1108 and 17 CFR 229.1110) regarding any new servicers or originators that would be required to be disclosed under those items regarding the pool assets.

*Instruction.*

No report is required under this Item if substantially the same information is provided in a post-effective amendment to the Securities Act registration statement or in a subsequent prospectus filed pursuant to Securities Act Rule 424 (17 CFR 230.424).

**Section 7 - Regulation FD**

**Item 7.01 Regulation FD Disclosure.**

Unless filed under Item 8.01, disclose under this item only information that the registrant elects to disclose through Form 8-K pursuant to Regulation FD (17 CFR 243.100 through 243.103).

**Section 8 - Other Events**

**Item 8.01 Other Events.**

The registrant may, at its option, disclose under this Item 8.01 any events, with respect to which information is not otherwise called for by this form, that the registrant deems of importance to security holders. The registrant may, at its option, file a report under this Item 8.01 disclosing the nonpublic information required to be disclosed by Regulation FD (17 CFR 243.100 through 243.103).

**Section 9 - Financial Statements and Exhibits**

**Item 9.01 Financial Statements and Exhibits.**

List below the financial statements, pro forma financial information and exhibits, if any, filed as a part of this report.

(a) Financial statements of businesses acquired.

(1) For any business acquisition required to be described in answer to Item 2.01 of this form, financial statements of the business acquired shall be filed for the periods specified in Rule 3-05(b) of Regulation S-X (17 CFR 210.3-05(b)) or Rule 8-04(b) of

Regulation S-X (17 CFR 210.8-04(b)) for smaller reporting companies.

(2) The financial statements shall be prepared pursuant to Regulation S-X except that supporting schedules need not be filed. A manually signed accountant's report should be provided pursuant to Rule 2-02 of Regulation S-X (17 CFR 210.2-02).

(3) With regard to the acquisition of one or more real estate properties, the financial statements and any additional information specified by Rule 3-14 of Regulation S-X (17 CFR 210.3-14) or Rule 8-06 of Regulation S-X (17 CFR 210.8-06) for smaller reporting companies.

(4) Financial statements required by this item may be filed with the initial report, or by amendment not later than 71 calendar days after the date that the initial report on Form 8-K must be filed. If the financial statements are not included in the initial report, the registrant should so indicate in the Form 8-K report and state when the required financial statements will be filed. The registrant may, at its option, include unaudited financial statements in the initial report on Form 8-K.

(b) Pro forma financial information.

(1) For any transaction required to be described in answer to Item 2.01 of this form, furnish any pro forma financial information that would be required pursuant to Article 11 of Regulation S-X (17 CFR 210) or Rule 8-05 of Regulation S-X (17 CFR 210.8-05) for smaller reporting companies.

(2) The provisions of paragraph (a)(4) of this Item 9.01 shall also apply to pro forma financial information relative to the acquired business.

(c) Shell company transactions. The provisions of paragraph (a)(4) and (b)(2) of this Item shall not apply to the financial statements or pro forma financial information required to be filed under this Item with regard to any transaction required to be described in answer to Item 2.01 of this Form by a registrant that was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before that transaction. Accordingly, with regard to any transaction required to be described in answer to Item 2.01 of this Form by a registrant that was a shell company, other than a business combination related shell company, immediately before that transaction, the financial statements and pro forma financial information required by this Item must be filed in the initial report. Notwithstanding General Instruction B.3. to Form 8-K, if any financial statement or any financial information required to be filed in the initial report by this Item 9.01(c) is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in the initial report.

(d) Exhibits. The exhibits shall be deemed to be filed or furnished, depending on the relevant item requiring such exhibit, in accordance with the provisions of Item 601 of Regulation S-K (17 CFR 229.601)and Instruction B.2 to this form.

Instruction.

During the period after a registrant has reported a business combination pursuant to Item 2.01 of this form, until the date on which the financial statements specified by this Item 9.01 must be filed, the registrant will be deemed current for purposes of its reporting obligations under Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)). With respect to filings under the Securities Act, however, registration statements will not be declared effective and post-effective amendments to registrations statements will not be declared effective unless financial statements meeting the requirements of Rule 3-05 of Regulation S-X (17 CFR 210.3-05) are provided. In addition, offerings should not be made pursuant to effective registration statements, or pursuant to Rules 505 and 506 of Regulation D (17 CFR 230.505 and 230.506) where any purchasers are not accredited investors under Rule 501(a) of that Regulation, until the audited financial statements required by Rule 3-05 of Regulation S-X (17 CFR 210.3-05) are filed; provided, however, that the following offerings or sales of securities may proceed notwithstanding that financial statements of the acquired business have not been filed:

(a) offerings or sales of securities upon the conversion of outstanding convertible securities or upon the exercise of outstanding warrants or rights;

(b) dividend or interest reinvestment plans;

(c) employee benefit plans;

(d) transactions involving secondary offerings; or

(e) sales of securities pursuant to Rule 144 (17 CFR 230.144).

**SIGNATURES**

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

_____

(Registrant)

Date _____

_____

(Signature)*

*Print name and title of the signing officer under his signature.

| INDIVIDUAL NAME: | INDIVIDUAL CRD #: |
|---|---|
| FIRM NAME: | FIRM CRD #: |

## 14. DISCLOSURE QUESTIONS

IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS 'YES', COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON APPROPRIATE DRP(S)

REFER TO THE EXPLANATION OF TERMS SECTION OF FORM U4 INSTRUCTIONS FOR EXPLANATIONS OF ITALICIZED TERMS.

| | | YES | NO |
|---|---|---|---|
| | **Criminal Disclosure** | | |
| 14A. | (1) **Have you ever:** | | |
| | (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any *felony*? | O | O |
| | (b) been *charged* with any *felony*? | O | O |
| | (2) **Based upon activities that occurred while you exercised *control* over it, has an organization ever:** | | |
| | (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to any *felony*? | O | O |
| | (b) been *charged* with any *felony*? | O | O |
| 14B. | (1) **Have you ever:** | | |
| | (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a *misdemeanor involving*: investments or an *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses? | O | O |
| | (b) been *charged* with a *misdemeanor* specified in 14B(1)(a)? | O | O |
| | (2) **Based upon activities that occurred while you exercised *control* over it, has an organization ever:** | | |
| | (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to a *misdemeanor* specified in 14B(1)(a)? | O | O |
| | (b) been *charged* with a *misdemeanor* specified in 14B(1)(a)? | O | O |
| | **Regulatory Action Disclosure** | YES | NO |
| 14C. | **Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:** | | |
| | (1) *found* you to have made a false statement or omission? | O | O |
| | (2) *found* you to have been *involved* in a violation of its regulations or statutes? | O | O |
| | (3) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted? | O | O |
| | (4) entered an *order* against you in connection with *investment-related* activity? | O | O |
| | (5) imposed a civil money penalty on you, or *ordered* you to cease and desist from any activity? | O | O |
| | (6) *found* you to have willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board, or *found* you to have been unable to comply with any provision of such Act, rule or regulation? | O | O |
| | (7) *found* you to have willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board? | O | O |
| | (8) *found* you to have failed reasonably to supervise another person subject to your supervision, with a view to preventing the violation of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board? | O | O |
| 14D. | (1) **Has any other Federal regulatory agency or any state regulatory agency or *foreign financial regulatory authority* ever:** | | |
| | (a) *found* you to have made a false statement or omission or been dishonest, unfair or unethical? | O | O |
| | (b) *found* you to have been *involved* in a violation of *investment-related* regulation(s) or statute(s)? | O | O |
| | (c) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted? | O | O |
| | (d) entered an *order* against you in connection with an *investment-related* activity? | O | O |
| | (e) denied, suspended, or revoked your registration or license or otherwise, by *order*, prevented you from associating with an *investment-related* business or restricted your activities? | O | O |

| INDIVIDUAL NAME: | INDIVIDUAL CRD #: |
|---|---|
| FIRM NAME: | FIRM CRD #: |

## 14. DISCLOSURE QUESTIONS (CONTINUED)

| | | YES | NO |
|---|---|---|---|
| | (2) **Have you been subject to any *final order* of a state securities commission (or any agency or office performing like functions), state authority that supervises or examines banks, savings associations, or credit unions, state insurance commission (or any agency or office performing like functions), an appropriate *federal banking agency*, or the National Credit Union Administration, that:** | | |
| | (a) bars you from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or | O | O |
| | (b) constitutes a *final order* based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct? | O | O |
| 14E. | **Has any *self-regulatory organization* ever:** | | |
| | (1) *found* you to have made a false statement or omission? | O | O |
| | (2) *found* you to have been *involved* in a violation of its rules (other than a violation designated as a "*minor rule violation*" under a plan approved by the U.S. Securities and Exchange Commission)? | O | O |
| | (3) *found* you to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted? | O | O |
| | (4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities? | O | O |
| | (5) *found* you to have willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board, or *found* you to have been unable to comply with any provision of such Act, rule or regulation? | O | O |
| | (6) *found* you to have willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board? | O | O |
| | (7) *found* you to have failed reasonably to supervise another person subject to your supervision, with a view to preventing the violation of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board? | O | O |
| 14F. | **Have you ever had an authorization to act as an attorney, accountant or federal contractor that was revoked or suspended?** | O | O |
| 14G. | **Have you been notified, in writing, that you are now the subject of any:** | | |
| | (1) regulatory complaint or *proceeding* that could result in a "yes" answer to any part of 14C, D or E? (*If "yes", complete the Regulatory Action Disclosure Reporting Page.)* | O | O |
| | (2) *investigation* that could result in a "yes" answer to any part of 14A, B, C, D or E? (If "*yes*", complete the *Investigation* Disclosure Reporting Page.) | O | O |
| | **Civil Judicial Disclosure** | YES | NO |
| 14H. | (1) **Has any domestic or foreign court ever:** | | |
| | (a) *enjoined* you in connection with any *investment-related* activity? | O | O |
| | (b) *found* that you were *involved* in a violation of *any investment-related* statute(s) or regulation(s)? | O | O |
| | (c) dismissed, pursuant to a settlement agreement, *an investment-related* civil action brought against you by a state or *foreign financial regulatory authority*? | O | O |
| | (2) **Are you named in any pending *investment-related* civil action that could result in a "yes" answer to any part of 14H(1)?** | O | O |
| | **Customer Complaint/Arbitration/Civil Litigation Disclosure** | YES | NO |
| 14I. | (1) **Have you ever been named as a respondent/defendant in an *investment-related*, consumer-initiated arbitration or civil litigation which alleged that you were *involved* in one or more *sales practice violations* and which:** | | |
| | (a) is still pending, or; | O | O |
| | (b) resulted in an arbitration award or civil judgment against you, regardless of amount, or; | O | O |
| | (c) was settled, prior to 05/18/2009, for an amount of $10,000 or more, or; | O | O |
| | (d) was settled, on or after 05/18/2009, for an amount of $15,000 or more? | O | O |

| INDIVIDUAL NAME: | INDIVIDUAL CRD #: |
|---|---|
| FIRM NAME: | FIRM CRD #: |

## 14. DISCLOSURE QUESTIONS (CONTINUED)

| | YES | NO |
|---|---|---|
| **(2) Have you ever been the subject of an *investment-related*, consumer-initiated (written or oral) complaint, which alleged that you were *involved* in one or more *sales practice violations*, and which:** | | |
| (a) was settled, prior to 05/18/2009, for an amount of $10,000 or more, or; | O | O |
| (b) was settled, on or after 05/18/2009, for an amount of $15,000 or more? | O | O |
| **(3) Within the past twenty four (24) months, have you been the subject of an *investment-related*, consumer-initiated, written complaint, not otherwise reported under question 14I(2) above, which:** | | |
| (a) alleged that you were *involved* in one or more *sales practice violations* and contained a claim for compensatory damages of $5,000 or more (if no damage amount is alleged, the complaint must be reported unless the *firm* has made a good faith determination that the damages from the alleged conduct would be less than $5,000), or; | O | O |
| (b) alleged that you were *involved* in forgery, theft, misappropriation or conversion of funds or securities? | O | O |
| **Answer questions (4) and (5) below only for arbitration claims or civil litigation filed on or after 05/18/2009.** | | |
| **(4) Have you ever been the subject of an *investment-related*, consumer-initiated arbitration claim or civil litigation which alleged that you were *involved* in one or more *sales practice violations*, and which:** | | |
| (a) was settled for an amount of $15,000 or more, or; | O | O |
| (b) resulted in an arbitration award or civil judgment against any named respondent(s)/defendant(s), regardless of amount? | O | O |
| **(5) Within the past twenty four (24) months, have you been the subject of an *investment-related*, consumer-initiated arbitration claim or civil litigation not otherwise reported under question 14I(4) above, which:** | | |
| (a) alleged that you were *involved* in one or more *sales practice violations* and contained a claim for compensatory damages of $5,000 or more (if no damage amount is alleged, the arbitration claim or civil litigation must be reported unless the *firm* has made a good faith determination that the damages from the alleged conduct would be less than $5,000), or; | O | O |
| (b) alleged that you were *involved* in forgery, theft, misappropriation or conversion of funds or securities? | O | O |
| **Termination Disclosure** | **YES** | **NO** |
| **14J. Have you ever voluntarily *resigned*, been discharged or permitted to *resign* after allegations were made that accused you of:** | | |
| (1) violating *investment-related* statutes, regulations, rules, or industry standards of conduct? | O | O |
| (2) fraud or the wrongful taking of property? | O | O |
| (3) failure to supervise in connection with *investment-related* statutes, regulations, rules or industry standards of conduct? | O | O |
| **Financial Disclosure** | **YES** | **NO** |
| **14K. Within the past 10 years:** | | |
| (1) have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? | O | O |
| (2) based upon events that occurred while you exercised *control* over it, has an organization made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? | O | O |
| (3) based upon events that occurred while you exercised *control* over it, has a broker or dealer been the subject of an involuntary bankruptcy petition, or had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act? | O | O |
| **14L. Has a bonding company ever denied, paid out on, or revoked a bond for you?** | O | O |
| **14M. Do you have any unsatisfied judgments or liens against you?** | O | O |

| INDIVIDUAL NAME: | INDIVIDUAL CRD #: |
|---|---|
| FIRM NAME: | FIRM CRD #: |

## 15. SIGNATURES

Please Read Carefully. All signatures required on this Form U4 filing must be made in this section.

A "signature" includes a manual signature or an electronically transmitted equivalent. For purposes of an electronic form filing, a signature is effected by typing a name in the designated signature field. By typing a name in this field, the signatory acknowledges and represents that the entry constitutes in every way, use, or aspect, his or her legally binding signature.

15A. INDIVIDUAL/APPLICANT'S ACKNOWLEDGMENT AND CONSENT This section must be completed on all initial or Temporary Registration form filings.
15B. FIRM/APPROPRIATE SIGNATORY REPRESENTATIONS This section must be completed on all initial or Temporary Registration form filings.
15C. TEMPORARY REGISTRATION ACKNOWLEDGMENT This section must be completed on Temporary Registration form filings to be able to receive Temporary Registration.
15D. INDIVIDUAL/APPLICANT'S AMENDMENT ACKNOWLEDGMENT AND CONSENT This section must be completed on any amendment filing that amends any information in Section 14 (Disclosure Questions) or any Disclosure Reporting Page (DRP).
15E. FIRM/APPROPRIATE SIGNATORY AMENDMENT REPRESENTATIONS This section must be completed on all amendment form filings.
15F. FIRM/APPROPRIATE SIGNATORY CONCURRENCE This section must be completed to concur with a U4 filing made by another *firm* (IA/BD) on behalf of an individual that is also registered with that other *firm* (IA/BD).

## 15A. INDIVIDUAL/APPLICANT'S ACKNOWLEDGEMENT AND CONSENT

1. I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.

2. I apply for registration with the *jurisdictions* and *SROs* indicated in Section 4 (SRO REGISTRATION) and Section 5 (JURISDICTION REGISTRATION) as may be amended from time to time and, in consideration of the *jurisdictions* and *SROs* receiving and considering my application, I submit to the authority of the *jurisdictions* and *SROs* and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the *jurisdictions* and *SROs* as they are or may be adopted, or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the *jurisdictions* and *SROs*, subject to right of appeal or review as provided by law.

3. I agree that neither the *jurisdictions* or *SROs* nor any person acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of the *jurisdictions* and *SROs*.

4. I authorize the *jurisdictions*, *SROs*, and the *designated entity* to give any information they may have concerning me to any employer or prospective employer, any federal, state or municipal agency, or any other *SRO* and I release the *jurisdictions*, *SROs*, and the *designated entity*, and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.

5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my *firm*, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the *SROs* indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent *jurisdiction*.

6. For the purpose of complying with the laws relating to the offer or sale of securities or commodities or investment advisory activities, I irrevocably appoint the administrator of each *jurisdiction* indicated in Section 5 (JURISDICTION REGISTRATION) as may be amended from time to time, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process, pleading, subpoena or other document in any action or *proceeding* against me arising out of or in connection with the offer or sale of securities or commodities, or investment advisory activities or out of the violation or alleged violation of the laws of such *jurisdictions*. I consent that any such action or *proceeding* against me may be commenced in any court of competent *jurisdiction* and proper venue by service of process upon the appointee as if I were a resident of, and had been lawfully served with process in the *jurisdiction*. I request that a copy of any notice, process, pleading, subpoena or other document served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.

7. I consent that the service of any process, pleading, subpoena, or other document in any *investigation* or administrative *proceeding* conducted by the SEC, CFTC or a *jurisdiction* or in any civil action in which the SEC, CFTC or a *jurisdiction* are plaintiffs, or the notice of any *investigation* or *proceeding* by any *SRO* against the *applicant*, may be made by personal service or by regular, registered or certified mail or confirmed telegram to me at my most recent business or home address as reflected in this Form U4, or any amendment thereto, by leaving such documents or notice at such address, or by any other legally permissible means. I further stipulate and agree that any civil action or administrative *proceeding* instituted by the SEC, CFTC or a *jurisdiction* may be commenced by the service of process as described herein, and that service of an administrative subpoena shall be effected by such service, and that service as aforesaid shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made.

8. I authorize all my employers and any other person to furnish to any *jurisdiction*, *SRO*, *designated entity*, employer, prospective employer, or any agent acting on its behalf, any information they have, including without limitation my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U5). I recognize that I may be the subject of an investigative consumer report and waive any requirement of notification with respect to any investigative consumer report ordered by any *jurisdiction*, *SRO*, *designated entity*, employer, or prospective employer. I understand that I have the right to request complete and accurate disclosure by the *jurisdiction*, *SRO*, *designated entity*, employer or prospective employer of the nature and scope of the requested investigative consumer report.

9. I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Section 1 (GENERAL INFORMATION) or Section 6 (REGISTRATION REQUESTS WITH AFFILIATED FIRMS) of this form. I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.

10. I authorize any employer or prospective employer to file electronically on my behalf any information required in this form or any amendment thereto; I certify that I have reviewed and approved the information to be submitted to any *jurisdiction* or *SRO* on this Form U4 Application; I agree that I will review and approve all disclosure information that will be filed electronically on my behalf; I further agree to waive any objection to the admissibility of the electronically filed records in any criminal, civil, or administrative *proceeding*.

*Applicant* or *applicant's* agent has typed *applicant's* name under this section to attest to the completeness and accuracy of this record. The *applicant* recognizes that this typed name constitutes, in every way, use or aspect, his or her legally binding signature.

Date (MM/DD/YYYY) _____

_____
Signature of *Applicant*

_____
Printed Name

| INDIVIDUAL NAME: | INDIVIDUAL CRD #: |
|---|---|
| FIRM NAME: | FIRM CRD #: |

## 15B. FIRM/APPROPRIATE SIGNATORY REPRESENTATIONS

**THE FIRM MUST COMPLETE THE FOLLOWING:**

To the best of my knowledge and belief, the *applicant* is currently bonded where required, and, at the time of approval, will be familiar with the statutes, constitution(s), rules and by-laws of the agency, *jurisdiction* or *SRO* with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, *jurisdiction* or *SRO* which hereby is requested, I will not employ the *applicant* in the capacity stated herein without first receiving the approval of any authority that may be required by law.

This *firm* has communicated with all of the *applicant's* previous employers for the past three years and has documentation on file with the names of the persons contacted and the date of contact. In addition, I have taken appropriate steps to verify the accuracy and completeness of the information contained in and with this application.

I have provided the *applicant* an opportunity to review the information contained herein and the *applicant* has approved this information and signed the Form U4.

Date (MM/DD/YYYY)

Printed Name

Signature of *Appropriate Signatory*

## 15C. TEMPORARY REGISTRATION ACKNOWLEDGEMENT

If an *applicant* has been registered in a *jurisdiction* or *self regulatory organization (SRO)* in the 30 days prior to the date an application for registration is filed with the Central Registration Depository or Investment Adviser Registration Depository, he or she may qualify for a Temporary Registration to conduct securities business in that *jurisdiction* or *SRO* if this acknowledgment is executed and filed with the Form U4 at the *applicant's firm*.

This acknowledgment must be signed only if the *applicant* intends to apply for a Temporary Registration while the application for registration is under review.

I request a Temporary Registration in each *jurisdiction* and/or *SRO* requested on this Form U4, while my registration with the *jurisdiction(s)* and/or *SRO(s)* requested is under review;

I am requesting a Temporary Registration with the *firm* filing on my behalf for the *jurisdiction(s)* and/or *SRO(s)* noted in Section 4 (SRO REGISTRATION) and/or Section 5 (JURISDICTION REGISTRATION) of this Form U4;

I understand that I may request a Temporary Registration only in those *jurisdiction(s)* and/or *SRO(s)* in which I have been registered with my prior *firm* within the previous 30 days;

I understand that I may not engage in any securities activities requiring registration in a *jurisdiction* and/or *SRO* until I have received notice from the CRD or IARD that I have been granted a Temporary Registration in that *jurisdiction* and/or *SRO*;

I agree that until the Temporary Registration has been replaced by a registration, any *jurisdiction* and/or *SRO* in which I have applied for registration may withdraw the Temporary Registration;

If a *jurisdiction* or *SRO* withdraws my Temporary Registration, my application will then be held pending in that *jurisdiction* and/or *SRO* until its review is complete and the registration is granted or denied, or the application is withdrawn;

I understand and agree that, in the event my Temporary Registration is withdrawn by a *jurisdiction* and/or *SRO*, I must immediately cease any securities activities requiring a registration in that *jurisdiction* and/or *SRO* until it grants my registration;

I understand that by executing this Acknowledgment I am agreeing not to challenge the withdrawal of a Temporary Registration; however, I do not waive any right I may have in any *jurisdiction* and/or *SRO* with respect to any decision by that *jurisdiction* and/or *SRO* to deny my application for registration.

Date (MM/DD/YYYY)

Signature of *Applicant*

Printed Name

## 15D. AMENDMENT INDIVIDUAL/APPLICANT'S ACKNOWLEDGEMENT AND CONSENT

Date (MM/DD/YYYY)

Signature of *Applicant*

Printed Name

# *Faculty Biography: Larry Polk*

**Partner | Sutherland Asbill & Brennan | Atlanta, GA**

404.853.8225 | larry.polk@sutherland.com
http://www.sutherland.com/People/S-Lawrence-Polk

Larry Polk represents broker-dealers, banks and accountants in securities litigation, securities arbitration, professional liability litigation, commercial litigation and U.S. Securities and Exchange Commission (SEC) enforcement actions. He is a sought-after speaker, presenting at numerous seminars on securities and sales practice issues including issues arising from the structured finance and subprime markets.

In connection with his securities litigation practice, Larry represents officers, registered representatives, investment advisors, banks and broker-dealers in a wide variety of proceedings in state and federal courts and before self-regulatory organizations such as Financial Industry Regulatory Authority (FINRA). He defends claims arising from transactions in a number of investment vehicles including stocks, bonds, mutual funds, options, variable products, foreign currencies, and structured finance products.

Larry defends banks in actions arising from the sale of debt and equity derivative products. He defends class actions filed against banks, accounting firms, underwriters and corporate officers. Over the past 30 years, Larry has tried numerous cases through award or verdict, and he has defended individuals and firms in dozens of FINRA arbitrations throughout the country involving sales practice issues. His experience in regulatory matters includes representing broker-dealers and individuals in enforcement proceedings, advising clients and performing special compliance audits.

**Practices / Industries**

- Litigation
- Accountants' & Attorneys' Liability
- Banking & Financial Institutions
- Broker-Dealer
- Securities Enforcement & Litigation
- Class Action Defense
- Alternative Dispute Resolution
- Financial Services
- Insurance
- Complex Business Litigation

**Awards and Rankings**

- Selected for inclusion in Georgia Super Lawyers® (2010-2014)
- Named to The Best Lawyers in America in the area of securities litigation (2013-2014)

**Education**

- J.D., Emory University School of Law, Order of Barristers, National Moot Court Team
- B.A., University of Colorado at Boulder