

# A CLOSER LOOK AT THE MANDATORY VICTIMS RESTITUTION ACT AND WHETHER THE COSTS OF A CORPORATION’S INDEPENDENT INTERNAL INVESTIGATION SHOULD BE INCLUDED IN A CRIMINAL DEFENDANT’S MANDATORY RESTITUTION ORDER

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## I. INTRODUCTION

The Mandatory Victims Restitution Act of 1996 (“MVRA”)<sup>1</sup> provides that a defendant convicted of an offense<sup>2</sup> must make restitution to the victim or the victim’s estate.<sup>3</sup> The Act requires the issuance of a restitution order when (1) the defendant is convicted of an offense enumerated within the statute; and

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\* J.D. Candidate, 2014, Shepard Broad Law Center of Nova Southeastern University. I would like to thank Professor Elena Marty-Nelson for her guidance, inspiration and direction while writing this article. I would also like to thank my parents, George and Maureen Nichols. Without their encouragement and support, I may not have been able to achieve my dreams of someday becoming a lawyer. Last, but certainly not least, I would like to thank my husband, Scott, and beautiful son, Sef, for their love and support every day. You make life meaningful.

1. 18 U.S.C. § 3663A (2012). The MVRA was enacted on April 24, 1996. *Id.*

2. The offenses are described in subsection (c) of the Mandatory Victims Restitution Act. 18 U.S.C. § 3663A(c). An offense is considered (A)(i) a crime of violence; (ii) an offense against property; (iii) tampering with consumer products as described in 18 U.S.C. § 1365; or (iv) theft of medical products as described in 18 U.S.C. § 670; and (B) any identifiable victim who has suffered a physical injury or pecuniary loss. *Id.* A crime of violence is defined as “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” *Id.* § 16. An offense against property under the Act includes “damages to or loss or destruction of property,” *Id.* § 3663A(b)(1), “any offense committed by fraud or deceit,” *Id.* § 3663A(c)(a)(A)(ii), as well as “(1) knowingly open[ing], lease[ing], rent[ing], us[ing], or maintain[ing] any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; [or] (2) manag[ing] or control[ing] any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent[ing], lease[ing], profit[ing] from, or mak[ing] available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance,” as stated in the Controlled Substances Act. 21 U.S.C. § 856(a).

3. 18 U.S.C. § 3663A(a)(1).

(2) the victim has suffered damages and can be identified.<sup>4</sup> The order must be issued during any sentencing proceeding or plea agreement that directly results from the enumerated offense.<sup>5</sup>

An offense, among other things, includes a criminal act of violence or damages to or loss of property including losses of property incurred as a result of fraud or deceit against a victim.<sup>6</sup> For purposes of the MVRA, a victim is “a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.”<sup>7</sup> The victim must suffer a pecuniary loss or physical injury to be eligible for restitution.<sup>8</sup> Even though a corporation is not specifically named as a victim within the text of the Act, courts have awarded corporations restitution under specific provisions of the MVRA.<sup>9</sup> A corporation may be entitled to a restitution award when the criminal defendant has been convicted of an enumerated offense and the corporation can prove it is a victim of the offense and has suffered a pecuniary loss as a result.<sup>10</sup> Over the past decade, corporations have mainly received restitution under the MVRA from former employees who have gone rogue.<sup>11</sup>

Once a corporation is eligible to receive restitution it can only collect restitution under two provisions.<sup>12</sup> First, under (b)(1) of the MVRA, a criminal defendant is required to pay for the loss, damage, or destruction of the victim’s property.<sup>13</sup> In offenses against property, specifically committed by fraud or deceit, corporations have been awarded restitution for the losses of an employee’s honest services.<sup>14</sup> In those cases, the criminal defendant must return the property or pay the value of the property

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4. 18 U.S.C. § 3663A(c)(1)(A)–(B). The term “mandatory” in the name is intentional. Judges do not have discretion in requiring restitution when the MVRA applies. Accordingly, determining when and to what extent MVRA applies is critical. *See infra* Part II.B.

5. 18 U.S.C. § 3663A(c)(1).

6. *Id.* § 366A(c). *See also supra* note 2.

7. 18 U.S.C. § 3663A(a)(2). Victim may also include any person who is directly harmed as a result of the defendant criminal’s conduct that occurred during “the course of [a] scheme, conspiracy or pattern” of criminal activity. *Id.*

8. *Id.* § 3663A(c)(1)(B).

9. *See United States v. Skowron III*, 839 F.Supp. 2d 740, 748, 751 (S.D.N.Y. 2012) *aff’d*, No. 12-1284-cr, 2013 WL 3593780, at \*1 (2nd Cir. 2013) (awarding Morgan Stanley restitution under 3663A(b)(1) and (b)(4)); *United States v. Amato*, 540 F.3d 153, 158, 163 (2nd Cir. 2008) (awarding restitution under § 3663A(b)(4) to Electronic Data Systems Corporation (EDS)—victim of mail and wire fraud); *United States v. Gupta*, 925 F.Supp. 2d 581, (S.D.N.Y. 2013) (awarding Goldman Sachs restitution for expenses incurred during the corporation’s internal investigation for crimes of securities fraud and insider trading). *See also* Leslie M. Villacis, *Did Congress Intend for Corporations to Benefit from the MVRA? A Look at the Legislative History of the Mandatory Victims Restitution Act of 1996 and the Courts’ Application of the MVRA to Corporations*, PACE U. SCH. OF L., August 15, 2013, at 11–13, *available at* [http://works.bepress.com/leslie\\_villacis/1](http://works.bepress.com/leslie_villacis/1), for an interesting discussion as to why a corporation should be classified as a victim under the MVRA. For example, a “person” under the United States Code “include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” *Id.* at 12; *see also* 1 U.S.C. § 1. The Supreme Court of the United States has also made it clear that “it is well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.” Villacis *supra*, note 9 at 12 (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666–67 (1979)).

10. *See* 18 U.S.C. § 3663A(c).

11. *See e.g.*, *United State v. Papagno*, 639 F.3d 1093, 1094 (D.C. Cir. 2011) (convicting former employee, Papagno, of stealing from his former employer, the Naval Research Laboratory); *Skowron III*, 839 F.Supp. 2d at 742 (charging Morgan Stanley’s former employee, Skowron, of conspiracy to commit securities fraud and attempt to obstruct the SEC investigation, both of which he pled guilty to).

12. *See, e.g.*, *United States v. Bahel*, 662 F.3d 610, 647–50 (2nd Cir. 2011). *See* 18 U.S.C. § 3663A(b). A corporation can only collect a form of restitution under (b)(1) and (b)(4). *See id.* Because a corporation cannot incur a “bodily injury,” it cannot collect restitution under (b)(2) or (b)(3). *See id.*

13. 18 U.S.C. § 3663A(b)(1).

14. *See, e.g.*, *Bahel*, 662 F.3d at 648–49; *Skowron III*, 839 F.Supp. 2d at 750–52 (holding that the court may award Morgan Stanley a part of Skowron’s salary under (b)(1) as restitution for the value of deprived honest services).

We may assume that [the employer] would not have hired [the defendant] had it known of his intentions, and in that event it would not have paid him four years’ salary . . . . [W]hat [the employer] lost . . . [was] the difference in the value of the services that [the defendant] rendered . . . and the value of the services that an honest [employee] would have rendered.

*Bahel*, 662 F.3d at 649 (quoting *United States v. Sapoznik*, 161 F.3d 1117, 1121 (7th Cir. 1998) (alteration in original)). The concept of honest services deprivation discussed for purposes of the MVRA and in this paper is not to be confused with the honest-services doctrine that applies to only bribery and kickback schemes. *See Skilling v. United States*, 130 S.Ct. 2896, 2904 (2010).

as determined by the statute.<sup>15</sup> For example, criminal defendant, Joseph Skowron, more commonly known as “Chip” Skowron,<sup>16</sup> was recently ordered by the Southern District of New York to pay over six million dollars of his total compensation to former employer, Morgan Stanley.<sup>17</sup> According to the District Court, Skowron’s offense<sup>18</sup> resulted in lost property because he deprived his former employer of honest services when he committed various crimes of insider trading and securities fraud.<sup>19</sup> As a result, Skowron was ordered to return the lost property—his salary—to Morgan Stanley.<sup>20</sup>

The more controversial type of restitution award a corporation may receive comes under provision (b)(4).<sup>21</sup> Because of varying interpretations of its statutory language, restitution awards granted under (b)(4) have been debated more than awards granted under (b)(1).<sup>22</sup> Under (b)(4), the criminal defendant is required to “reimburse the victim for lost income and *necessary* child care, transportation, and *other expenses* incurred *during participation in the investigation or prosecution of the offense* or attendance at proceedings related to the offense.”<sup>23</sup> The controversy seems to turn on what the legislature intended by “necessary . . . other expenses” or “during participation in the investigation or prosecution of the offense.”<sup>24</sup> Depending on the court, “necessary . . . other expenses” may include attorney fees<sup>25</sup>, accounting costs<sup>26</sup>, or costs incurred as a result of internal investigations.<sup>27</sup> Some courts interpret “necessary . . . other expenses” very broadly,<sup>28</sup> while others have a more narrow view of its application.<sup>29</sup> There is a circuit split as to whether the costs of independent internal investigations should be deemed “necessary . . . other expenses” under (b)(4) of the MVRA and therefore, included in a criminal defendant’s mandatory restitution order.<sup>30</sup> Additionally, circuits have debated over what “during participation in the investigation or prosecution of the offense” means; and if an independent internal

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15. 18 U.S.C. § 3663A(b)(1).

If return of the property . . . is impossible . . . pay the amount equal to -- (i) the greater of -- (I) the value of the property on the date of the damage, loss, or destruction; or (II) the value of the property on the date of sentencing, less (ii) the value (as the date the property is returned) of any part of the property that is returned.

*Id.* § 3663A(b)(1)(B)(i)–(ii).

16. Patricia Hurtado, *Morgan Stanley Seeks More Than \$31 Million From Chip Skowron*, BLOOMBERG (Sept. 6, 2013, 9:06 PM), <http://www.bloomberg.com/news/2013-09-07/morgan-stanley-seeks-more-than-31-million-from-skowron.html>.

17. *Skowron III*, 839 F.Supp. 2d at 752.

18. Skowron was convicted of insider trading and various obstruction schemes that deprived his former employer, Morgan Stanley, of its property. *Id.* at 751.

19. *Id.* at 745, 751.

20. *Id.* Typically, as in the Skowron case, the criminal defendant must only pay a portion of the salary back to his former employer. *See, e.g., id.* “Under similar circumstances, courts have awarded between 10% to 25% of the defendant’s compensation to the employer, representing ‘the difference in the value of the services that [the employee] rendered [the employer] and the value of the services that an honest [employee] would have rendered.’” *Skowron III*, 839 F.Supp. 2d at 751 (citing *United States v. Bahel*, 662 F.3d 610, 649 (2nd Cir. 2011)).

21. Villacis, *supra* note 9, at 14–16.

22. *See id.* at 13–16.

23. 18 U.S.C. § 3663A(b)(4) (emphasis added).

24. Villacis, *supra* note 9, at 15–16.

25. *See, e.g., United States v. Amato*, 540 F.3d 153, 159 (2nd Cir. 2008) (holding that “other expenses” under (b)(4) may include attorney fees and accounting costs).

26. *Id.*

27. *United States v. Gupta*, 925 F. Supp. 2d 581, 588 (S.D.N.Y. 2013) (holding that “ninety percent of [Goldman Sachs’] tendered expenses were both necessary and incurred during its participation in the investigation and prosecution of the offense of conviction”); *but see United States v. Papagno*, 639 F.3d 1093, 1101 (D.C. Cir. 2011) (holding that “the costs of the Naval Research Laboratory’s internal investigation were not ‘necessary . . . other expenses’” under the MVRA).

28. *See Amato*, 540 F.3d at 162 (holding that large costs incurred from the corporation’s own internal investigations were a direct and foreseeable result of the criminal defendant’s offense and could be considered a “necessary expense” under (b)(4)).

29. *See Papagno*, 639 F.3d at 1100 (holding internal investigations conducted on an entity’s own fruition without the request of a criminal investigator or prosecutor cannot be deemed a “necessary expense” under (b)(4)).

30. *See id.* at 1101. The D.C. Circuit acknowledges that it takes a more narrow view of the restitution provision compared to other courts of appeals, such as the Second Circuit. *Id.*

investigation falls under that category, to what extent?<sup>31</sup> Resultantly, mandatory restitution awards have varied greatly for a corporation depending upon which circuit the defendant is prosecuted.<sup>32</sup>

This paper overall addresses whether Congress intended for corporations to recover the costs of independent internal investigations from a criminal defendant under the MVRA, and if so to what extent. Part II of this article reviews the MVRA and its legislative history to determine Congress' original intent when enacting the law.<sup>33</sup> Part III of this article examines what constitutes an independent internal investigation, takes a closer look at why these types of investigations have been so commonly employed in recent years, and discusses what has contributed to the extraordinary expenses incurred as a result of conducting an independent internal investigation.<sup>34</sup> Part IV of this paper examines the circuit split within the United States Court of Appeals regarding whether restitution under (b)(4) of the MVRA covers the costs of independent internal investigations.<sup>35</sup> More specifically, this part focuses on the two most conflicting circuits on the topic: The Second Circuit and the D.C. Circuit.<sup>36</sup> Part V of this paper analyzes recently awarded restitution orders and determines whether a criminal defendant should be liable to his former employer for a multi-million dollar internal investigation.<sup>37</sup> Part VI, titled Proposal, will give some proactive guidelines a corporation can take before conducting an internal investigation.<sup>38</sup> And finally, the Conclusion will opine which Circuit has the best approach when awarding restitution for private internal investigations.<sup>39</sup>

## II. A BRIEF HISTORY OF THE MVRA: WHAT IS ITS TRUE INTENT?

Restitution—compensating the victim to make him or her whole—has dated back to ancient times.<sup>40</sup>

The principle of restitution is an integral part of virtually every formal system of criminal justice, of every culture and every time. It holds that, whatever else the sanctioning power of society does to punish its wrongdoers; it should also ensure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being.<sup>41</sup>

Unfortunately for victims of crime, restitution was not a priority in the United States for a long time.<sup>42</sup> Before federal legislation was ever enacted; several states passed their own legislation to protect victims.<sup>43</sup> The state of California first implemented a victim compensation program in 1965.<sup>44</sup> What started out as a victims' welfare program, soon evolved into a victims' justice program as more states

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31. See *infra* note 250.

32. Compare *Amato*, 540 F.3d at 162–63 with *Papagno*, 639 F.3d at 1100.

33. See *infra* Part II.

34. See *infra* Part III.

35. See *infra* Part IV.

36. See *Papagno*, 639 F.3d at 1101 (noting it takes a more narrow view of the restitution provision compared to the Second, Sixth, Seventh, and Eighth Circuits). See e.g., *Amato*, 540 F.3d at 162–63; *United States v. Elson*, 577 F.3d 713, 727 (6th Cir. 2009); *United States v. Hosking*, 567 F.3d 329, 332 (7th Cir. 2009); *United States v. Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009). See also *Gupta*, 925 F.Supp. 2d at 585 (addressing the D.C. Circuit's express recognition in the *Papagno* case that “the Second Circuit has taken a very broad view of what, under the MVRA, may compose a ‘necessary’ link between the offense and the victims’ expenses.”) (citing *Papagno*, 639 F.3d at 1101).

37. See *infra* Part V.

38. See *infra* Part VI.

39. See *infra* Part VII.

40. Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 *Fordham L. Rev.* 2711, 2711 (2005).

41. S. Rep. No. 104–179, at 20 (1995).

42. Dr. Marlene Young and John Stein, *The History of the Crime Victims' Movement in the United States A Component of the Office for Victims of Crime Oral History Project*, NAT'L ORG. FOR VICTIM ASSISTANCE 1, 2 (Dec. 2004).

43. *Id.* at 2.

44. *Id.*

enacted statutes to compensate victims of crimes.<sup>45</sup> By 1979, twenty-eight states had implemented restitution programs.<sup>46</sup> The origination of the crime victim's movement in the 1960s inspired many states to pass their own legislation, and eventually led to the enactment of the federal restitution statutes that federal courts implement today.<sup>47</sup> The movement received national attention in 1981 when President Ronald Reagan declared a National Victims' Rights Week and created a Task Force on Violent Crime.<sup>48</sup> Shortly thereafter, a Presidential Task Force on Victims of Crime was commissioned to shift the focus from the criminal to the victim.<sup>49</sup> Finally, in 1982 federal legislation was enacted to compensate victims of crime.<sup>50</sup>

#### A. *The Victim and Witness Protection Act of 1982: Discretionary Restitution*

The Victim and Witness Protection Act of 1982 ("VWPA") was enacted to order criminal defendants to pay restitution to victims of the convicted offense during the sentencing phase of a prosecution.<sup>51</sup> The VWPA allowed a judge to issue restitution independent of a probation sentence for the first time in American history.<sup>52</sup> Offenders of Title 18 crimes were required to pay restitution to a victim of personal injury or loss of property.<sup>53</sup> "Examples of Title 18 crimes include embezzlement, murder, mail fraud, burglary, kidnapping, bank robbery, interstate transportation of stolen vehicles, and violations of civil rights."<sup>54</sup> If a judge chose not to issue a restitution order, she had to state the reasons why in the record.<sup>55</sup>

The driving force behind legislating restitution within the criminal justice system was the government's failure to protect victims and witnesses from the harassment or threatening nature of the criminal defendant.<sup>56</sup> All too often, the victim or witness had been forgotten once their use—to testify against the criminal defendant—had come to an end.<sup>57</sup> "This insensitivity and lack of concern for the victim and witness [was] a tragic failing in [the] criminal justice system . . . [w]ithout the cooperation of victims and witnesses, the criminal justice system would simply cease to function and few criminals, if any, would be brought to justice."<sup>58</sup> As a result, the VWPA was created to protect witnesses and victims of federal crimes.<sup>59</sup> Restitution was instituted to ensure that the offender made right the harm he caused.<sup>60</sup> Additionally, Congress noted that the majority of violent crimes occurred on a more local level.<sup>61</sup> Resultantly, the VWPA served as model for state and local governments to adopt.<sup>62</sup>

Overall, the VWPA enhanced the power of the federal courts to make the victim whole, but it also created strict limitations on when a court could order restitution.<sup>63</sup> The criminal defendant's resources, financial needs, earning ability, and dependents were taken into consideration prior to the court

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45. *Id.*

46. *Id.*

47. *See* Young & Stein, *supra* note 42, at 1–3.

48. *Id.* at 6.

49. *Id.*

50. *Id.*

51. Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1688 (2009). The Act was passed in 1982. *Id.* Victims no longer had to file a civil suit in order to receive restitution for a crime committed on the victim's person or property. *See* Villacis, *supra* note 9, at 5.

52. S. Rep. No. 97–532, at 22 (1982).

53. Laura Munster Sever, *The Victim and Witness Protection Act of 1982: Who Are the Victims of Which Offenses?*, 20 Val. U. L. Rev. 109, 109–10 (1985).

54. *Id.* at 109–10 n. 5.

55. S. Rep. No. 97–532, at 22.

56. *Id.* at 1–2.

57. *Id.* at 2.

58. *Id.*

59. *Id.* at 2.

60. S. Rep. No. 97–532, at 22.

61. *Id.* at 2.

62. *Id.*

63. Dickman, *supra* note 53, at 1688.

deciding an award of restitution.<sup>64</sup> Additionally, the court had authority to decline an award of restitution if its computation became overly complicated and could prolong the sentencing process.<sup>65</sup> Because most criminal defendants were found to be indigent, very few awards of restitution were ordered.<sup>66</sup> For example in 1994—twelve years after the enactment of the VWPA—only 20.2% of federal criminal cases had awarded restitution.<sup>67</sup>

Restitution moved from discretionary to mandatory when Congress enacted the Violence Against Women Act (“VAWA”) in 1994.<sup>68</sup> Victims of domestic violence, sexual abuse and or exploitation, and other abuse of children were now required to receive mandatory restitution from criminal defendants of federal crimes.<sup>69</sup> The enactment of the VAWA created some conflict with the VWPA.<sup>70</sup> The VAWA required restitution whereas the VWPA made restitution discretionary.<sup>71</sup> Moreover, both restitution statutes provided different procedure orders to follow.<sup>72</sup> The MVRA was intended to resolve this conflict.<sup>73</sup>

## B. *The MVRA Mandates Restitution*

Congress was prompted to enact the MVRA because of the courts’ resistance to award restitution under the VWPA.<sup>74</sup> Additionally, the institution of required restitution under the VAWA made mandatory restitution for all Title 18 offenses seem like a natural progression.<sup>75</sup> The MVRA removed judicial discretion and made restitution mandatory during the sentencing process of a criminal defendant in enumerated offenses.<sup>76</sup> The Act also removed any consideration of the criminal defendant’s financial circumstances or ability to pay when fashioning a restitution award.<sup>77</sup> Instead, the criminal defendant was required to pay the full loss the victim experienced as a direct and proximate cause of the offense.<sup>78</sup>

However, the MVRA does contain some limits on awarding restitution.<sup>79</sup> If the number of victims is too large, making an award unfeasible, then the statute shall not apply.<sup>80</sup> Additionally, if the

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64. *Id.*

65. Judge William M. Acker, Jr., *The Mandatory Victims Restitution Act Is Unconstitutional. Will the Courts Say So After Southern Union v. United States?*, 64 ALA. L. REV. 803, 811 (2013); *see also* 18 U.S.C. § 3663(a)(1)(B)(ii) (2012).

66. Acker, Jr., *supra* note 69, at 811. The VWPA and MVRA still remain in effect today and act as separate forms of restitution. Villacis, *supra* note 9, at 7.

67. S. Rep. No. 104–179, at 20 (1995). The Senate Report discussing the MVRA reviewed the impact that the VWPA had in previous years. *Id.* The Senate Report referenced the Annual Report of the United States Sentencing Commission and discussed why the enactment of the MVRA was needed. *Id.* Specifically, it reviewed the statistics of restitution awards granted in 1994. *Id.* Interestingly, only violent crimes, such as murder, kidnapping, robberies and sexual-abuse were mentioned in the Senate Report. *Id.* Corporate crimes were not. *See* S. Rep. No. 104–79, at 20. Even though there is little legislative history revolving around the MVRA, the available Senate Reports seem to indicate that restitution was mainly intended for victims of violent crimes who had been personally injured or who had lost personal property as a result of the charged offense. *See id.*; S. Rep. No. 97–532, at 26 (1982). Perhaps, Congress was not concerned about corporations collecting restitution at all.

68. *See* S. Rep. No. 104–179, at 21.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. S. Rep. No. 104–179, at 21.

74. Acker, Jr., *supra* note 69, at 811.

75. *See* S. Rep. No. 104–179, at 21.

76. Dickman, *supra* note 53, at 1688.

77. *Id.* at 1688–89. Courts are however, required to consider a criminal defendant’s financial means when creating a schedule to pay restitution to the victim. *Id.* at 1689.

78. Villacis, *supra* note 9, at 7; *see also* 18 U.S.C. § 3663A(2)–(3). While victims received more restitution orders under the MVRA; a substantial number of awards have gone unpaid. Dickman, *supra* note 53, at 1693. *See* Dickman’s article for an interesting discussion on how “the MVRA restitution framework has been the driving force behind the recent surge in uncollected criminal sanctions.” *Id.* at 1692.

79. *See* 18 U.S.C. § 3663A(c)(3)(A)–(B).

80. *Id.* § 3663A(c)(3)(A).

computation of an award is overly complicated and could prolong the sentencing process to the extent it outweighs any benefit received by the victim, then a court can decline to apply the Act.<sup>81</sup>

The MVRA expanded the items a victim could receive in a restitution order.<sup>82</sup> Under the MVRA, “[r]estitutable items . . . include property or its value, medical care and therapy, lost income, funeral expenses, and expenses incurred during the participation in investigation and prosecution proceedings.”<sup>83</sup> The introduction of the latter language, “expenses incurred during the participation in investigation and prosecution proceedings” under (b)(4) changed the landscape of restitution orders and opened the possibility of corporations recovering expenses incurred during independent internal investigations.<sup>84</sup> The next section evaluates how necessary independent internal investigations have become in order to determine whether they should be considered a “necessary . . . other expense” under the MVRA.<sup>85</sup>

### III. HOW NECESSARY ARE VOLUNTARY INTERNAL INVESTIGATIONS?

Today’s regulatory landscape scrutinizes corporations more than ever before.<sup>86</sup> In the last decade, Congress has passed several federal laws increasing regulation over corporations in a variety of industries.<sup>87</sup> Alongside those new laws, Congress created new federal crimes and penalties that a corporation could face if in violation of a specified regulation.<sup>88</sup> Consequently, increased regulation has led to more enforcement actions.<sup>89</sup> Some government agencies have even worked simultaneously conducting parallel proceedings against the same corporation, at the same time, over the same reported

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81. *Id.* § 3663A(c)(3)(B).

82. *See* S. Rep. No. 104-179, at 21.

83. *Id.*

84. *See* Villacis, *supra* note 9, at 13–14.

85. *See infra* Part III.

86. *See* Benton J. Campbell & Katelyn Beaudette, *The Way Forward: A Primer on Conducting an Independent Investigation*, THE CONF. BD., 1, 1 (February 2012); Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C.L. REV. 73, 83 (2013).

87. *See* Campbell & Beaudette, *supra* note 90, at 1; Charles D. Weisselberg & Su Li, *Big Law’s Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1236 (2011). The Enron Corporation filing bankruptcy at the end of 2001, was the catalyst that led to the modern enforcement environment. Campbell & Beaudette, *supra* note 90, at 1; Green & Podgor, *supra* note 90, at 83 n. 55. In response to the Enron scandal, Congress tightened regulation over corporations with the enactment of the Sarbanes-Oxley Act of 2002. Weisselberg & Li, *supra* note 91, at 1236. In the same month that Sarbanes-Oxley was enacted, President George W. Bush created the Corporate Fraud Task Force by executive order. *Id.* at 1236 n. 77. The Corporate Fraud Task Force was created “to hold wrongdoers responsible and to restore an atmosphere of accountability and integrity within corporations across the country.” Green & Podgor, *supra* note 90, at 84 n. 56. In 2009, President Barack Obama renamed the Task Force: Financial Fraud Enforcement Task Force in light of the financial market collapse of 2008. *See id.* at 84 n. 57. In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act to further regulate the U.S. financial markets and even created a new government agency with enforcement power, the Consumer Financial Protection Bureau (“CFPB”). 12 U.S.C. Ch. 53; § 5491 (2012).

88. Weisselberg & Li, *supra* note 91, at 1236.

89. *See* Green & Podgor, *supra* note 90, at 84–85. “[F]iscal year 2011 marked the largest number of enforcement actions brought in a single year by the [SEC] in the agency’s history. This parallels the explosive growth in the number of [DOJ] and SEC Foreign Corrupt Practices Act (FCPA) investigations . . .” Campbell & Beaudette, *supra* note 90, at 1. *But see*

In 2012, DOJ and the SEC brought 25 new Foreign Corrupt Practices Act (“FCPA”) enforcement actions, a significant decrease from the number of FCPA enforcement actions brought in 2011 (45) and the prolific 2010 (71). However, there is no reason to suspect that DOJ and the SEC are losing their zeal for enforcement. Rather, it is likely that DOJ and the SEC are juggling the approximately 150 open investigations and were distracted by the drafting of their comprehensive FCPA Resource Guide, which was released in November 2012, as well as several trials.

violation.<sup>90</sup> Resultantly, criminal and administrative sanctions have simply become a cost of doing business.<sup>91</sup>

Often, when faced with a government investigation or prosecution, the corporation's main goal is to complete the process ultimately escaping an indictment or criminal conviction.<sup>92</sup> What became of Arthur Andersen LLP is the classic nightmare for companies facing a government investigation.<sup>93</sup> The very fact of conviction precluded the public accounting firm from practicing before the SEC.<sup>94</sup> By the time the Supreme Court of the United States "reversed the company's conviction in 2005, the company had already ceased to exist."<sup>95</sup>

Unsurprisingly, in response to the new regulatory landscape, many corporations have chosen to conduct their own internal investigations.<sup>96</sup> "An 'internal investigation' is a term generally used when an organization asks an attorney, investigator, or auditor to look into suspected wrongdoing within the organization and determine, for example, what went wrong, whom to hold accountable, and how to prevent recurrence of the problem."<sup>97</sup> As soon as a corporation becomes aware of some form of corporate misconduct, it is faced with the decision of whether to employ an internal investigation.<sup>98</sup> Strategically, many corporations will hire outside counsel to conduct the internal investigation.<sup>99</sup> "White-collar [defense] lawyers, who arrive on the scene early, strive to get information under their control and keep it out of the hands of potential adversaries, including the government."<sup>100</sup> By doing so, the corporation can identify what information may be protected and what information may need to be disclosed.<sup>101</sup> Because "[c]orporation's do not have a Fifth Amendment privilege against compelled self-incrimination," its communications are protected only by the attorney-client privilege and the work-product doctrine.<sup>102</sup> The

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90. See Green & Podgor, *supra* note 90, at 84. "It is . . . common to see parallel proceedings with both the Department of Justice (DOJ) and an agency like the Internal Revenue Service (IRS) or the Securities Exchange Commission (SEC) simultaneously investigating the same conduct." *Id.*

91. Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1095 (2006).

92. Weisselberg and Li, *supra* note 91, at 1241. "[D]ebarment or suspension aside, companies want to escape prosecution to avoid a drop in stock price and damage to reputation (among other collateral consequences), not to mention escaping the criminal penalties themselves." *Id.*

93. Weisselberg & Li, *supra* note 91, at 1239.

At the time of its indictment for obstruction of justice, Arthur Andersen was one of the 'Big Five' accounting firms, with an estimated 85,000 employees worldwide, 28,000 of them in the United States. Following its conviction in June 2002, the firm was sentenced to five years' probation and a fine of \$500,000. Yet the partnership was forced to close its doors and employees lost their jobs. What killed Arthur Andersen was not the sentence but the indictment and the very fact of conviction.

*Id.* at 1239–40.

94. *Id.* at 1240.

Under the SEC's regulations, a person (or entity) convicted of a felony or misdemeanor involving moral turpitude is suspended from practicing before the SEC. The term 'practicing' includes preparing any statement, opinion, or other paper by an attorney, accountant, or other professional for filing with the SEC. Arthur Andersen became a public accounting firm that was unable to conduct audits and prepare opinions for publicly held corporations.

*Id.*

95. *Id.*

96. Campbell & Beaudette, *supra* note 90, at 1. "Since 2001, public companies have retained outside counsel to conduct more than 3,000 internal investigations encompassing a staggering range of subject matters." *Id.*

97. United States v. Papagno, 639 F.3d 1093, 1099 n.2 (D.C. Cir. 2011).

98. Campbell & Beaudette, *supra* note 90, at 2. "The decision to start an internal investigation is typically a matter of discretion . . . [i]n some cases, however, the corporation must commence an internal inquiry." *Id.* Some federal laws require an internal investigation to commence if an illegal act may have occurred. *Id.* For example, both the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and the Sarbanes-Oxley Act of 2002 both require corporations to report any misconduct in a timely manner. Green & Podgor, *supra* note 90, at 89.

99. Weisselberg & Li, *supra* note 91, at 1242.

100. *Id.* at 1243.

101. *Id.*

102. *Id.* at 1242–43.



government has successfully provided incentives for corporations to relinquish control of its protected communications.<sup>103</sup>

This section provides an analysis of the rise of internal investigations. Part A evaluates why internal investigations have dramatically increased over the last decade.<sup>104</sup> Part B examines why internal investigations are so costly.<sup>105</sup>

#### A. *What's Behind the Increased Use of Internal Investigations?*

Many factors have contributed to the increased use of internal investigations employed by corporations.<sup>106</sup> Since the Enron scandal of 2001, Congress has passed various laws to increase accountability and criminal sanctions on corporations.<sup>107</sup> Congress has also increased the enforcement power used by government agencies to investigate and prosecute corporations suspected of criminal conduct.<sup>108</sup> Additionally, corporate incentives have been given by government agencies to encourage corporation cooperation when an agency conducts a criminal investigation or prosecution.<sup>109</sup> The following text reviews how increased (1) corporate criminality; (2) government power; and (3) emphasis on corporate incentives, have all contributed to an increase in the use of internal investigations.

##### 1. Increased Corporate Criminality

Historically, corporations could not be found criminally liable.<sup>110</sup> This conclusion was based on the theory that a corporation could not manifest the requisite mental state to commit a criminal act.<sup>111</sup> Moreover, a corporation could not be imprisoned.<sup>112</sup> Eventually, courts allowed strict liability offenses to be charged against corporations based on an omission or failure to act.<sup>113</sup> No mens rea was required to be convicted.<sup>114</sup> Corporate criminality drastically changed, however, when courts began to allow corporations to be charged with offenses requiring a mens rea.<sup>115</sup> In recent times, corporate criminality has radically grown due to more heavily imposed regulations.<sup>116</sup>

[O]ver the last several decades, Congress has enacted a variety of laws that criminalize a broad range of conduct associated with business organizations and provide greater criminal penalties. These statutes are often passed in the wake of the scandal of the day, with highly publicized

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103. *Id.* at 1243.

104. *See infra* Part III.A.

105. *See infra* Part III.B.

106. *See infra* Part III.A.1–3.

107. *See supra* note 87.

108. *See supra* note 89.

109. Green & Podgor, *supra* note 90, at 89–91.

110. *Id.* at 81.

111. *Id.*

112. *Id.*

113. *Id.*

114. Green & Podgor, *supra* note 90, at 81.

115. *Id.* In 1909, the Supreme Court of the United States authorized criminal prosecution of a corporation for violation of a federal law imputing a mental state of knowledge and purpose. *Id.* at 81 n.46. *See also* N. Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 491, 494–96 (1909).

It is true that there are some crimes, which in their nature cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them.

*Id.* at 494–95.

116. Weisselberg & Li, *supra* note 91, at 1236.

business sector meltdowns drawing the most attention from federal investigators and prosecutors.<sup>117</sup>

Generally, through agency principles a corporation can be criminally liable as a result of an employee's act or omission if it occurred within the scope of his employment.<sup>118</sup> Corporate criminality oftentimes comes down to two theories: (1) vicarious liability;<sup>119</sup> or (2) "whether a 'high managerial agent' acted criminally for the benefit of the corporate entity."<sup>120</sup> There is no "good faith" exception for corporations facing criminal liability as a result of an employee's actions.<sup>121</sup> Despite the legal fiction behind the conclusion; corporations are treated simply as persons.<sup>122</sup> The passing of more federal laws and criminal sanctions over the past decade have provided government agencies with more discretion and ammunition to indict and convict corporations of any criminal wrongdoing.<sup>123</sup> As a result, if the corporation believes that an officer, employee, or director may have committed a crime, an internal investigation will likely commence immediately.<sup>124</sup>

## 2. Increased Government Power to Investigate

Many regulatory agencies of the federal government have the authority to investigate a corporation for criminal misconduct or the violation of a law.<sup>125</sup> Government agents have been given substantial power by Congress to investigate a corporation for a potential crime.<sup>126</sup> For example, the Department of Justice ("DOJ") has wide discretion and can decide whether to institute a criminal charge or decline to prosecute notwithstanding the strength of the evidence presented.<sup>127</sup> As a result, this wide discretion gives prosecutors a considerable amount of control over a corporation that is subject to a government investigation.<sup>128</sup> The potential threat of an Arthur Andersen scenario,<sup>129</sup> and the high likelihood that cooperation may reduce the effect of the threat, has led many corporations to hire outside counsel to conduct internal investigations.<sup>130</sup>

Corporate internal investigations are the prelude to forthcoming criminal prosecutions and negotiations with the government. When a corporation learns of possible wrongdoing, its reaction is typically to commence an internal investigation to ascertain the level and breadth of any misconduct. Corporations are notified of possible wrongdoing through various sources, including internal whistleblowers, external *qui tam* actions, routine internal compliance measures implemented in response to sentencing incentives, and judicial acknowledgements that corporate compliance is a necessary component of corporate governance.<sup>131</sup>

For a corporation that is likely to come under government investigation, initiating an independent internal investigation is often viewed as the best first step a corporation can take.<sup>132</sup> Independent internal investigations conducted by a corporation are viewed by government agencies as an indication of

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117. *Id.*

118. *Id.* at 1239.

119. Green & Podgor, *supra* note 90, at 82. Vicarious liability or "respondeat superior" is the majority view. *Id.*

120. *Id.* The Model Penal Code asks "whether a 'high managerial agent' acted criminally for the benefit of the corporate entity." *Id.*; see also MODEL PENAL CODE § 2.07(1)(c), (4)(cx) (1985).

121. Green & Podgor, *supra* note 90, at 82–83.

122. *Id.* at 83. See also *Citizens United v. Fed. Election Commission*, 558 U.S. 310, 343 (2010).

123. See Green & Podgor, *supra* note 90, at 83 n 53, 54.

124. Weisselberg & Li, *supra* note 91, at 1242.

125. Green & Podgor, *supra* note 90, at 84.

126. See Weisselberg & Li, *supra* note 91, at 1239.

127. See *id.*

128. *Id.*

129. See *supra* notes 93–95.

130. See Weisselberg & Li, *supra* note 91, at 1241–42.

131. Green & Podgor, *supra* note 90, at 90–91.

132. See Weisselberg & Li, *supra* note 91, at 1243. See also *infra* Part III.A.3.

cooperation.<sup>133</sup> As the next section discusses, corporations that cooperate with the investigating government agency are more likely to be shown favor than corporations that do not.<sup>134</sup>

### 3. Increased Emphasis on Corporate Incentives

Government agencies incentivize corporations to independently conduct internal investigations and then subsequently collaborate with government regulators or enforcement officers for leverage.<sup>135</sup> The decision to cooperate with a government agency is perhaps the most challenging choice a corporation will have to make during an internal investigation.<sup>136</sup> However, corporations have a strong incentive to initiate them.<sup>137</sup>

[C]orporations have a strong incentive to expand the scope of their cooperation by commencing internal investigations and disclosing the results to the government. The objective of undertaking such a thorough review is typically to build a strong relationship with the government entity or regulator and to accrue a benefit from “cooperating,” often in the form of an agreement not to bring a charge or to reduce the severity of a charge. Government officials routinely state that cooperation has direct and tangible benefits to a corporation facing regulatory or criminal enforcement action.<sup>138</sup>

The government benefits from this cooperation strategy because it seeks the waivers of attorney-client privilege and work product protection from the corporation.<sup>139</sup> “The corporation owns the information obtained during the internal investigation and may exchange it for a favorable disposition from the government.”<sup>140</sup> Commonly, these waivers allow the government to discover information that individuals under investigation might not be willing to reveal to the government, but will reveal to investigators employed by the corporation.<sup>141</sup>

Following the completion of a government investigation, the government agency typically decides whether to prosecute the corporation, decline to prosecute, or offers an alternative.<sup>142</sup> By cooperating with the DOJ, for example, a corporation may be able to enter into a non-prosecution agreement (“NPA”) or a deferred prosecution agreement (“DPA”).<sup>143</sup> NPAs and DPAs put off prosecution for a specified period of time to allow a corporation time to complete government imposed requirements.<sup>144</sup> If a corporation completes the specified requirements within the set time, the government agency dismisses the case and the company avoids an indictment or criminal conviction.<sup>145</sup>

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133. Campbell & Beaudette, *supra* note 90, at 4.

134. *See infra* Part III.A.3.

135. Weisselberg & Li, *supra* note 91, at 1243, 1269.

136. Campbell & Beaudette, *supra* note 90, at 3.

137. *Id.*

138. *Id.* See Weisselberg & Li, *supra* note 91, at 1244–46, for a history of DOJ cooperation standards.

139. Weisselberg & Li, *supra* note 91, at 1243.

140. Green & Podgor, *supra* note 90, at 88.

141. Weisselberg & Li, *supra* note 91, at 1243.

142. Patricia M. Sulzbach, *Using Corporate Monitors to Your Advantage*, 28 CRIM. JUST. 51 (Summer 2013). The alternative can be the choice of entering into a nonprosecution agreement (“NPA”) or a deferred prosecution agreement (“DPA”). *Id.*

143. Weisselberg & Li, *supra* note 91, at 1241.

144. Sulzbach, *supra* note 146, at 51. “The agreements may also include monetary settlements, waiver of attorney-client and work-product privileges, disclosure of information to the DOJ and other agencies, acknowledgement of wrongdoing, ongoing monitoring, and other terms.” Weisselberg & Li, *supra* note 91, at 1242.

145. Sulzbach, *supra* note 146, at 51. The DOJ and SEC appear to be more “willing[] to reward companies for their swift voluntary disclosure and ongoing cooperation.” *FCPA Snapshot–2012*, *supra* note 93, at 1. “In at least one significant case (*U.S. v. Peterson*), DOJ and the SEC declined to bring an enforcement action against the individual defendant’s corporate employer, financial services giant Morgan Stanley, noting Morgan Stanley’s rigorous FCPA compliance program, voluntary disclosure, and cooperation.” *Id.*

To enter into an NPA or DPA, a corporation oftentimes must give up its privacy and allow a corporate monitor to observe the corporation subsequent the agreement to insure that the corporation is in compliance.<sup>146</sup> An independent third party evaluates the corporation until the government concludes that the monitor is no longer needed because the corporation continues to satisfy all of the requirements imposed by the formal agreement.<sup>147</sup> The corporation is responsible for all legal fees connected to the corporate monitor.<sup>148</sup> Despite the rights a corporation must give up in order to cooperate with a government agency, most corporations are not going to risk the alternative: A potential indictment or criminal conviction.<sup>149</sup> As a result, corporations will hire experts—typically, former prosecutors—to navigate the process and insure that the government reasonably concludes that the corporation is cooperating with the prosecuting agency.<sup>150</sup>

Due to increased corporate criminality, government power, and corporate incentives for cooperation with the prosecuting government agency, it is easy to conclude that voluntary internal investigations have become the necessity of the day.

#### B. *Extraordinary Costs: Why Are Internal Investigations so Expensive?*

The regulatory landscape over the last decade has fueled the internal investigation industry.<sup>151</sup> In response to an increase in government investigations and prosecutions, big law firms all over the country have expanded their practices to include a corporate criminal defense bar.<sup>152</sup> Why? Because “white-collar criminal practice is enormously profitable.”<sup>153</sup>

Government agencies often look at the quality of remedial actions taken by a corporation when determining whether to charge the corporation with a crime or violation.<sup>154</sup> By conducting an internal investigation, a corporation can show that it has taken the allegation of criminal misconduct seriously.<sup>155</sup> Often, hiring outside counsel is one of the only ways a corporation can convey to the outside world that the investigation will be conducted independently.<sup>156</sup> This is especially important when high-level directors or managers may be involved in the alleged misconduct.<sup>157</sup> Another beneficial reason to hire outside counsel is to protect internal communications.<sup>158</sup> A reviewing court may be more willing to grant or uphold the attorney-client privilege or work-product doctrine when outside counsel has conducted the

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146. Sulzbach, *supra* note 146, at 51. *See also* Green & Podgor, *supra* note 90, at 91. *But see* *FCPA Snapshot—2012*, *supra* note 93, at 1 (noting a trend that government agencies are moving away from the requirement of corporate monitoring).

147. Sulzbach, *supra* note 146, at 51.

148. *Id.*

149. *See supra* notes 93–95.

150. *See* Weisselberg & Li, *supra* note 91, at 1249; Green & Podgor, *supra* note 90, at 89–91.

151. *See* Green & Podgor, *supra* note 90, at 91.

152. Weisselberg & Li, *supra* note 91, at 1235. “White-collar criminal defense lawyers are in demand, and changes in federal law have encouraged the development of corporate compliance and internal investigations practices.” *Id.*

153. Weisselberg & Li, *supra* note 91, at 1268.

154. *Id.* at 1269.

155. *Id.*

156. *Id.*

157. *Id.* at 1270.

Where the alleged or suspected conduct involves senior officers or serious employee misconduct, or where the corporate entity is the focal point of a government inquiry, it is important that management, including usually the General Counsel’s office, not be, and not be perceived to be, in charge of the internal investigation. An investigation carried out by management, or a corporate department (such as an internal audit department), likely will not be afforded credibility.

Weisselberg & Li, *supra* note 91, at 1270.

158. *Id.* at 1269.

investigation.<sup>159</sup> For these reasons, in-house counsel has responded to government investigations and prosecutions by hiring outside counsel.<sup>160</sup>

Typically, in-house counsel can manage the costs of legal services.<sup>161</sup> However, because of the high-stakes surrounding a matter that requires an internal investigation, whoever is charged with employing outside counsel may not be afforded the opportunity to “shop around.”<sup>162</sup> As a result, cost controls normally employed by in-house counsel are largely eliminated when hiring outside counsel to conduct an internal investigation.<sup>163</sup> Also, because these investigations are expected to be thorough, limiting the scope of the investigation is oftentimes not an option.<sup>164</sup> For these reasons, hiring outside counsel to conduct an internal investigation can quickly become quite costly.

Furthermore, directors’ and officers’ liability insurance (“D&O Insurance”) can increase the costs of internal investigations. Often, it covers most of the costs of individual representation.<sup>165</sup> Usually, corporations are obligated to advance legal fees to its directors and managers as dictated by their bylaws, corporate charters, or employment agreements.<sup>166</sup> Most employers carry D&O Insurance to protect higher level employees and directors from any liability that arises as a result of misconduct in their official capacity.<sup>167</sup>

[T]he very existence of insurance makes the representation of many entities and individual corporate actors profitable in a way that is quite different from work on behalf of ordinary criminal defendants. Entities may seek recovery from insurers when they incur legal expenses in a criminal investigation or when they indemnify their officers, directors, and employees, and there are circumstances in which these individuals may seek payment directly from insurers if there is no indemnification.<sup>168</sup>

The majority of these policies extend coverage to criminal proceedings, unless the policy specifically limits these types of claims.<sup>169</sup> The policies require the insurance company to pay defense costs until there has been a final adjudication against the officer or director.<sup>170</sup> Needless to say, drawn out investigations could occur because the company knows that a portion of the expenses incurred will be reimbursed by the D&O policy.

Finally, another major reason that costs of internal investigations are extraordinarily high is because most of the lawyers running these white-collar defense practices are partners.<sup>171</sup> “[I]n white-collar practice groups, partners comprise a much higher percentage of all lawyers (58%) than the partners in the non-white collar [practice groups] (43%). . . .”<sup>172</sup> This means that more partners are doing the work

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159. *Id.*

160. *Id.* “The percentage of larger companies retaining outside counsel for assistance in a government or regulatory investigation continues to rise, from 48% of 2010 sample to 60% in 2011 to 73% in 2012.” *Fulbright 9th Annual Litigation Trends Survey Report*, FULBRIGHT & JAWORSKI L.L.P., 30 (June 2013).

161. Weisselberg & Li, *supra* note 91, at 1269.

162. *Id.* at 1269–70.

163. *Id.* at 1268–69.

164. *See id.* at 1269.

165. *Id.* at 1271.

166. Frances S. Cohen, et.al., *Indemnification and Advancement of Fees for Corporate Officers, Directors, and Employees*, SM086 ALI-ABA 1023, 1035 (2007). Even though corporations advance legal fees to defend its corporate managers or directors, it does not mean that the counsel retained by the corporation represents any of its employees, including higher level. Weisselberg & Li, *supra* note 91, at 1242. Lawyers retained by the corporation, represent the entity. *Id.* Similarly, lawyers chosen by individuals only represent the individuals even though they are paid for by the corporation. *Id.*

167. Weisselberg & Li, *supra* note 91, at 1271.

168. *Id.*

169. *Id.* at 1272.

170. *Id.*

171. *See id.* at 1254. “Among the partners whose primary practice is white-collar and internal investigations, fully three-fourths are former federal or state prosecutors.” Weisselberg & Li, *supra* note 91, at 1255.

172. *Id.* at 1251.

in white-collar practice groups, which includes steering the path an internal investigation will take.<sup>173</sup> Hence, corporations pay a premium—the partner rate—when they hire outside counsel to conduct an internal investigation on the corporation’s behalf.<sup>174</sup>

Another possible problem with big law white-collar defense groups is that the majority of partners are former prosecutors.<sup>175</sup> While a former prosecutor may have the knowledge and insight as to how a corporation should effectively conduct an internal investigation to show cooperation with the DOJ or other applicable regulatory agency; her background may present an unconscious bias.<sup>176</sup> After working for the prosecuting agency for so long, can a former prosecutor truly be independent and work for the corporation? Or, is it possible that the former prosecutor conducts an internal investigation in the manner she wishes an entity would have, when she was on the other side prosecuting the corporation?

There are occasional claims that some lawyers in the compliance and investigations field—the majority of whom are former prosecutors—have such difficulty separating their responsibilities on behalf of their current clients from their prior work as prosecutors that they lack both independence from the government and a sincere interest in fighting it.<sup>177</sup>

If this unconscious bias exists, it might contribute to why the costs of internal investigations have increased.<sup>178</sup> A former prosecutor may conduct an internal investigation with the intent to investigate every inch of a corporation, simply to turn over everything found to the prosecuting agency.<sup>179</sup> This includes waiving attorney-client privileges and work product protections.<sup>180</sup> In the alternative, government regulatory agencies may expect these former prosecutors to do all of the work for them—eliminating any need for the government to conduct its own internal investigation.<sup>181</sup> As more and more government agents make the lateral move to private sector big law firms, it becomes easier to criticize the government for “outsourcing” criminal investigations by requiring corporations to do the work of prosecutors.<sup>182</sup> As one criminal defense attorney put it, “federal prosecutors and the corporate white-collar bar have built ‘a synergistic system . . . where the former creates the opportunity for the latter to thrive, and the latter creates the opportunity for the former to prevail . . . prov[ing] to be a huge fee generator . . . .”<sup>183</sup>

In summary, the growth of the big law white-collar defense bar has contributed to the increased costs of internal investigations. The urgency to commence an internal investigation at the first sign of corporate misconduct has prevented corporate decision-makers from shopping around for the best price when hiring outside counsel. Additionally, the corporation’s D&O Insurance allows outside counsel to expend any necessary amount when representing the individuals of the corporation with the underlying thought that the corporation will be reimbursed. And finally, the big law white-collar bar consists of mostly former prosecutors in partner roles. Corporations are paying a premium for their work and

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173. See *id.*

174. See *id.*

175. *Id.* at 1249.

176. See Weisselberg & Li, *supra* note 91, at 1247.

177. *Id.*

178. See Peter J. Henning, *The Mounting Costs of Internal Investigations*, DEALBOOK (Mar. 5, 2012), [http://dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations/?\\_r=0](http://dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations/?_r=0).

179. See Weisselberg & Li, *supra* note 91, at 1248.

Their job is to come in, parachute in with all sorts of lawyers at considerable expense to the client, investigate up one side and down the other, extract as much information as they can, then go back to the government, waive the attorney-client privilege, provide them all the information and give them whatever the employees have said on the silver platter.

*Id.* at 1248.

180. *Id.*

181. See *id.* at 1247.

182. *Id.*

183. Weisselberg & Li, *supra* note 91, at 1249.

sometimes at a high cost—leaving the potential for a former prosecutor to do the work of the prosecuting agency. For corporations facing impropriety accusations, independent internal investigations have likely become a necessary expense. But should a criminal defendant be liable for the extraordinary expenses incurred during that independent internal investigation? Two Circuits in the United States Court Appeals have very different opinions on the topic.<sup>184</sup>

#### IV. CIRCUIT SPLIT:

##### SHOULD INTERNAL INVESTIGATION EXPENSES BE REIMBURSED UNDER (B)(4) OF THE MVRA?

Recently, corporations have been awarded restitution under the MVRA for federal crimes committed against them, usually by a former employee.<sup>185</sup> Courts have denied awards of restitution requested by corporations under (b)(1) if they are deemed “consequential damages.”<sup>186</sup> However, the same types of restitution corporations have sought and been denied under (b)(1) have been awarded under (b)(4).<sup>187</sup> Legal fees, accounting costs, and expenses incurred as a result of conducting an internal investigation have all been awarded to victim corporations under (b)(4).<sup>188</sup> The provision states that the criminal defendant is required to pay restitution for “*necessary . . . other expenses incurred during participation in the investigation or prosecution of the offense . . .*”<sup>189</sup> Expenses paid for an internal investigation tend to be the most controversial form of restitution awarded under (b)(4).<sup>190</sup> While the Second Circuit of the United States Court of Appeals believes that victim corporations should be awarded reimbursement for expenses incurred for internal investigations that occur prior, during, and after an ongoing government or prosecutorial investigation, the D.C. Circuit strongly disagrees.<sup>191</sup> Below is an analysis of each circuit’s view.<sup>192</sup>

##### A. *Second Circuit: Adopts a Broad View of (b)(4)*

In *United States v. Amato*,<sup>193</sup> the Second Circuit of the United States Court of Appeals first addressed whether internal investigation expenses should be reimbursed under (b)(4) of the MVRA.<sup>194</sup> In

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184. See *infra* Part IV.

185. See e.g., *United States v. Skowron III*, 839 F. Supp. 2d 740, 750–52 (S.D.N.Y. 2012) *aff’d*, No. 12-1284-cr, 2013 WL 3593780, at \*1 (2nd Cir. 2013); *United States v. Amato*, 540 F.3d 153, 162–63 (2nd Cir. 2008); *United States v. Gupta*, 925 F.Supp. 2d 581, 588 (S.D.N.Y. 2013).

186. See *United States v. Onyiego*, 286 F.3d 249, 256 (5th Cir. 2002) (holding that the MVRA similar to the VWPA precludes the award of consequential damages and that here, the victim’s losses were incurred in attempt to recover the stolen property.) “There is no provision [in the restitution Act] authorizing restitution for lost income, cost of restoring property to its pre-theft condition, or *cost of employing counsel to recover from an insurance company.*” *Id.* (quoting *United States v. Mitchell*, 876 F.2d 1178, 1184 (5th Cir. 1989)) (alterations in original). The Court stated that the language of the MVRA was identical to that of the VWPA and resultantly, applied the same analysis it had concluded for the VWPA to the MVRA. *Id.*

187. Villacis, *supra* note 9, at 13–14. “The preclusion of ‘consequential damages’ from other types of restitution does not apply to § 3663A(b)(4).” *Amato*, 540 F.3d at 162 (2nd Cir. 2008) (citing *United States v. Phillips*, 477 F.3d 215, 224–25 (5th Cir. 2007)).

188. Villacis, *supra* note 9, at 14.

189. 18 U.S.C. § 3663A(b)(4) (2012) (emphasis added).

190. See Villacis, *supra* note 9, at 15–16. The debate seems to be over the statutory language of (b)(4). *Id.* The words “necessary” and “during” tend to receive the most discussion. *Id.* Some circuit courts take a broader view when interpreting the language of the statute, while others interpret the statute more narrowly. *Id.*

191. *Amato*, 540 F.3d at 162–63 (2nd Cir. 2008); *United States v. Papagno*, 639 F.3d 1093, 1100–01 (D.C. Cir. 2011).

192. The author chose to specifically analyze the Second Circuit and the D.C. Circuit because of how transparent both Circuits have been in opposing one another. See *Papagno*, 639 F.3d at 1101; *United States v. Gupta*, 925 F.Supp. 2d 581, 585 (S.D.N.Y. 2013) (citing *Papagno*, 639 F.3d at 1101; *Amato*, 540 F.3d at 162–63). Additionally, it is interesting to note that white-collar crime defense practices are mostly concentrated in the cities of Washington D.C. and New York. Weisselberg & Li, *supra*, note 91 at 1273. While not all corporations are incorporated in either New York or Washington D.C., most large corporations likely have principal places of business in either city—making it a likely possibility that corporations facing future charges of criminal misconduct may be prosecuted in front of one of these two circuits.

193. 540 F.3d 153 (2nd Cir. 2008).

*Amato*, “[t]hree individuals . . . conspired together and perpetrated a series of frauds against several states and a corporation that had purchased the small company [and continued to] employ[] the three individuals.”<sup>195</sup> The trial court convicted two of the individuals with conspiracy to commit mail and wire fraud and eleven substantive counts of mail and wire fraud offenses.<sup>196</sup> In the sentencing phase, the trial court ordered the defendants to pay restitution to the victim corporation.<sup>197</sup>

On appeal, the criminal defendants challenged a portion of the district court’s restitution order arguing that attorney fees and accounting costs incurred during “the investigation and prosecution of defendants’ offenses” were not authorized under the MVRA.<sup>198</sup> In granting restitution, the district court relied on necessary “other expenses” in the language of (b)(4) to include attorney fees and accounting costs in the order.<sup>199</sup> In its review, the Second Circuit looked at the plain language of the statute and concluded that the authority given to the district courts to determine which expenses may be granted in restitution is broad.<sup>200</sup> Other than a requirement that the expense be “necessary,” “incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense” and be the victim’s expense; there is nothing else in the statute that limits the inclusion of any categorical expenditure.<sup>201</sup> While some circuits have read in additional requirements to allow the inclusion of attorney fees and accounting costs in a (b)(4) restitution order,<sup>202</sup> the Second Circuit has declined to do so.<sup>203</sup>

In its holding, the Second Circuit affirmed “that ‘other expenses’ incurred during the victim’s participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense may include attorney fees and accounting costs.”<sup>204</sup> Interestingly, while the Second Circuit does not directly state that expenses incurred from an internal investigation can be included in a restitution order, its summary of the District Court’s findings provides concrete evidence that it can.<sup>205</sup> The law firm hired by the victim corporation presented a two hundred twenty eight page memorandum which included documentation of invoices and detailed costs.<sup>206</sup> Within the memorandum, expenses included (1) auditing

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194. *Amato*, 540 F.3d at 159.

195. *Id.* at 156.

196. *Id.* at 158. One of the three individuals died before trial. *Id.*

197. *Id.* The restitution award was \$12,799,795 and “included \$3,088,466 in attorney fees and accounting costs that the district court found [the victim corporation] to have incurred as a result of its participation in the investigation and prosecution of defendants’ offense.” *Amato*, 540 F.3d at 158.

198. *Id.* at 158.

199. *Id.* at 159.

200. *Id.* at 160.

201. *Id.* The defendants argued *ejusdem generis* (“of the same class”) urging that attorney fees and accounting costs could not be included in the definition of “other expenses” when the provision was looked at in its entirety. *Amato*, 540 F.3d at 160. In its entirety, (b)(4) “reimburse[s] [a] victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.” 18 U.S.C. § 3663A(b)(4) (2012). The defendants claimed that “other expenses” should only include expenses that were similar in nature to the enumerated expenses, such as “lost income,” “child care,” and “transportation.” *Amato*, 540 F.3d at 160. Limiting “other expenses” to this categorical class would preclude attorney fees and accounting costs from being included. *Id.* The Second Circuit dismissed this argument stating “that *ejusdem generis* cannot be called into play when the specific terms preceding the general one do not themselves have a common attribute from which a ‘kind of class’ may be defined.” *Id.* Because attorney fees and accounting costs “are so obviously associated with investigation and prosecution,” the Court concluded that Congress had no fear that these “other expenses” might be excluded from an award of restitution, whereas the ones enumerated may have. *Id.*

202. For example, “[t]he Ninth Circuit has specified that such expenses must be the ‘direct and foreseeable result’ of the defendant’s wrongful conduct. *Amato*, 540 F.3d at 162.

203. *Id.* at 162. [The Second Circuit] ha[s] noted similar causation requirements in [its] analysis of victims’ losses generally under the MVRA but have not yet fully addressed these requirements.” *Id.*

204. *Id.* at 159.

205. *See id.* at 162–63.

206. *Amato*, 540 F.3d at 163. The District Court found that the expenses were adequately documented. *Id.* at 162. The corporation’s attorney fees and accounting costs were signed under oath by a member of the corporation’s hired law firm, tasked with finding evidence of the defendant’s fraud. *Id.* “Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence.” 18 U.S.C. § 3664(e).



costs that led to the internal investigation; (2) legal fees spent to complete the internal investigation; (3) legal fees that covered the representation of the victim corporation in assisting the government's investigation and prosecution; (4) legal fees to respond to defendant's document requests; (5) legal fees to work with victim corporation's clients and other states that had become victims of the criminal defendant's fraud; and (6) auditing costs paid to forensic accounting firms to expose the magnitude of the fraud.<sup>207</sup> The legal expenses listed in the memorandum included costs incurred prior, during, and after the internal investigation conducted by the victim corporation and were included in the restitution order.<sup>208</sup>

In *United States v. Bahel*,<sup>209</sup> the Second Circuit reaffirmed its decision in *Amato* that legal fees were necessary expenses under (b)(4).<sup>210</sup> In *Bahel*, the defendant argued that the legal fees incurred by his former employer were not "necessary" because the corporation hired outside counsel to conduct an internal investigation when instead, the corporation could have had its own in-house counsel do the same services at a much lower cost.<sup>211</sup> The Second Circuit dismissed this contention and stated that nothing in *Amato* or other case law limited internal investigation expenses to in-house counsel only.<sup>212</sup> Nor was the Court concerned with the corporation's expense of hiring outside counsel because neither party had claimed the legal fees were unreasonable.<sup>213</sup> The Court added that it is not "uncommon for an organization to retain outside counsel in connection with investigations into internal fraud," and then dismissed the proposed argument for capping legal fees in a restitution order.<sup>214</sup>

Most recently, the Second Circuit affirmed the Southern District of New York's restitution order for criminal defendant, Chip Skowron.<sup>215</sup> In *United States v. Skowron III*,<sup>216</sup> the District Court awarded \$3,827,052.49 in legal fees and related expenses to former employer, Morgan Stanley.<sup>217</sup> The legal fees award included (1) expenses endured to work with the Securities and Exchange Commission ("SEC") and the DOJ during the agencies' own governmental investigation and prosecution; (2) legal expenses incurred by Morgan Stanley to conduct its own internal investigation; (3) the legal fees and costs that Morgan Stanley expended on other managers and employees in connection with the Skowron investigation; and (4) advanced legal fees expended on Skowron during the period of time he maintained his innocence.<sup>218</sup>

On appeal, Skowron argued that the District Court abused its discretion when granting restitution for legal fees because it had used the overly broad language of the VWPA rather than the more narrow provision of the MVRA.<sup>219</sup> The Second Circuit dismissed Skowron's argument.<sup>220</sup> Like in *Amato*, where the criminal defendant was required to reimburse any legal expenses paid in connection with the employer's internal investigation that eventually led to the filing of a criminal investigation, Skowron too was ordered to pay restitution for the expenses incurred by Morgan Stanley to conduct its own internal investigation that led to an SEC and DOJ investigation of Skowron's misconduct.<sup>221</sup>

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207. *Amato*, 540 F.3d at 162.

208. *See id.*

209. 662 F.3d 610 (2nd Cir. 2011).

210. *Bahel*, 662 F.3d at 647.

211. *Id.* at 647–48.

212. *Id.* at 648.

213. *Id.* at 648. Arguing that the extraordinary costs of independent internal investigation are "unreasonable expenses" might be a way to challenge the Second Circuit's broad interpretation of the MVRA when granting restitution. *See id.*

214. *See id.*; Campbell & Beaudette, *supra*, note 90, at 1.

215. *United States v. Skowron III*, No. 12-1284-cr, 2013 WL 3593780, at \*3 (2nd Cir. 2013).

216. 839 F.Supp. 2d 740 (S.D.N.Y. 2012) *aff'd*, No. 12-1284-cr, 2013 WL 3593780, at \*1 (2nd Cir. 2013).

217. *Skowron III*, 839 F.Supp. 2d at 752.

218. *Id.* at 747.

219. *United States v. Skowron III*, No. 12-1284-cr, 2013 WL 3593780, at \*2 (2nd Cir. 2013). Skowron argued that, "[u]nder the MVRA, a victim is entitled to restitution for 'necessary . . . other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.'" *Id.* (alteration in original). He continued, the District Court "relied on the broader language of the VWPA, which allows for restitution of expenses 'related to participation in the investigation or prosecution of the offense.'" *Id.* (alteration in original).

220. *Id.* at \*3.

221. *Id.*

In conclusion, the Second Circuit has made it clear that its interpretation of (b)(4) is broad and all encompassing.<sup>222</sup> “Necessary . . . other expenses” include any expense incurred in connection with “the investigation or prosecution of the offense.”<sup>223</sup> Case law confirms that any expense incurred by the victim corporation prior, during, or after a self-employed internal investigation that can be loosely connected to any government investigation or prosecution will be awarded in a restitution order in the Second Circuit.<sup>224</sup>

#### B. *D.C. Circuit: Adopts a Narrow View of (b)(4)*

In contrast from the Second Circuit, the D.C. Circuit takes a more narrow view as to what “necessary” expenses may include.<sup>225</sup> In *United States v. Papagno*,<sup>226</sup> an employee was convicted of stealing nineteen thousand seven hundred nine pieces of computer equipment from his employer, the Naval Research Laboratory, over a ten year period.<sup>227</sup> At sentencing, the employer sought restitution for the costs incurred as a result of conducting an internal investigation to uncover the criminal defendant’s culpable behavior.<sup>228</sup> Under (b)(4) of the MVRA, the District Court awarded the employer one hundred sixty thousand dollars in restitution for the expenditures it incurred during the internal investigation.<sup>229</sup> The criminal defendant appealed the restitution order and the D.C. Circuit addressed “whether the costs of [an employer’s] internal investigation constituted ‘necessary . . . expenses incurred during participation in the investigation or prosecution of the offense.’”<sup>230</sup>

Similar to the Second Circuit in *Amato*, the D.C. Circuit began its review by interpreting the statutory language of (b)(4).<sup>231</sup> After reading the applicable provision, the D.C. Circuit claimed it did not believe that the statute authorized restitution for a corporation’s internal investigation, especially when the investigation was not commanded by a criminal investigator or prosecutor.<sup>232</sup> The Court began its reasoning by looking at the Congressional history and intent of the MVRA.<sup>233</sup> The Court started by reviewing the VWPA and its discretionary authority to order restitution in three categories of costs.<sup>234</sup> In 1994, the Legislature authorized a new category of costs under the VWPA.<sup>235</sup> “That new provision empower[ed] courts to ‘reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.’”<sup>236</sup> The MVRA was passed in 1996 and it required courts to award mandatory restitution to victims of enumerated criminal acts.<sup>237</sup> The MVRA contains the same four categories of costs covered under the VWPA, including the exact same language from the fourth category of costs added to the VWPA in 1994.<sup>238</sup> Therefore, the Court concluded that (b)(4) of the MVRA models similar language to (b)(4) of the VWPA.<sup>239</sup>

222. See *United States v. Bahel*, 662 F.Supp. 3d 610, 648 (2nd Cir. 2011); *United States v. Amato* 540 F.3d 153, 162 (2nd Cir. 2008); *Skowron III*, 839 F.Supp. 2d at 747.

223. See *Bahel*, 662 F.Supp. 3d at 648; *Amato* 540 F.3d at 162; *Skowron III*, 839 F.Supp. 2d at 747.

224. See *Amato* 540 F.3d at 162; *Skowron III*, 839 F.Supp. 2d at 747.

225. See *United States v. Papagno*, 639 F.3d 1093, 1101 (D.C. Cir. 2011).

226. 639 F.3d 1093 (D.C. Cir. 2011).

227. *Id.* at 1094.

228. *Id.*

229. *Id.* at 1094–95.

230. *Id.* at 1094.

231. *Papagno*, 639 F.3d at 1095; see *United States v. Amato*, 540 F.3d 153, 160 (2nd Cir. 2008).

232. *Papagno*, 639 F.3d at 1095.

233. *Id.* at 1096–97.

234. *Id.* at 1096.

235. *Id.*

236. *Id.*

237. *Papagno*, 639 F.3d at 1096–97.

238. *Id.*

239. See *id.*

Next, the Court determined what “necessary . . . other expenses incurred during participation in the investigation or prosecution of the offense” means.<sup>240</sup> The Court reasoned that because the MVRA addresses a criminal offense of conviction, the only necessary expenses covered must be directly related to the criminal offense.<sup>241</sup> Limiting (b)(4) to a strict criminal offense, the “‘investigation or prosecution’ of ‘the offense’ [must] therefore [be] the criminal investigation and prosecution that is usually conducted by the Federal Bureau of Investigation (“FBI”) or other federal investigators and the local United States Attorney’s office.”<sup>242</sup> Resultantly, any internal investigation expenses incurred during a non-criminal government investigation may not be covered under the MVRA in the D.C. Circuit.<sup>243</sup>

Additionally, the Circuit took a closer look at the word, “participation.”<sup>244</sup> In *Papagno*, the Government argued that participation “means anything that significantly *assists* the criminal investigation or prosecution.”<sup>245</sup> The Naval Research Laboratory spent close to one hundred sixty thousand dollars on a thirty-five-hundred-hour internal investigation to recover property worth a little over one hundred twenty thousand dollars.<sup>246</sup> “There [was] no evidence suggesting that the criminal investigators from the [Naval Criminal Investigative Service] or the prosecutors from the U.S. Attorney’s Office asked the Naval Research Laboratory to conduct its internal investigation.”<sup>247</sup> However, the Government argued that the employer’s internal investigation assisted the criminal prosecution of the defendant and therefore constituted “participation” under (b)(4).<sup>248</sup> The D.C. Circuit disagreed.<sup>249</sup> After a detailed analysis of the meaning between the two words: participation and assistance;<sup>250</sup> the Court concluded that the employer did “not participat[e] in the criminal investigation or prosecution of Papagno when it conducted its [own] internal investigation.”<sup>251</sup> The word “participate” appears to have a much narrower meaning than “assistance” and its common understanding is “to take part in.”<sup>252</sup> As a result, assisting a criminal investigator or prosecutor by conducting an internal investigation is not the same as participating or “taking part in” a criminal investigation or prosecution with the investigator or prosecutor.<sup>253</sup> The D.C. Circuit further pointed out the peculiarity of the Government’s argument:

[A]n organization’s internal investigation could begin either before or after the criminal investigation begins. If assisting the criminal investigation were alone enough to constitute ‘participation’ in the criminal investigation, as the Government argues, then even an internal investigation that *preceded* the criminal investigation could qualify as “participation.” That result seems anomalous at best: After all, one cannot ordinarily be participating in something that has not yet begun.<sup>254</sup>

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240. *Id.* at 1097.

241. *See id.* 1097–98.

242. *Papagno*, 639 F.3d at 1097–98.

243. *See id.*

244. *Id.* at 1098.

245. *Id.*

246. *Id.* at 1095.

247. *Papagno*, 639 F.3d at 1095.

248. *Id.* at 1098.

249. *Id.*

250. *Id.* The Court began differentiating the meaning of “assistance” and “participation” by looking closely at various examples in modern day society. *Id.* For example, “[t]he company that provides electricity to power the sound system at [the Court’s] oral arguments assists the proceedings, but its employees are not ordinarily said to have participated in the oral argument.” *Papagno*, 639 F.3d at 1098. Next, the Court looked at the dictionary to define “participation” as the “act of taking part or sharing in something.” *Id.* And finally, the Court reviewed the Supreme Court of the United States’ analysis in *Reves v. Ernst & Young*, when the Court “rejected the proposition that ‘aid’ equals ‘participation.’” *Id.* (citing *Reves v. Ernst & Young*, 507 U.S. 170, 178–79 (1993)).

251. *Id.* at 1098–99.

252. *Id.* at 1098. The Court proceeded to give several examples, highlighting the differences between assistance and participation. *See Papagno*, 639 F.3d. at 1098.

253. *See id.* at 1098.

254. *Id.* at 1099. This rationale is the exact opposite of the Second Circuit’s analysis of internal investigations in *Amato*. *See United States v. Amato*, 540 F.3d 153, 162–63 (2nd Cir. 2008).

The Court furthered its argument for excluding a corporation's internal investigation from inclusion in a (b)(4) restitution award by reviewing an amendment Congress made in 2008 to the VWPA, but not the MVRA.<sup>255</sup> The amendment to the discretionary restitution statute allowed restitution for "an amount equal to the value of the *time reasonably spent* by the victim *in an attempt to remediate* the intended or actual harm incurred by the victim from the offense."<sup>256</sup> The Court took the position that if applicable, the language in the VWPA amendment would cover the victim corporation's internal investigation costs.<sup>257</sup> Curiously, "Congress did not add similar language to the mandatory restitution statute . . . ."<sup>258</sup> The Court noted that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."<sup>259</sup> Therefore, the D.C. Circuit concluded that Congress did not intend to extend costs of voluntary internal investigations to the mandatory restitution statute.<sup>260</sup>

Finally, the D.C. Circuit analyzed which expenses were deemed "necessary" under (b)(4) when "incurred during participation in the investigation or prosecution of the offense."<sup>261</sup> In analyzing the statute, the D.C. Circuit limited "necessary" to include only expenses incurred as a result of the victim corporation "doing something required or requested by the criminal investigators or prosecutors."<sup>262</sup> The D.C. Circuit would not extend mandatory restitution to cover costs of internal investigations solely initiated by a corporation without any coinciding government investigation.<sup>263</sup> Moreover, the D.C. Circuit clarified that the holding in *Papagno* does not mean that the MVRA always covers internal investigation expenses when requested or required by a criminal investigator or prosecutor, because some may not be necessary.<sup>264</sup> Rather, the Circuit left open the question whether internal investigation expenses requested or required by a criminal government agency would be covered and if so, under what circumstances.<sup>265</sup> The D.C. Circuit in *Papagno* specifically acknowledged that several other Circuits including the Second, Sixth, Seventh, and Eighth have all taken a much broader view of the MVRA and have included internal investigation expenses within a mandatory restitution order, but viewed its interpretation as more faithful to the intent of the statute.<sup>266</sup>

Compared to the Second Circuit, the D.C. Circuit has made it clear that it has adopted a much more narrow and limited view as to whether costs of internal investigations should be awarded in a mandatory restitution order.<sup>267</sup> While the Second Circuit has awarded restitution for internal investigations at all stages—prior, during, and after *any* government investigation has taken place by *any* government agency—<sup>268</sup> the D.C. Circuit has stated that restitution may only be considered when an internal investigation has been requested or required by a *criminal* investigator or prosecutor.<sup>269</sup> Even then, whether the costs of the internal investigation that would be covered would turn on whether the Court believes the circumstances surrounding the internal investigation can be deemed necessary at that time.<sup>270</sup> Resultantly, one may easily conclude that it is much harder to recover costs of internal investigations in the D.C. Circuit as opposed to the Second Circuit.<sup>271</sup>

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255. *Papagno*, 639 F.3d at 1099.

256. *Id.* (quoting 18 U.S.C. § 3663(b)(6) (2012) (emphasis added)).

257. *Id.* The new provision only applies to crimes of identity theft. *Id.*

258. *Id.*

259. *Papagno*, 639 F.3d at 1099 (quoting *Kucana v. Holder*, 558 U.S. 233, 249 (2010)).

260. *See id.*

261. *Id.* at 1100.

262. *Id.*

263. *Id.*

264. *Papagno*, 639 F.3d at 1100.

265. *Id.* To date, this question still has not been answered by the D.C. Circuit.

266. *Id.* at 1101.

267. *See id.* at 1101.

268. *See United States v. Amato*, 540 F.3d 153, 162–63 (2nd Cir. 2008).

269. *See Papagno*, 639 F.3d at 1100.

270. *See id.*

271. *Compare id. with Amato*, 540 F.3d at 162–63.

#### IV. HAS THE MVRA GONE TOO FAR? AN OVERREACHING RESTITUTION ORDER

On February 25, 2013, Rajat Gupta, a former director of Goldman Sachs, was ordered to pay most of the legal fees his former employer incurred as a result of its internal investigation.<sup>272</sup> A five hundred forty two page document was submitted by Goldman Sachs detailing hired counsel's billing records.<sup>273</sup> Interestingly, Gupta used the D.C. Circuit's *Papagno* opinion to support some of his arguments against the government's legal claim for a restitution order under the MVRA.<sup>274</sup> First, Gupta argued that Goldman Sachs was only entitled to mandatory restitution for necessary fees that incurred in connection with the government investigation or prosecution.<sup>275</sup> The Southern District of New York readily dismissed this argument by reemphasizing that the Second Circuit has adopted a much broader view of what is necessary in comparison to the D.C. Circuit.<sup>276</sup> The proposed restitution order "include[d] expenses incurred during Goldman Sach's internal investigations into Gupta's conduct, . . . expenses incurred for work related to Goldman Sach's advancement of Gupta's legal fees, . . . and legal fees incurred by Goldman Sachs to attend [the] post-verdict restitution proceeding . . . ."<sup>277</sup> Citing the Second Circuit's holding in *Amato*, the District Court found that nearly all of the expenses claimed were necessary and covered by the statute.<sup>278</sup>

Drawing support again from the *Papagno* case, Gupta argued that Goldman Sachs was only entitled to mandatory restitution for a "singular" conviction and that any expenses incurred as a result of "participating in the Government's investigation in United States v. Rajaratnam must be excluded from the Court's restitution sentence."<sup>279</sup> Essentially, any overlap between Rajaratnam's case and Gupta's case, should not fall on Gupta.<sup>280</sup> The Court disagreed.<sup>281</sup> "Gupta's argument ignores the glaring fact that in the instant case Gupta was convicted of conspiring with Rajaratnam to commit securities fraud, thus confirming the relevance of the Rajaratnam investigation, at all its stages to the instant case."<sup>282</sup>

It is also worth noting that Gupta argued that because his ultimate convictions were narrower than his initial charges,<sup>283</sup> he should not be liable for all of the expenses incurred as a result of the entire investigation and prosecution.<sup>284</sup> The internal investigation in connection with the government's

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272. Kevin LaCroix, *Gupta Ordered to Repay Goldman Sachs \$6.2 Million for Attorney's Fees*, THE D&O DIARY, (Feb. 26, 2013), <http://www.dandodiary.com/2013/02/articles/securities-litigation/gupta-ordered-to-repay-goldman-sachs-62-million-for-attorneys-fees/>. Goldman Sachs was awarded \$6,218,223.59 of the \$6,909,137.32 it sought of legal fees paid in connection with Gupta's case and related matters. *United States v. Gupta*, 925 F.Supp. 2d 581, 584, 588 (S.D.N.Y. 2013). The judge reduced the restitution request by 10%. *Id.* at 588.

273. *Gupta*, 925 F.Supp. 2d at 584.

The records covered expenses, "involving 'fact-finding regarding Gupta's conduct, representing the Firm and its directors, officers, and employees in responding to criminal and regulatory enforcement investigations and the resulting prosecutions of Gupta and his tippee, Raj Rajaratnam, and providing other legal services that were[the] direct by-product of Gupta's conduct.

*Id.* at 585.

274. *Id.* at 585–86.

275. *Id.* at 585. "Gupta[] argu[es] that, under the MVRA, 'Goldman is entitled to restitution of only those fees it can demonstrate were necessarily incurred in connection with specific requests by the government . . . or were otherwise required to be done . . . in the investigation or prosecution of the *Gupta* case.'" *Id.* (citing *United States v. Papagno*, 639 F.3d 1093, 1100 (D.C. Cir. 2011)).

276. *Gupta*, 925 F.Supp. 2d at 585.

277. *Id.*

278. *Id.*

279. *Id.* at 586.

280. *See id.*

281. *Gupta*, 925 F.Supp. 2d at 586.

282. *Id.* "The Court also reject[ed] Gupta's . . . argument, . . . that Goldman Sach's decision not to seek restitution from Rajaratnam 'precludes it from seeking restitution now . . . .'" *Id.* (citing Gupta Mem. at 13).

283. *Gupta*, 925 F.Supp. 2d at 587. Gupta was acquitted of certain counts of insider trading. *Id.*

284. *Id.*

investigation ended up being far more encompassing than necessary and he should not be liable for those additional expenses.<sup>285</sup> The Court also rejected Gupta’s argument, claiming that the MVRA’s definition of “victim” required restitution to be paid by a conspirator “regardless of the facts underlying counts of conviction in individual prosecutions.”<sup>286</sup> Resultantly, Gupta would be required to pay restitution despite “his acquittal of certain counts of insider trading.”<sup>287</sup> In conclusion, the Court found that ninety percent of the billing records were necessary and Gupta would be required to pay Goldman Sachs restitution amounting to more than six million dollars.<sup>288</sup>

Similarly, Chip Skowron was ordered by the same Court to pay Morgan Stanley an award of attorney fees and costs close to four million dollars.<sup>289</sup> The award included expenses incurred as a result of conducting an internal investigation.<sup>290</sup> Should these awards include internal investigation expenses? Knowing that internal investigations conducted by outside counsel incur extraordinary expenses, should one person bear the cost?<sup>291</sup> And is it fair that a defendant receives a much different outcome depending on where jurisdiction of his case lies? It is clear from the *Papagno* case, that a District Court following the D.C. Circuit precedent would have decided the Gupta and Skowron cases much differently.<sup>292</sup> The next section will attempt to answer the question: Whether internal investigation expenses should be reimbursed under (b)(4) of the MVRA.<sup>293</sup>

#### A. *Should the Defendant Pay for Internal Investigation Expenses Incurred?*

As Part III.B. of this paper explains, internal investigations can become extraordinarily expensive rather quickly.<sup>294</sup> At the first sign of criminal misconduct, most corporations hire outside counsel to assist in conducting an internal investigation.<sup>295</sup> Sometimes an internal investigation can go on for months or years before the government even gets involved.<sup>296</sup> Regardless, an internal investigation is likely to invite a government investigation or prosecution subsequent its commencement.<sup>297</sup> While a criminal defendant may be at the heart of a search, should he ultimately be required to pay for every stage of an internal investigation? What about when expenses spiral out of control?<sup>298</sup> A criminal conviction will already

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285. *See id.*

286. *Id.*

287. *Gupta*, 925 F.Supp. 2d at 587.

288. *Id.* at 588.

[A]fter careful review of Goldman Sach’s bills, the Court has identified a small number of time entries that should be excluded because they relate to post-conviction deposition preparation for civil cases, . . . on a few occasions, the number of attorneys staffed on a task—while perhaps perfectly appropriate *on the assumption that Goldman Sachs wished to spare no expense* on a matter of great importance to it—exceeded what was reasonably necessary under the MVRA.

*Id.* at 587 (emphasis added). The Court used caution and excluded ten percent instead of the nine percent it found necessary to exclude. *Id.* at 587–88. Does the additional attorneys staffed indicate the possibility of abuse when an outside law firm conducts an internal investigation? While the Court did not break down the amounts attributed to each category of legal fees and costs, the court did affirm that a portion of this award did include expenses incurred as a result of conducting an internal investigation prior, during and after the government’s investigation. *Gupta*, 925 F.Supp. 2d at 585.

289. *United States v. Skowron III*, 839 F.Supp. 2d 740, 747 (S.D.N.Y. 2012) *aff’d*, No. 12-1284-cr, 2013 WL 3593780, at \*1 (2nd Cir. 2013).

290. *Id.* at 747.

291. *See supra* Part III.B.

292. *See United States v. Papagno*, 639 F.3d 1093, 1096–1101 (D.C. Cir. 2011).

293. *See infra* Part V.A.

294. *See supra* Part III.B.

295. *Weisselberg & Li*, *supra* note 91, at 1269.

296. *See Henning*, *supra* note 182.

297. *See supra* note 131.

298. *See Henning*, *supra* note 182.

Avon Products disclosed that it spent about \$93.3 million in 2011 on an internal investigation of possible violations of the Foreign Corrupt Practices Act, on top of \$95 million spent in 2010 and \$59 million in 2009. The case still has not been

incarcerate the defendant and in most cases require him to pay a fine. But those consequences are clearly not enough for our society, as indicated by the victims' movement that led to the enactment of the VWPA and eventually the MVRA.<sup>299</sup> The enactment of the MVRA only affirmed that as a nation, we want our criminals to be punished by making restitution mandatory and refusing to consider the criminal defendant's financial ability to pay.<sup>300</sup> There are many unanswered questions surrounding the Act. However, this section will only focus on the statutory language of (b)(4); the driving forces behind the extraordinary expenses of internal investigations; and whether those expenses should be reimbursed by a corporate criminal defendant at all phases of an internal investigation under (b)(4) of the MVRA.

As mentioned in Part II, the Second Circuit takes a broad view of (b)(4) when awarding restitution for internal investigations to a corporation.<sup>301</sup> In contrast, the D.C. Circuit takes a more narrow view.<sup>302</sup> Given the statutory language of (b)(4) and the driving forces behind the extraordinary expenses of an internal investigation as discussed in Part III, should a criminal defendant be liable for all stages of the internal investigation, as the Second Circuit suggests.<sup>303</sup> Or should a criminal defendant only be liable for the internal investigation that occurs *during* the parallel criminal government investigation or prosecution, as the D.C. Circuit suggests.<sup>304</sup>

First, (b)(4) of the MVRA states, “[t]he order of restitution shall require that such defendant—in any case, reimburse the victim for lost income and necessary child care, transportation, and other expense incurred *during participation in* the investigation or prosecution of the offense or attendance at proceedings related to the offense.”<sup>305</sup> Strictly looking at the words of the statute, it appears that the only time restitution should be mandatory is when dealing with an internal investigation that occurs *during the participation in* a government investigation or prosecution. Expenses should not be reimbursed prior to or after the government investigation or prosecution, as the Second Circuit has ruled.<sup>306</sup> Nor should a corporation be reimbursed for its internal investigation after a government investigation or prosecution, as the Second Circuit has ruled.<sup>307</sup> The D.C. Circuit appears to be correct in its interpretation that expenses incurred by an internal investigation should only be reimbursed when the investigation takes place simultaneously with a government investigation or prosecution and with collaboration to indicate participation, not merely assistance.<sup>308</sup> Furthermore, the D.C. Circuit limits internal investigation expense only to criminal offenses.<sup>309</sup> This too, appears to be correct as the statute states that expense reimbursed must be “related to the offense.”<sup>310</sup> Subsection (c) of the MVRA describes in detail what may constitute

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resolved, and the fact that there was only a minuscule decline in the legal costs last year indicates that the investigation has uncovered a wider range of possible violations.

*Id.*

299. Dickman, *supra* note 49, at 1687.

Beginning in the 1970s, the [Victims' Rights] [M]ovement reflected public sentiment that the criminal justice system had become overly offender-focused and sought “to make the justice system more sensitive to victims’ needs and concerns.” At the apex of the campaign, President Reagan commissioned a Task Force on Victims of Crime, which conducted a national study of the plight of crime victims and made a series of policy recommendations to improve their situation. A central component of the reforms suggested by both the President’s Task Force and the victims’ rights movement was the right of victims to receive restitution from the perpetrator of the crime. Heeding that advice, Congress enacted legislation over the last twenty-five years that significantly enhanced the authority of federal courts to order restitution to victims of crime.

*Id.*

300. See Dickman, *supra* note 49, at 1687–88.

301. See *supra* Part IV.A.

302. See *supra* Part IV.B.

303. See 18 U.S.C. § 3663A (2012); see *supra* Part IV.A., III.B.

304. See *supra* Part IV.B.

305. 18 U.S.C. § 3663A(b)(4) (2012) (emphasis added).

306. See *supra* Part IV.A.

307. See *id.*

308. See *supra* Part IV.B.

309. See *id.*

310. See 18 U.S.C. § 3663A(b)(4).

an offense. Interestingly, the introductory language of subsection (c)(1) states, “[t]his section shall apply in all *sentencing proceedings* for *convictions* of, or *plea agreements* relating to charges for, any offense . . . .”<sup>311</sup> The terms “sentencing proceedings,” “convictions,” and “plea agreements,” all describe processes in criminal procedure. Strictly interpreting the words of the statute, it appears that the D.C. Circuit was accurate in concluding that mandatory restitution is only available in enumerated criminal offenses and therefore, reimbursable expenses for internal investigations can only be those of a *criminal* government investigation or prosecution.<sup>312</sup>

Secondly, a more narrow approach to a (b)(4) application is also favored when reviewing the driving forces that lead to the extraordinary expenses incurred by a corporation when outside counsel conducts an internal investigation. Factors such as the corporation’s limiting control over the internal investigation, the effect of D&O Insurance, and the fact that most white-collar defense practices are made up of former prosecutors billing partner rates, all contribute to extraordinarily high and unmanageable costs of internal investigations.<sup>313</sup> Summarily, internal investigations are like a runaway train. The end-goal of cooperating with the government in an effort to reduce or eliminate a criminal indictment or conviction,<sup>314</sup> leads many corporations willing to expend any cost necessary to reach its objective.

When a corporation is caught in a government investigation, the legal fees can quickly exceed \$100 million – and that’s before the lawsuits even begin. Once the government files charges, those costs can continue to grow as companies are required to pay the legal fees for any officers or directors accused of wrongdoing.

Is there any way to limit these costs? The short answer is probably not . . . .<sup>315</sup>

As a result, perhaps the criminal defendant could argue that the costs associated with the internal investigation are simply unreasonable, as the Second Circuit pointed out in *Bahel*.<sup>316</sup> Bahel’s argument failed because instead of claiming that the expenses themselves were unreasonable, he directed his argument toward the corporation and how it could have reduced its expenses by handling the case in-house.<sup>317</sup> Had he argued that the internal investigation expenses were simply unreasonable, he may have had a viable defense.<sup>318</sup>

Because there is no real control over the expenditures of an internal investigation, corporations should not be incentivized to rack up the costs before and after, knowing that a criminal conviction of a former employee will potentially lead to reimbursement.<sup>319</sup> The Southern District of New York’s recent multi-million-dollar-award to Goldman Sachs for the misconduct of Rajat Gupta and the Second Circuit’s recent multi-million-dollar-award to Morgan Stanley for the misconduct of Chip Skowron treads on dangerous territory.<sup>320</sup> These awards encourage corporations to cooperate with the government, leave no stone unturned, and potentially find a scapegoat for a greater corporate crimes scandal. After all, putting a face on a conflict can lead to a criminal conviction of a former manager or director. A criminal

311. *Id.* § 3663A(c)(1) (emphasis added).

312. *See supra* Part IV.B.

313. *See supra* Part III.B.

314. Weisselberg & Li, *supra* note 91, at 1237.

315. Henning, *supra* note 182.

316. *See United States v. Bahel*, 662 F.3d 610, 648 (2<sup>nd</sup> Cir. 2011).

317. *Id.*

318. *See id.*

319. While not every corporation’s goal is to recoup the costs of an investigation from a convicted employee, it is noteworthy to mention that Morgan Stanley did attempt to recoup the \$33 million settlement it paid out to the SEC as a result of Chip Skowron’s misconduct in addition to its internal investigation costs. *United States v. Skowron III*, 839 F.Supp. 2d 740, 743 (S.D.N.Y. 2012) *aff’d*, No. 12-1284-cr, 2013 WL 3593780, at \*1 (2<sup>nd</sup> Cir. 2013). The Second Circuit rightfully denied the request noting that “Morgan Stanley [was] not entitled to restitution of the amount it paid to the SEC.” *Id.* at 746. The court reasoned that the settlement represented disgorged losses avoided because of Skowron’s fraudulent behavior and had the Court allowed reimbursement of the settlement the deterrent value of disgorgement would have been completely undermined. *Id.* at 746–47.

265. *See United States v. Skowron III*, No. 12-1284-cr, 2013 WL 3593780, at \*3 (2<sup>nd</sup> Cir. 2013); *United States v. Gupta*, 925 F.Supp. 2d 581, 588 (S.D.N.Y. 2013).



conviction will lead to a mandatory restitution order. And if the corporation has the good fortune of being in the Second Circuit, that restitution order will be over-expansive and include every expense incurred prior, during, and after the internal investigation. This difference between the Circuits poses the question: How should this knowledge influence a corporation when conducting an internal investigation? With internal investigations on the rise, it may be time for corporations to embrace its corporate responsibility and find alternative ways to manage its expenses when conducting an independent internal investigation.<sup>321</sup>

## VI. PROPOSAL: PROACTIVE SOLUTIONS FOR CONDUCTING AN INTERNAL INVESTIGATION

Even though the driving forces behind expensive internal investigations are difficult to avoid,<sup>322</sup> a corporation can manage the cost of an internal investigation without sacrificing due diligence by being proactive.<sup>323</sup> The first and most important step a corporation can take to reduce the exorbitant costs of an internal investigation is to have a response procedure in place before a subpoena, allegation, warrant, or whistleblower ever comes forth.<sup>324</sup> This procedure should identify the general categories of possible improprieties that could affect the corporation based on the type of industry it is, and how and where it conducts business.<sup>325</sup> Depending on the type of improprieties that could occur, a scaled response should be established.<sup>326</sup>

The second step in developing the procedure, should involve identifying a response team.<sup>327</sup> The response team should include members of higher management and any employee necessary to assist outside counsel with the investigative process.<sup>328</sup> The individuals on the response team should understand their roles and have the ability to act quickly and authoritatively once the procedure is in place.<sup>329</sup> Additionally, the corporation should consider finding independent outside counsel who will conduct the internal investigation prior to any impropriety occurrence.<sup>330</sup> To remain independent, the identified firm should not be involved in any other work outsourced by the corporation.<sup>331</sup>

When an investigation commences, the corporation should implement its procedure by identifying what type of scaled response is necessary and the likely expenses the internal investigation will incur.<sup>332</sup> By identifying the appropriate scope of the investigation early on, appropriate steps can be taken to manage the costs of the investigation more efficiently.<sup>333</sup> A schedule for periodic reporting should be established at the beginning of the investigation and modified if necessary, during its progression.<sup>334</sup> Status updates should help the corporation maintain its grasp on the progression of the investigation and budget for any necessary expansions on scope while continuing to control costs.<sup>335</sup>

Perhaps, the most challenging decision a corporation must make is when to end the internal investigation.<sup>336</sup> It is important that the corporation's response team communicates with all necessary parties, including the regulator, to determine whether the initial impropriety and any ancillary

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321. See *infra* Part VI.

322. See *supra* Part III.B.

323. Bert F. Lacativo & John R. Stanley, *Can You Really Manage the Cost of an Investigation?*, CORP. COUNS. (Nov. 21, 2013), <http://www.law.com/corporatecounsel/PubArticleFriendlyCC.jsp?id=1202629077869&slreturn=20131111195615>.

324. *Id.*

325. See *id.*

326. *Id.*

327. *Id.*

328. Lacativo & Stanley, *supra* note 328.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. Lacativo & Stanley, *supra* note 328.

334. *Id.*

335. *Id.*

336. *Id.*

improprieties have been fully addressed.<sup>337</sup> Once all improprieties have been adequately addressed, the response team must communicate with the external auditor that the investigation has been completed.<sup>338</sup> Finally, the corporation should establish a remediation plan to prevent the detected improprieties from occurring again in the future.<sup>339</sup> Ultimately, following a predetermined procedure for how to respond to an impropriety will ensure that a corporation effectively manages an internal investigation from start to finish.<sup>340</sup>

## VII. CONCLUSION

In conclusion, mandatory restitution orders awarded under (b)(4) should be limited. The D.C. Circuit's more narrow view approach to (b)(4) is favored over the Second Circuit's broad approach.<sup>341</sup> However, until the Supreme Court of the United States makes that determination, corporations need a way to limit the extraordinary expenses incurred as a result of conducting an independent internal investigation. With the ever-increasing costs of voluntary internal investigations, corporations should take proactive steps when preparing for the possibility of a government investigation or prosecution.<sup>342</sup> Awarding victim corporations restitution for all expenses incurred prior, during, and after the occurrence of an internal investigation wrongfully invites a corporation to take a back seat while outside counsel racks up billable hours. Because government investigations and prosecutions are unlikely to go away, corporations need to take a long hard look at how to prepare for the unexpected without relying on the Second Circuit's broad interpretation of the MVRA to make it whole. While the MVRA was intended to make the victim whole, awarding restitution orders for a corporation's multi-million dollar internal investigation simply takes the Act too far.

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337. *Id.*

338. Lacativo & Stanley, *supra* note 328.

339. *Id.*

340. *Id.*

341. Compare *supra* Part IV.B with *supra* Part IV.A.; See also *supra* Part V.A.

342. See *supra* Part III.B.; Lacativo & Stanley, *supra* note 328.