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## MAINTAINING PRIVILEGE PROTECTION OF INTERNAL INVESTIGATIONS

*Courts have not always consistently applied the protections of attorney-client privilege and work-product doctrine in internal investigations. The author discusses the Supreme Court's seminal Upjohn case, which recognized such protections, and then turns to more recent cases in which the Upjohn principles were tested and faltered. She then discusses the scope of privilege abroad and concludes with some practice tips and takeaways.*

By Sarah F. Warren \*

Courts in the United States and abroad have inconsistently applied privilege protections in the context of internal investigations since the seminal case of *Upjohn Co. v. United States*.<sup>1</sup> This is especially so in recent years. The inconsistent application of privilege protections has contributed to an ever-changing landscape and, in many respects, has eroded the legal privilege. In navigating the ever-changing landscape, attorneys conducting internal investigations should be mindful of potentially conflicting interpretations and application of privilege protections, especially in cross-border internal investigations. Similarly, company counsel should be mindful of legal developments in the area of privilege (and otherwise) in jurisdictions in which his/her company is doing business. This article surveys recent cases interpreting and applying privilege protections in the context of internal investigations, and

provides practice tips to address challenges attorneys may face during the course of those investigations.

### THE SEMINAL CASE

In 1981, the Supreme Court made clear in *Upjohn* that protections afforded by the attorney-client privilege and work-product doctrine apply to internal corporate investigations and to whom the protections extend. The case arose from an internal investigation involving claims that Upjohn employees made illegal payments to foreign government officials. As part of its investigation, Upjohn distributed a questionnaire to its employees seeking information regarding the potentially illegal payments. The employees' responses were reviewed by Upjohn's in-house counsel and its outside attorneys. After Upjohn concluded its internal investigation, the IRS sought the production of the questionnaire responses in connection with potential tax

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<sup>1</sup> 449 U.S. 383 (1981).

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\* SARAH F. WARREN is Special Counsel in the White Collar Criminal Defense and Securities Enforcement Practice focusing on government and regulatory investigations at Fried Frank. Ms. Warren also serves as Fried Frank's Associate General Counsel and is a member of the Firm's Professional Responsibility Committee. Her e-mail address is sarah.warren@friedfrank.com. Ms. Warren was assisted in the preparation of this article by Courtney D. Morphet, an associate in Fried Frank's Litigation Department.