

Beyond the Basics

Skadden

Privilege Issues to Consider in Internal Investigations

November 6, 2020

Presented by Mayra Suárez and Devin Benavidez

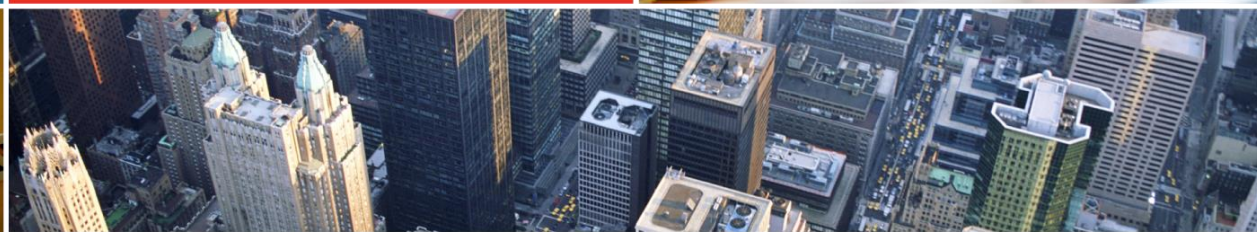
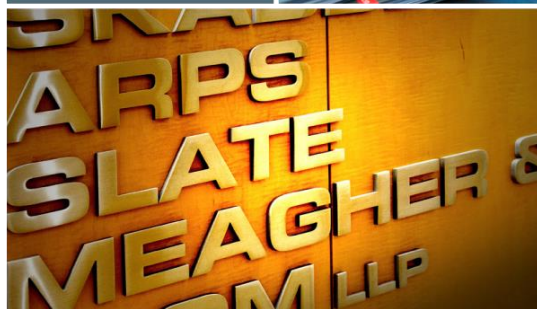


1,700
attorneys

22
offices



50+
practices



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Palo Alto / Paris / São Paulo / Seoul / Shanghai / Singapore / Tokyo / Toronto / Washington, D.C. / Wilmington

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- 3 **Structure of an Internal Investigation**
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1 Overview of the Privilege

Attorney-client privilege applies to:

(1) **Communications** between company employees and in-house or outside counsel that (2) were intended to be and were, in fact, kept **confidential** and (3) were made for the purpose of obtaining or providing **legal advice**

The privilege also covers confidential communications **between and among employees** discussing, relaying, or responding to legal advice

Work product doctrine applies to:

Documents that reflect the mental impressions, opinions, thoughts, analysis, or work of any attorney or any person working at the direction of an attorney

The documents must have been prepared for or “**in anticipation of litigation**”

A party may **waive** privilege or work product protection by voluntarily disclosing otherwise protected information to a third party or injecting protected material into a litigation

Joint Defense / Common Interest Doctrine:

Extends the attorney-client privilege to communications with third parties if the organization and the third party **share a common legal interest** and the communications are **made in furtherance of that shared interest**.

2 When is the Privilege Triggered?



Jane Inhouse
(General Counsel)



**Calisota
University**



Whistleblower Complaint



Jane Inhouse
(General Counsel)

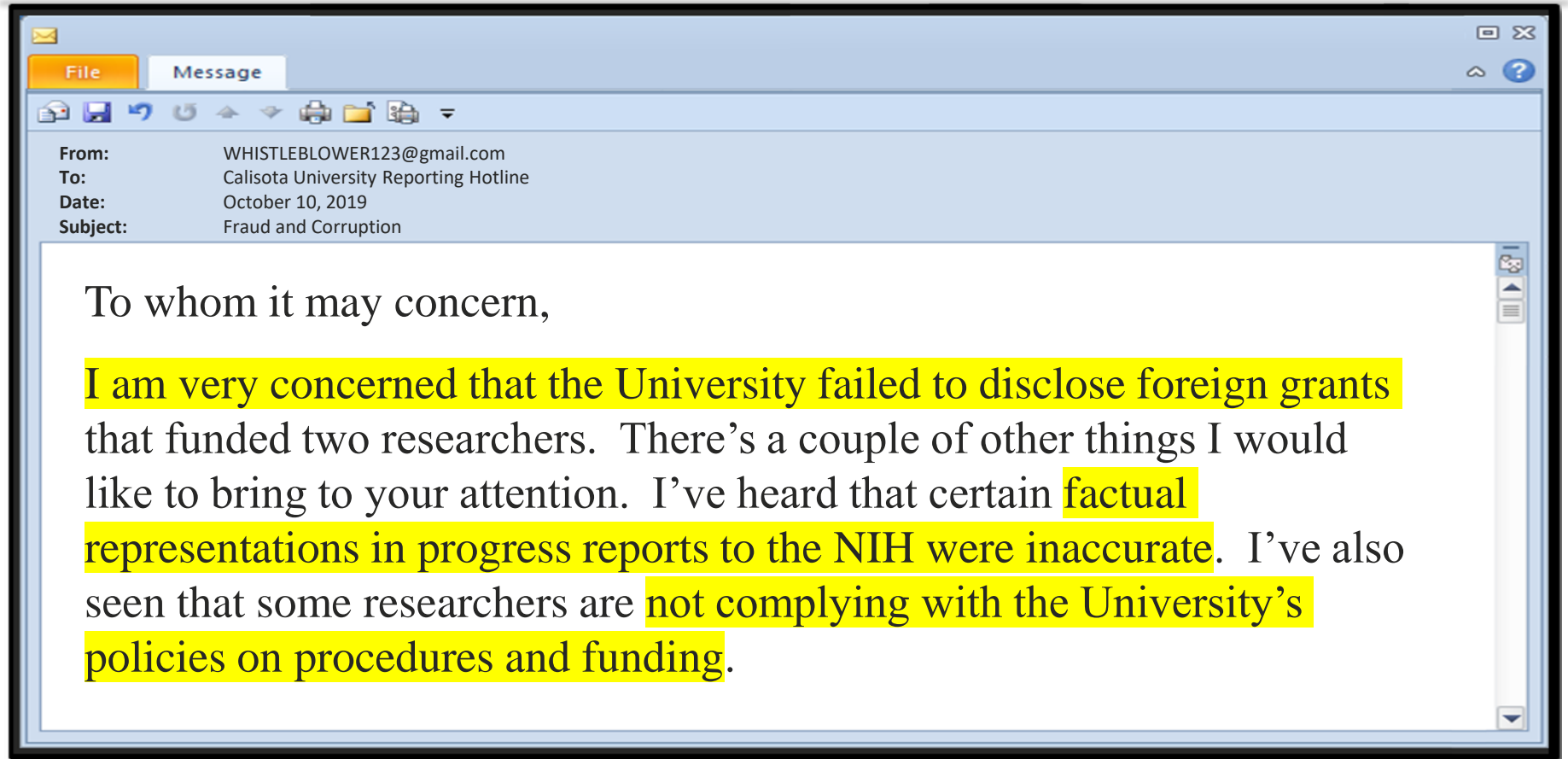


Whistleblower



**Calisota
University**





Initiating the Investigation

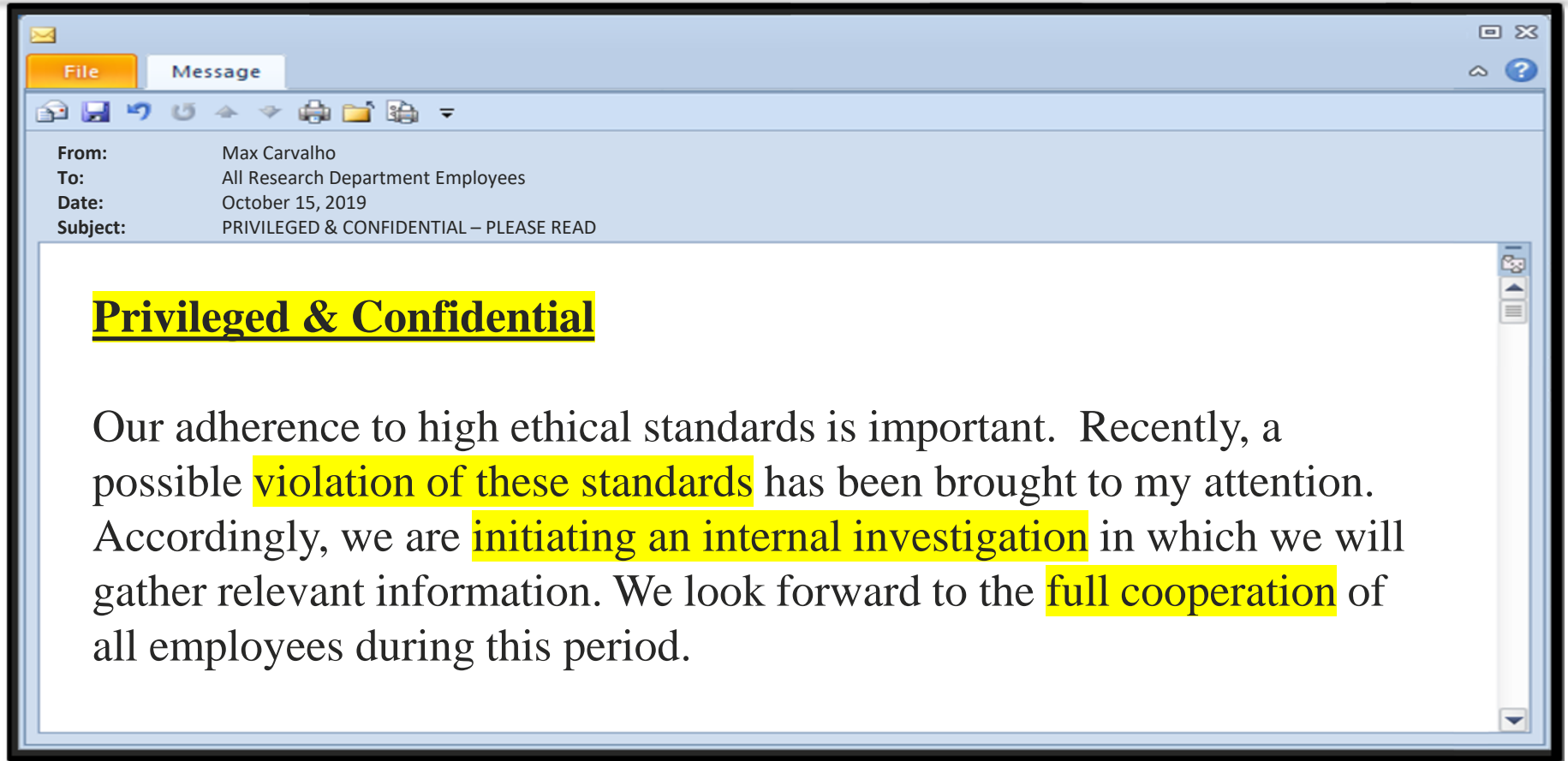


Jane Inhouse
(General Counsel)



Max Carvalho
(Medical Research Director)





Is Max's email protected by the attorney-client privilege?

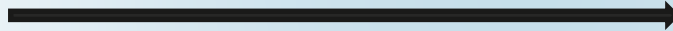
Does Max forwarding the email to Jane render it privileged?

What if Max had copied Jane on the email?
Would that have made the email privileged?

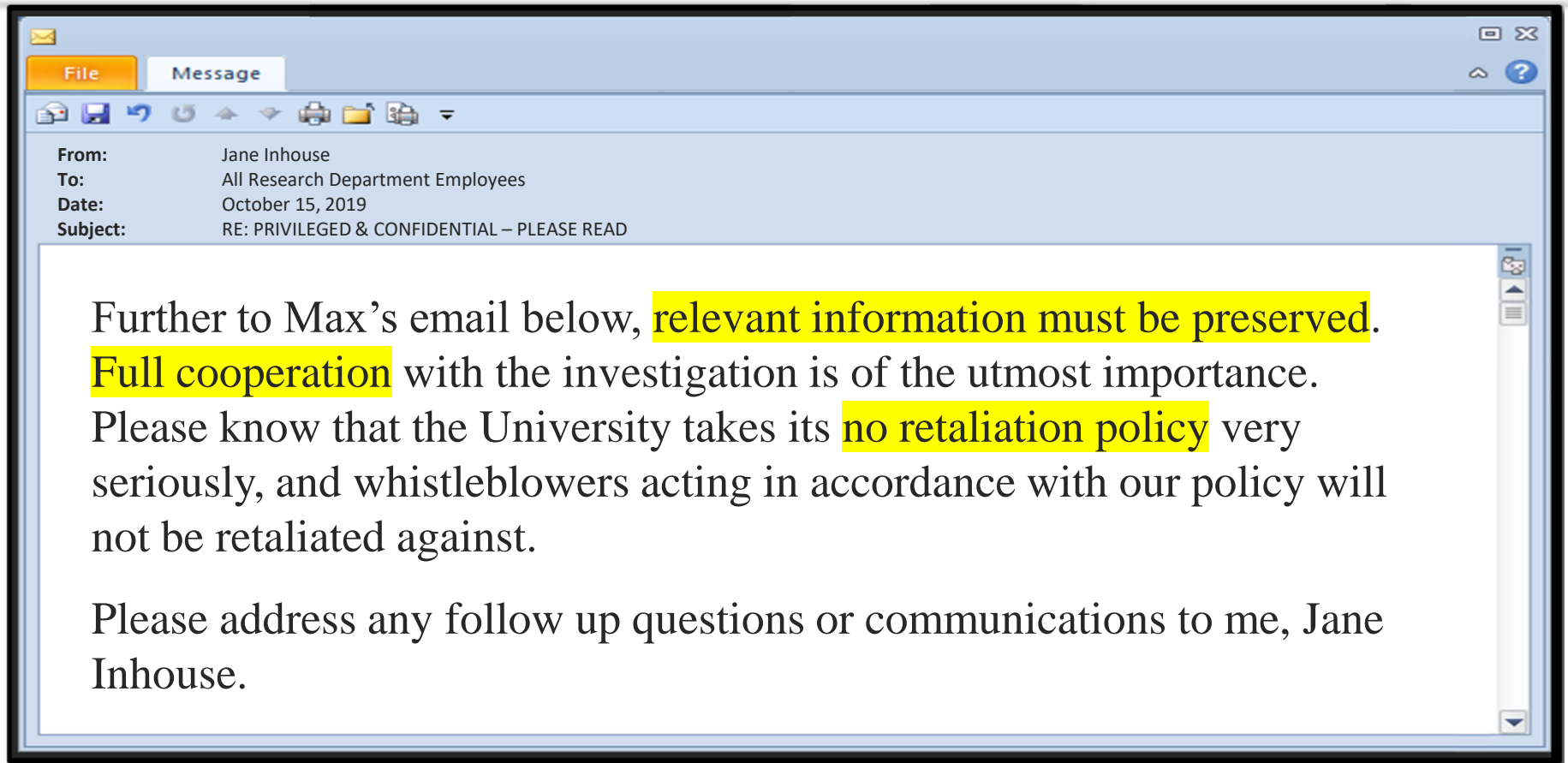
Initiating the Investigation



Jane Inhouse
(General Counsel)

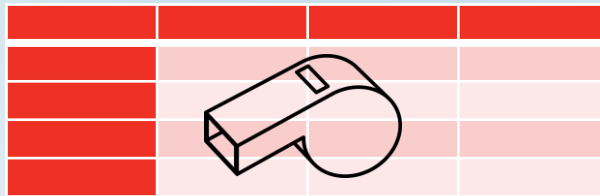


**Employees in the
Research
Department**





Senior Management



Whistleblower Log

Is the entry on Jane's log privileged?

Should Jane add her impressions of the allegation in an effort to render the log privileged?

Does the complaint sufficiently raise the possibility of litigation such that the attorney-work product privilege is triggered?

Triggering work product protections:

- The possibility of legal liability is **not enough** to trigger work product protections
- Courts generally require that litigation be “**foreseeable**”
- Documents that would have been prepared in **substantially the same manner**, in the ordinary course of business, absent the prospect of litigation are not protected by the work product doctrine

Factors relevant to whether the work product privilege is triggered:

- The University’s policy requires that all whistleblower complaints are logged and investigated in the **ordinary course of business**
- Jane is supervising the investigation, but will use internal resources from the Internal Audit Department as well as from the Legal Department
- No litigation has been filed; no external regulator or other entity has initiated and investigation

Is the “foreseeable litigation” standard for work product production related to the level of anticipation required to trigger obligations to preserve records?

3 Structure of an Internal Investigation

Preliminary considerations:

- Should the investigation be handled by the **Compliance or Legal** Department?
- What is the **purpose and scope** of the investigation?
- How will the University **use the results**?



Jane Inhouse
(General Counsel)

It's settled. An employee from Internal Audit will conduct the audit of the Research Department. However, Legal – and myself, in particular – will direct the investigation.



Jane Inhouse
(General Counsel)

Mary, I am designating you to compile background information and conduct witness interviews.

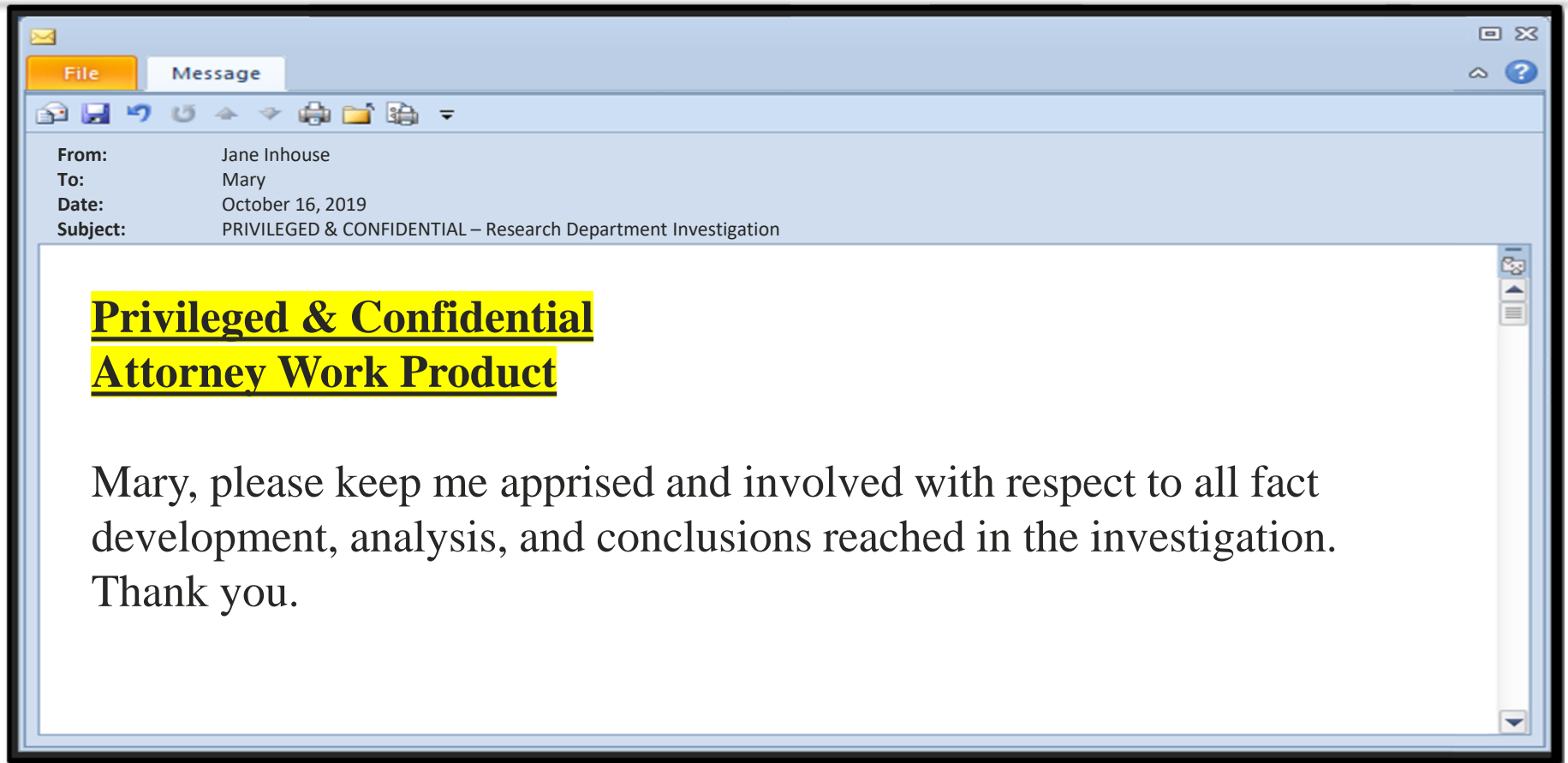


Mary
(Internal Audit)

Is the work that Mary, as a member of Internal Audit, performs covered by the attorney-client privilege?

For an internal investigation to be considered privileged:

- The investigation must be conducted for the **purpose of providing legal advice**
- Attorneys must have an active role in **directing the investigation**
- **Non-lawyers** assisting with the investigation should act as **agents of the attorneys**, under the direction and control of the attorneys, and for the purpose of assisting the attorneys in providing legal advice to the company



Is there any particular guidance that Jane should give to Mary?



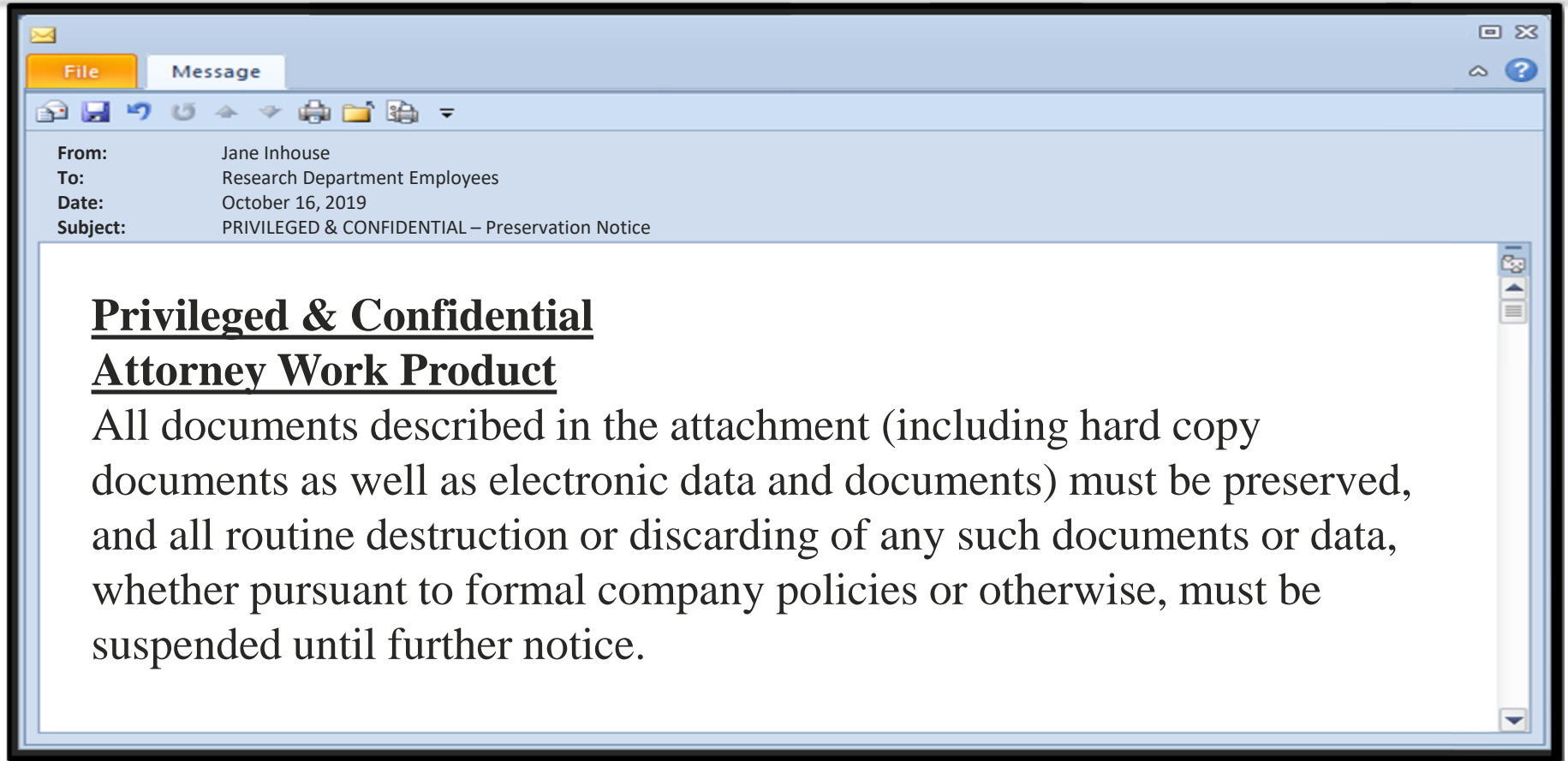
Jane Inhouse
(General Counsel)

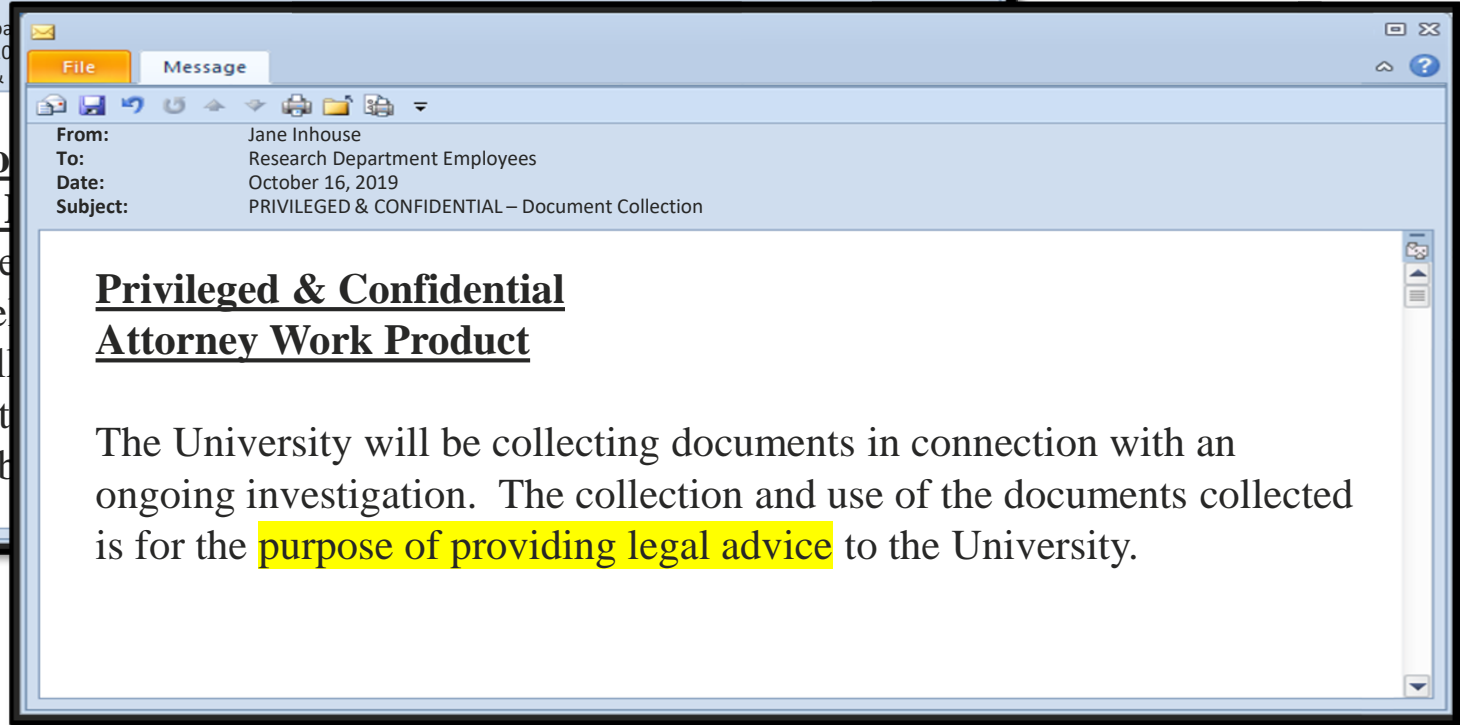
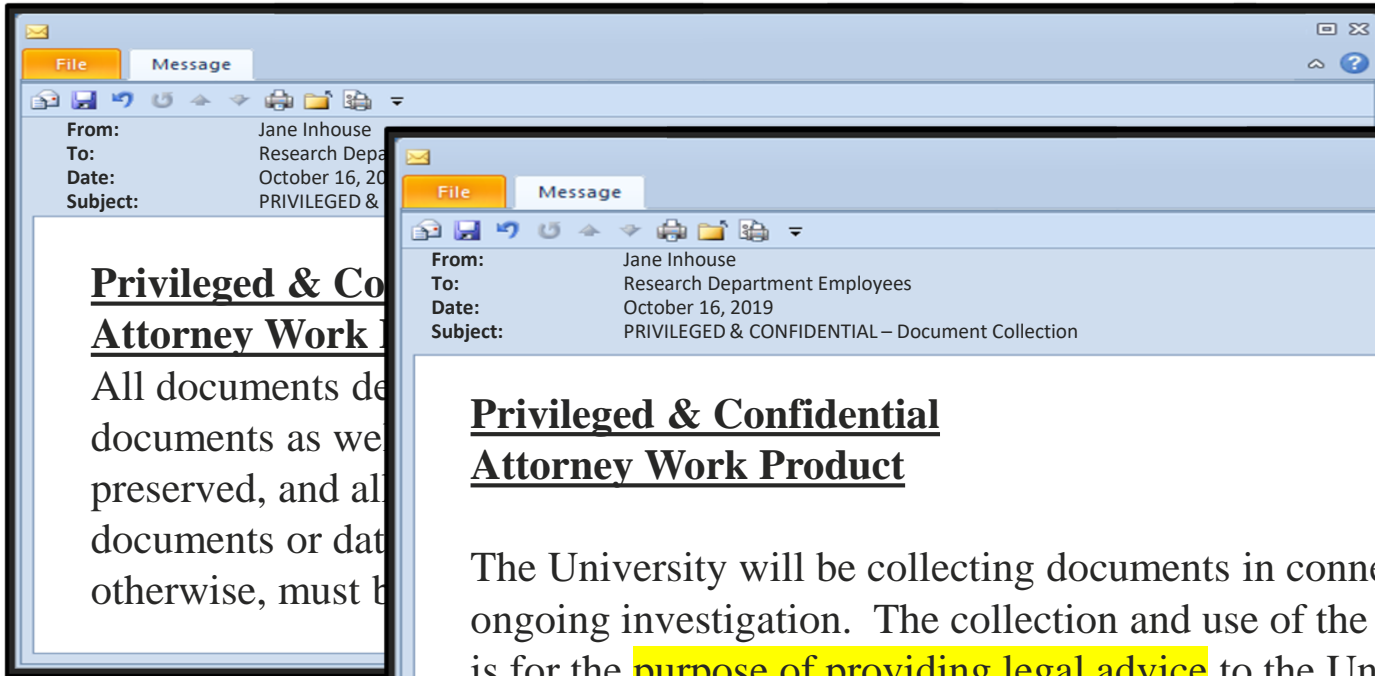
Mary, at this stage, please limit your interviews to gathering factual information. Make sure you document all facts learned in these discussions and do not characterize the information you receive.



Mary
(Internal Audit)

4 Document Collections and Witness Interviews







Jane Inhouse
(General Counsel)



Whistleblower



**Calisota
University**





Jane Inhouse
(General Counsel)

Mary, I think it's a great idea for you to meet with the whistleblower here at the University.



Mary
(Internal Audit)



Paralegal



Mary
(Internal Audit)



Whistleblower

Does the presence of the paralegal waive the attorney-client privilege?

- Agents, subordinates, and contractors working **under the direct supervision and control** of an attorney are included within the scope of the attorney-client privilege
- Communications with those working under the direct supervision and control of an attorney **do not waive the privilege**
- A second person **should always be present** during witness interviews to document what is said and serve as a witness if there is ever a dispute as to what was said during the interview

What warning should Jane give at the outset of the interview?

- Based on *Upjohn Co. v. United States*, 449 U.S. 383 (1981)
- Introduction should:
 - Discuss the purpose of the interview, including that the investigation is being conducted in order to provide legal advice to the company
 - Advise witness that counsel represents the company and not the employee
 - Indicate that communications between counsel and the employee are privileged and confidential, but the company can waive the privilege
 - Ensure that the interviewee understands the ground rules
- Should be reflected in the paralegal's notes
- Always plain language, avoid legalese



ABA Model Rule 1.13(f)

- Governs instances where a lawyer has an organization as a client
- Section (f) requires lawyers to explain the identity of the client to the organization's employees and other constituents "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."

ABA Model Rule 4.3

- Governs interactions with unrepresented persons
- Requires lawyers dealing with unrepresented persons "not [to] state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

If the witness asks if she needs to retain her own counsel:

- University counsel should consider informing the witness that she is entitled to a lawyer but that they cannot advise the witness on whether to do so, as they do not represent her
- It may be in the University's interest to recommend good defense counsel

Ethical obligations to consider:

- **ABA Model Rule 4.3** governs instances where a lawyer is dealing with an interviewee that is not represented by counsel
- **ABA Model Rule 4.2** requires that a lawyer not communicate with a represented person about the subject of the representation if the lawyer knows the person is represented by another lawyer, unless the other lawyer consents to the contact or the lawyer is authorized to do so by law or a court order



Jane Inhouse
(General Counsel)



Wait, what is the purpose of this interview? I'm confused.



**Employees in the
Research
Department**

What is privileged: the interview itself, or Jane's memorandum of the interview?

Can the University prohibit the whistleblower from disclosing information to others?

- The **University controls the privilege**, and may prohibit employees from disclosing privileged information to others
- Unauthorized disclosures will not waive the privilege
- The privilege covers communications with **former employees** so long as they relate to the former employees' period of employment
- Waiver is a potential issue if a former employee retains privileged corporate documents and the University does not take **reasonable steps** to protect against disclosure

5 Reporting Investigation Findings



Jane Inhouse
(General Counsel)



- The number of whistleblower complaints
- The number of complaints investigated
- A short description of ongoing investigations



Jane Inhouse
(General Counsel)



- Received a complaint regarding the Research Department
- Investigated by Internal Audit, at the direction of the Legal Department
- Uncovered federal grant issues that might violate the False Claims Act
- Seeking advice from outside counsel



Is Jane's update privileged?

- Generally privileged if the “**predominant**” or “**primary**” purpose of the communications are to seek or provide legal advice
- Where **non-legal elements** are contained in predominantly legal communications, the communication can still be privileged
- Where the communication includes **both legal and non-legal advice**, the legal advice must be “**more than incidental**” to the business (or other) purpose of the communication

A communication involves legal advice if:

- Counsel is “applying law to a set of facts, reviewing client conduct based on the effect of laws or regulations, [or] advising the client about status or trends in the law.” See *Neuberger Berman Real Estate Income Fund, Inc.*, 230 F.R.D. at 412; or
- Counsel is applying “legal principles to specific facts in order to guide future conduct” or otherwise rendering the type of services that a legal education qualifies a lawyer to render. See *id.*



Jane Inhouse
(General Counsel)



OneOfFour LLP
(Auditor)

Is information shared with outside auditors considered privileged?

- Disclosure of privileged communications to **a third party** generally waives the attorney-client privilege
- Most courts hold that disclosure of documents to **outside auditors** waives the attorney-client privilege
- However, the **work product** privilege may survive

Merrill Lynch & Co. v. Allegheny Energy, Inc. (2004):

- Even though attorney-client privilege was waived, the reports in question were protected work product:
 - Reports used by auditor to assess company's internal controls and determine the investigation's impact on the company's financial statements;
 - Auditor was under an ethical and professional obligation to keep the reports confidential; and
 - Company and its auditor shared an interest in preventing, detecting, and rooting out corporate fraud

- Disclosure of privileged communications to **a third party** generally waives the attorney-client privilege
- Most courts hold that disclosure of documents to **outside auditors** waives the attorney-client privilege
- However, the **work product** privilege may survive

SEC v. RPM International (2020):

- Work product protections for witness interview memoranda were waived where:
 - Company counsel relayed information learned during interviews to outside auditors;
 - The auditors memorialized this information in their own written notes; and
 - Company authorized the auditors to share those notes with the SEC

Would the communications be considered privileged if Jane decides to share the results with the government?

- Absent a non-waiver agreement with the government, the attorney-client privilege and work product protection are **likely to be waived**
- Even where there is a non-waiver agreement in place, there has been mixed reception by the courts
- Although several courts have rejected the **selective waiver doctrine**, others have upheld non-waiver agreements and precluded discovery under the selective waiver doctrine

SEC v. Vitesse Semiconductor Corp (2011):

- Work product protections for handwritten witness interview notes were waived where company counsel provided oral summaries to the SEC that went into “very detailed, witness-specific information”
- Waiver “would probably not apply” if the oral summaries “merely provided general impressions”

SEC v. Herrera (2017):

- Oral downloads of witness interview memoranda could constitute the “functional equivalent” of the actual notes and memos

6 Takeaways

- Establish clear roles for in-house counsel
- Use “Attorney-Client Privileged” or “Attorney Work Product” banners in communications intended to convey legal advice
- Be mindful of the types of communications that courts typically recognize to be legal advice
- To the extent possible, communicate about legal issues and/or provide legal advice in communications that are separate from those intended to convey business or compliance advice
- To the extent possible, be explicit about the type of advice being conveyed
- Where applicable, make clear that the purpose of the communication is to convey legal advice
- Where appropriate, copy outside counsel on the communication
- Where an investigation involves both compliance and legal issues, the Legal Department should participate in determining how the investigation will be handled and whether it involves legal issues



Mayra Suárez

Associate, Litigation / Government
Enforcement and White Collar Crime
Phone: +1 202 371 7364
Email: mayra.suarez@skadden.com

Mayra Suárez's litigation experience includes conducting internal investigations on behalf of U.S. and foreign corporations, audit committees and individuals in the U.S., Europe and Latin America. She also has defended clients in connection with allegations of unlawful antitrust practices and in investigations by the Department of Justice and the Securities and Exchange Commission related to the Foreign Corrupt Practice Act.



Devin Benavidez

Associate, Litigation
Phone: +1 202 371 7707
Email: devin.benavidez@skadden.com

Devin Benavidez is an associate in the litigation group of Skadden's Washington, D.C. office. Mr. Benavidez advises individuals and corporations in complex civil litigation and high-stakes government enforcement matters brought by the Department of Justice and Securities and Exchange Commission.