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Cooperation, privilege and internal investigations

Companies have to weigh the risks of disclosing "just the facts."

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Significant recent developments regarding cooperation with the government during internal investigations have affected the preservation of the attorney-client privilege and work-product protection.

The combined impact of the Department of Justice's (DOJ) and Securities and Exchange Commission's (SEC) new policies regarding corporate cooperation, along with several court rulings ordering disclosure of attorney notes and memoranda made during internal investigations, appear to have changed the playing field. These developments require reassessment of how to disclose information to the government and how to minimize the collateral consequences in subsequent litigation of court-ordered production of investigation-related documents seemingly protected by privilege or as work product.

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For the past decade, counsel and companies conducting internal investigations have received a relatively consistent answer to the question: "What does the government want?" Both the DOJ and SEC had policies and practices firmly in place that offered credit for cooperation and positive considerations in prosecutorial charging decisions to companies that disclosed documents and information that were protected by corporate attorney-client privilege and the work-product doctrine.

THE MEMOS

Beginning with the 1999 "Holder Memo" (Memorandum from Deputy Attorney General Eric H. Holder Jr., Bringing Criminal Charges Against Corporations (June 16, 1999)) and continuing with the 2003 "Thompson Memo" (Memorandum from Deputy Attorney General Larry D. Thompson, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003)) and the 2006 "McNulty Memo" (Memorandum from Deputy Attorney General Paul J. McNulty, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006)), the DOJ, and the SEC through its "Seaboard Report," Exch. Act Rel. No. 44,969 (Oct. 23, 2001), essentially made waiver of the attorney-client privilege and work-product protections near-necessary elements evidencing a company's cooperation.

During the past few years, the private bar voiced increasing concerns that internal DOJ and SEC procedures intended to limit requests for privilege waivers were not being followed and that prosecutors were inappropriately causing organizations to waive the attorney-client privilege and work-product protections. Furthermore, it was clear that the courts were unable to redress the coercive and deleterious effects of government waiver requests in subsequent lawsuits. The 1st, 2d, 3d, 4th, 6th, 10th and D.C. circuits rejected the "selective waiver" doctrine — which allows the holder of work-product and attorney-client protected materials to share privileged information with government investigators, but still retain claims of privilege against third parties in subsequent litigation. The 8th Circuit stood alone in its approval of the doctrine, along with limited district and state courts in specific circumstances.

In light of the DOJ and SEC policies, corporations seeking to cooperate with government investigators faced the decision of whether to surrender privileged materials and confidentiality rights in exchange for leniency, or to maintain the privilege and be deemed "uncooperative." In an effort to protect the privilege, a wide-ranging collection of advocates (from the American Civil Liberties Union and National Association of Criminal Defense Lawyers to the Association of Corporate Counsel

and U.S. Chamber of Commerce) pressed for revised policies and lobbied Congress for remedial legislation.

A new Federal Rule of Evidence 502(c) was proposed in 2006 that would have allowed selective waiver (and eliminated the predominant rationale for corporate noncooperation), but the private bar largely opposed the rule, and it was not adopted. Rules 502(d) and (e) relating to litigation privilege waivers were adopted in 2008, but are limited in application and Congress did not intend them to alter the law on selective waiver.

Instead, the House of Representatives passed legislation in 2007 that would have greatly curtailed the ability of prosecutorial offices and regulatory agencies to seek attorney-client privilege waivers and would have prohibited them from requesting privileged information or conditioning charging decisions on the production of privileged information. See Attorney-Client Privilege Protection Act of 2007, H.R. 3013, 110th Cong. (2007). A companion bill was introduced in the Senate in June 2008, but failed to pass. See Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008).

In an effort to dissuade what appeared to be growing momentum for the passage of this legislation, Deputy Attorney General Mark Filip advised the Senate Judiciary Committee that the DOJ would shortly issue significant changes to the 2006 McNulty Memo. See Letter from Deputy Attorney General Mark Filip to senators Patrick J. Leahy and Arlen Specter (July 9, 2008). On August 28, 2008, Filip announced significant changes to DOJ policies in evaluating a company's cooperation efforts with the government ("Filip Revisions").

The new policies are based largely on the principle that "[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection," but rather on the "relevant facts" the corporation discloses. United States Attorneys' Manual (USAM) § 9-28.720. In keeping with this principle, the DOJ may now not even ask for certain types of privileged information, such as legal advice, an attorney's mental impressions or an attorney's legal theories. Moreover, prosecutors are essentially forbidden from asking a corporation to disclose nonfactual privileged information. The Filip Revisions therefore largely removed corporations' incentives to turn over entire documents such as confidential employee interview memoranda to the government. USAM § 9-28.710.

In October 2008, the SEC updated its enforcement manual ("Red Book"), providing a similar policy on cooperation and waiver of the attorney-client and work-product privileges. SEC Division of Enforcement, Enforcement Manual (Oct. 6, 2008), available at www.sec.gov/divisions/enforce/enforcementmanual.pdf. The Red Book provides that entities can provide "significant cooperation" by disclosing "relevant information," which "need not include a waiver of privilege to be an effective form of cooperation, as long as all relevant facts are disclosed." Id. at § 4.3.

Despite some skepticism, the DOJ and SEC policy changes were nearly universally heralded by practitioners with much acclaim as an historic victory and a righting of the attorney-client privilege ship back toward its formerly safe harbor. However, this putative safe harbor remains replete with dangerous inadvertent waiver issues.

NEW RISKS OF COOPERATION

As the DOJ and SEC were refitting their policies regarding waivers, a number of courts in 2008 were ordering the production of attorney interview memoranda and other arguably privileged materials that had been shared with the government to third parties in subsequent litigations. These decisions were based on a rejection of the selective-waiver doctrine, even when bolstered by confidentiality agreements entered into with government agencies under the theory that the company shared a common interest with the government investigators. See, e.g., *In re Initial Public Offering Sec. Litig.*, 249 F.R.D. 457 (S.D.N.Y. 2008).

Furthermore, while the DOJ's and SEC's new corporate cooperation policies were seen in some circles as efforts to sidestep remedial legislation and selective-waiver issues, recent federal and state court decisions show that this newer, friendlier framework is nearly as susceptible to the privilege waiver problems created by past policies and practices.

In these cases, experienced counsel cognizant of selective-waiver problems took precautions to protect privilege and work product in cooperating with the government. During and after completion of internal investigations, counsel provided the government and others with factual information and took steps to shield notes and memoranda from disclosure. For example, counsel created presentations to the government based only on nonprivileged documents, oral disclosures were limited to confirming factual information and references to notes were made only to confirm or deny facts.

The courts nonetheless found that certain factual disclosures to the government operated to waive privilege on underlying attorney notes and memoranda. The courts ordered these documents produced to third parties with varying degrees of redaction. What is most important about these rulings is that counsel carefully controlled the information disclosures to provide only "relevant facts" to the government — as now prescribed by the Filip Revisions and SEC guidelines — but the courts nonetheless found inadvertent privilege waivers.

In a decision issued within a week of the Filip Revisions, *Sec. and Exch. Comm'n v. Roberts*, 254 F.R.D. 371 (N.D. Calif. 2008), the SEC brought a civil enforcement action against a

former officer of McAfee Inc., alleging various federal securities law violations. Independent counsel conducted the investigation on behalf of a special committee and made presentations to the board, the SEC, the DOJ and McAfee's outside auditors. During the presentations, counsel discussed their findings and answered questions about what was said by particular witnesses.

In the subsequent SEC civil enforcement action, the former officer moved to compel production of counsel's notes from the internal investigation, including notes of witness interviews and notes of meetings with the government and other third parties. Counsel affirmed that their notes were entitled to attorney-client privilege and work-product protection, as they contained impressions, opinions and conclusions and were never produced to government investigators or others.

The former officer asserted that the notes were relied on during communications with government investigators, and that therefore attorney-client privilege protection over the notes had been waived.

The court found that the privilege was preserved only as to the special committee client and the outside auditors, who shared a common interest. The court, however, ordered the production of a number of interview notes that had been used or relied upon during discussions with the government. That the interview notes themselves were never shared with the government was irrelevant because "'the transmission of privileged information is what matters, not the medium through which it is conveyed.'" Id. at 377 (citing *U.S. v. Reyes*, 239 F.R.D. 591, 604 (N.D. Calif. 2006)). Counsel were also directed to produce notes of meetings and communications with the government and the board, subject to redaction only to protect mental impressions and undisclosed conclusions.

In *Ryan v. Gifford*, 2008 WL 43699, No. 2213-CC (Del. Ch. 2008), the court denied an interlocutory appeal of an order to compel discovery in a stock-options backdating case at Maxim Integrated Products Inc. Shareholder derivative plaintiffs sought to compel investigating counsel to produce all communications with counsel's special committee client, including the presentation of the investigation's final report and all interview notes taken in the course of the investigation. Similar to the circumstances in Roberts, including precautions to protect privilege and work product, counsel reviewed documents and presented an oral final investigative report to third-parties including Maxim's board, the SEC, the DOJ, Nasdaq and Maxim's auditors.

The court ordered the production of all privileged material related to the internal investigation based in part on the "convenient and selective invocation of the attorney-client privilege." Id. at *4. In particular, the court had found that privilege had been waived due to documentary and other detailed disclosures to the government. The court held that this partial waiver operated as a complete waiver for all communications of the same subject matter, thereby entitling plaintiffs to all communications between counsel and the special committee.

The court rejected similar arguments as set forth in Roberts — that counsel's interview notes were protected by the work-product doctrine as they contained subjective opinions regarding witness credibility and testimony. After an in camera inspection, the court ruled that only certain nonfact attorney work product could remain protected.

FUTURE UNCERTAIN

Whether the Filip Revisions and existing SEC guidelines provide adequate privilege protection or whether remedial legislation needs to be enacted remains to be seen. Only time will reveal what, if any, real effect these revisions will have on the way that prosecutors, corporations and defense counsel conduct themselves during investigations and how courts respond to third-party requests for internal investigation materials.

In the meantime, investigating counsel and companies must anticipate that the current price of "factual" cooperation with the government may be that attorney memoranda and notes become fair game to third-party litigants. As such, counsel must also engage in thoughtful practices regarding the creation, content and preservation of attorney notes and memoranda.

Weighing the benefits and consequences of cooperation entails many other considerations such as investor relationships and publicity concerns, but potential advantages with the government can be overstated and outweighed by the possible loss of privilege and control to third parties. Attorney notes and memoranda typically were not part of this calculus.

The outcomes in *Roberts* and *Ryan* reveal, however, that in trying to provide cooperative conduct that warrants credit from government prosecutors and regulators under the new DOJ and SEC frameworks, counsel now need to factor new risks into the equation. NLJ

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