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Protecting Privileges During Government Investigations

The SEC and DOJ have changed their policies about requesting a privilege waiver during a government investigation significantly. Although the changes offer companies opportunities to preserve their privilege, only time will tell on how the new policies are applied in the field. Other agencies still use their prior procedures, and the case law remains unfavorable if a disclosure does occur.

by Randall J. Fons and Brian Neil Hoffman

After considerable criticism, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) both recently announced revisions to their guidelines with respect to waiver of the attorney-client communication privilege and work product doctrine (together, "privileges").[1] Among other things, the DOJ and SEC changed their position on whether a company effectively must waive its privileges to obtain credit for cooperating, which is one of the factors the DOJ and SEC consider when making charging decisions. These modifications represent a significant step away from prior practices. However, the extent to which the revisions result in a practical difference for companies facing government investigations remains to be seen.

Revised Policies No Longer Highlight Waiver

DOJ's New Policies

On August 28, 2008, US Deputy Attorney General Mark R. Filip announced revisions to the DOJ's Principles of Federal Prosecution of Business Organizations (Filip Revisions).[2] While prior policies concerning cooperation and privilege waiver were contained in memoranda issued by the Deputy Attorney General, the Filip Revisions are incorporated into the US Attorneys' Manual, which provides general guidance to all federal prosecutors in the DOJ. With respect to the privileges, the Filip Revisions explicitly state that "[t]he Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system."[3] In light of this, when assessing a company's cooperation with a DOJ investigation, "prosecutors should not ask for such waivers [of a company's privileges] and are directed not to do so."[4] This prohibition does not apply when a company asserts an advice-of-counsel defense or when the crime-fraud exception applies.[5]

Rather than focusing on a privilege waiver to establish cooperation, the Filip Revisions emphasize the disclosure of relevant facts concerning potential misconduct.[6] That is, the DOJ wants to know, among other things, "how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it?"[7] Disclosure of "the relevant facts about the putative misconduct" is the "critical factor" to assess a company's cooperation, regardless of the methods by which the company gathers that information.[8] Thus, although the Filip Revisions define a "cooperating company" as one which is willing to disclose relevant facts gathered by outside counsel during an internal investigation, the Filip Revisions, unlike prior practices, do not call for the disclosure of privileged materials generated during that internal investigation.[9] For example, corporate counsel "need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers' interviews."[10] To get cooperation credit, however, the relevant factual information acquired through the interviews must be disclosed.[11] In addition, "a corporation remains free to convey non-factual or 'core' attorney-client communications or work products—if and only if the corporation voluntarily chooses to do so."[12]

Randy Fons is a partner, and Brian Hoffman is a senior associate, at Morrison & Foerster in Denver, CO.

SEC's New Policies

On October 6, 2008, the SEC's Division of Enforcement published a new "Enforcement Manual."[13] The Enforcement Manual "contains various general policies and procedures and is intended to provide guidance only to the staff of the Division."[14] With respect to the privileges and assessing a company's cooperation in an investigation, the Enforcement Manual states that the SEC recognizes the importance of the privileges and that "[t]he staff must respect legitimate assertions of the attorney-client privilege and attorney work product doctrine, unless a party voluntarily chooses to waive privilege."[15] To this end, ***"[t]he staff should not ask a party to waive the attorney-client or work product privileges and is directed not to do so."***[16] This prohibition does not apply when a company asserts an advice-of-counsel defense or when the crime-fraud exception applies.[17] Decisions regarding privilege waivers are to be discussed with supervisors.[18]

Like the Filip Revisions, the SEC's Enforcement Manual instructs the staff that "an important measure of cooperation" should not be a company's waiver of its privileges, but, among other things, a company's timely disclosure of all relevant facts that are responsive to the staff's information requests.[19] The Enforcement Manual recognizes that certain materials generated during an internal investigation may be privileged, such as interview memoranda or notes, but states that the underlying factual information disclosed by the witnesses are not and, thus, are subject to disclosure to the staff to show cooperation.[20] The Enforcement Manual acknowledges that a party may choose to voluntarily waive the privileges.[21]

New Policies Depart from Prior Policies

The Filip Revisions and Enforcement Manual represent a significant departure from prior DOJ and SEC policies and practices.[22]

The DOJ's policy most recently was contained in a memorandum issued by then-Deputy Attorney General Paul J. McNulty in December 2006 (McNulty Memorandum).[23] Under the McNulty Memorandum, prosecutors could request certain types of privileged materials upon finding a legitimate need for them and obtaining the approval of high-level prosecutors. The McNulty Memorandum itself represented a retraction of a 2003 memorandum, issued by then-Deputy Attorney General Larry D. Thompson (Thompson Memorandum), which expressly authorized the DOJ to consider "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection."[24]

Prior to the Enforcement Manual, the SEC operated under policies akin to the Thompson Memorandum and adopted in the SEC's October 23, 2001 "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions" (Seaboard Report).[25] In the Seaboard Report, the SEC announced its policy on cooperation: When making charging decisions, the SEC would consider whether a company promptly disclosed to the SEC the company's own review of the situation and made sufficient documentation available to the Staff, which could require the company to forgo assertion of its privileges. In a January 4, 2006, "Statement of the Securities and Exchange Commission Concerning Financial Penalties," the SEC reiterated that, when assessing whether to seek a penalty against a company, it would consider whether the company cooperated during an investigation.[26]

The Thompson Memorandum, the McNulty Memorandum, and the Seaboard Report were all criticized for creating what many, including former SEC Commissioner Paul Atkins, called a "culture of waiver."[27] Indeed, many corporate counsel reported feeling pressured by government agencies to waive the privileges.[28] Although none of the prior policies, on their face, actually required a privilege waiver (instead considering waiver, along with other factors, when assessing cooperation), companies frequently, and understandably, felt that waiver was necessary to avoid being labeled as uncooperative, and thus increasing the odds of facing charges.

The Filip Revisions and Enforcement Manual represent a step forward in terms of protecting

corporate privileges and reducing the "culture of waiver." Appropriately, the new policies focus on disclosure of relevant facts concerning the alleged wrongdoing, and not on a privilege waiver. Thus, companies facing DOJ or SEC investigations can at least consider alternatives to waiving the privileges in providing relevant information to the government, and may evaluate the strategic and substantive benefits of a waiver before voluntarily doing so. This said, neither the US Attorneys' Manual, nor the Enforcement Manual actually creates enforceable rights on which companies may rely.[29] Only time will tell whether prosecutors and staff attorneys in the field—who have been operating for many years under the prior policies that were less deferential to corporate privileges—will apply the new Filip Revisions and Enforcement Manual with the certainty in which they are apparently written.

Other Agencies Use Prior Policies

The effects of the Filip Revisions and Enforcement Manual also are limited because they solely apply to the DOJ and SEC. Companies under investigation by multiple federal or state agencies may face differing policies at the various agencies, some of which may still gauge a company's cooperation partly by its willingness to waive its privileges.[30] Thus, companies dealing with such regulators must still contend with the oft-criticized "culture of waiver."[31] And these other agencies may share the results of their investigations with DOJ and/or SEC officials. As a practical consequence, companies may see increased coordination between these other regulators and the DOJ and SEC, with the other regulators taking the lead in gathering information from the company.

Potential Legislation

Some lawmakers have reacted negatively to the patchwork of policies among various regulatory agencies. Most notably, Senator Arlen Specter (R-PA) has been particularly outspoken. He, as well as others, criticized the SEC's and DOJ's policies, even after the Filip Revisions (he has yet to speak on the Enforcement Manual), as incomplete, since other agencies still operate under their prior policies, and as too malleable, since future DOJ (and SEC) leaders can again change the department's policies.[32] In June 2008, Sen. Specter reintroduced legislation called the "Attorney-Client Privilege Protection Act of 2008," Senate Bill No. 3217 (Bill).[33] This Bill would categorically prohibit any federal agency or agent from demanding that a company waive its privileges, or from basing charging decision on any company's waiver of or refusal to waive its privileges. The House of Representatives already passed a prior version of the Bill. At this point, it is not certain whether the Filip Revisions and Enforcement Manual are substantial enough to forestall Senate action on the Bill. Moreover, the Bill would not apply to state agencies.

Disclosure Has Significant Ramifications

The Filip Revisions and Enforcement Manual have not changed the significant consequences companies face if they do disclose privileged materials to the government during an investigation. In most circuits, the production of privileged materials to the government results in a complete waiver of the privileges with respect to all subsequent requestors, be they other governmental agencies or private parties.[34] Although some cases draw distinctions between the different types of work product (opinion versus non-opinion), only ruling on non-opinion work product, which is typically afforded fewer protections,[35] other courts apply their rulings uniformly to both types of work product.[36] Moreover, courts generally give little weight to confidentiality agreements between the producing party and the government.[37] The circuits following this majority rule have found broad privilege waivers because the production of privileged materials to the government, which is then or may soon be an adversary of the company, is inconsistent with the original purposes behind the privileges.[38]

The courts adopting the majority view have rejected the selective waiver doctrine adopted by the Eighth Circuit, and in certain circumstances by the Fourth Circuit. Under the selective waiver doctrine, the privileges attaching to materials produced to the government are not waived as to subsequent requesting parties.[39] The Eighth Circuit applied this doctrine to materials protected by the attorney-client privilege as a way to promote cooperation with government investigations, but rejected the doctrine's

application to non-opinion work product.[40] The Fourth Circuit rejected the selective waiver doctrine except with respect to opinion work product, which the court found little danger of a party using both "as a sword and as a shield . . . so as to distort the fact-finding process."[41] A recent attempt to codify the selective waiver doctrine in the Federal Rules of Evidence was thwarted when a new Rule 502 was adopted by Congress without a proposed selective waiver provision.[42]

The Fifth, Seventh, Ninth, Eleventh, and Federal Circuits have yet to clearly address this issue.[43] And the Second Circuit seemingly adopted a case-by-case approach to determining whether waiver occurred for opinion work product produced to the government.[44]

Given this case law, companies should assume that any documents produced to the government will lose their privilege protections.[45] Although the Filip Revisions and Enforcement Manual may reduce the number of times companies actually face this issue (at least as to information produced to the DOJ and SEC), the Filip Revisions and Enforcement Manual likely will not change any court's decision as to produced documents. The majority rule in the case law, typically finding waiver, crystallized, at least in part, under the more aggressive Thompson Memorandum and the Seaboard Report, which virtually required disclosure of privileged materials. The courts following the majority rule were generally unsympathetic to companies' arguments that the disclosures were somehow involuntary.[46] Corporate disclosures of privileged materials under the more permissive Filip Revisions and Enforcement Manual likely are to be deemed all the more voluntary and, thus, even more likely to have resulted in a complete waiver under the majority rule.

Conclusion

Managing a company's privileges during a government investigation is a complex area with shifting laws and practices. While the Filip Revisions to the DOJ's policies, and the Enforcement Manual's changes to SEC policies, may help companies protect their privileges, the lack of uniformity across regulators may undermine many of the benefits. Moreover, the price of disclosure remains steep under the federal case law: typically, waiver of the privileges vis-à-vis other government agencies and private litigants. Given the complexities of these matters, companies facing government requests that may impact privileged information should seek the guidance of well-informed counsel to work through the issues.

NOTES

1. For a prior discussion of these issues by the same authors, *see* "The Attorney-Client Privilege and Work Product Doctrine in Government Investigations," Randall J. Fons and Brian N. Hoffman, *INSIGHTS*, June 2007, *available at http://www.mofo.com/news/docs/AttorneyClientInsightsJune2007.pdf*.
2. *See http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html*.
3. *See* USAM § 9-28.710.
4. *See* USAM § 9-28.710.
5. *See* USAM 9-28.720(b).
6. *See* USAM § 9-28.720; *see also* USAM § 9-28.710 (stating that "[t]he critical factor is whether the corporation has provided the facts about the events. . . ").
7. *See* USAM § 9-28.720.
8. *See* USAM §§ 9-28.710, 9-28.720.
9. *See* USAM § 9-28.720(a).
10. *See* USAM § 9-28.720(a), note 3.
11. *See* USAM § 9-28.720(a), note 3.
12. *See* USAM § 9-28.710.
13. The Enforcement Manual can be located at *http://www.sec.gov/divisions/enforce/enforcementmanual.pdf*. (*Editor's note: For further discussion of the SEC Enforcement Manual*, see INSIGHTS*, November 2008*.)
14. *See* Enforcement Manual at § 1.1.
15. *See* Enforcement Manual at § 4.3.
16. *See* Enforcement Manual at § 4.3 (emphasis in original).
17. *See* Enforcement Manual at § 4.3.
18. *See* Enforcement Manual at § 4.3.
19. *See* Enforcement Manual at § 4.3.
20. *See* Enforcement Manual at § 4.3.
21. *See* Enforcement Manual at § 4.3.
22. FINRA also recently modified its policies. *See* FINRA Regulatory Notice 07-70. The new FINRA policy mirrors the SEC and DOJ revised guidance.
23. The McNulty Memorandum can be located at *http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf*.
24. The Thompson Memorandum can be located at *http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm*.
25. The Seaboard Report can be located at *http://www.sec.gov/litigation/investreport/34-44969.htm*.
26. This press release (No. 2006-4) can be located at *http://www.sec.gov/news/press/2006-4.htm*.

27. *See*, *e.g.*, Remarks of then-SEC Commissioner Paul S. Atkins before the SEC Speaks in 2007 (2/9/07) (*available at http://www.sec.gov/news/speech/2007/spch020907psa.htm*); American Bar Association Recommendation No. 111 (8/05) objecting to government policies or practices eroding privileges (*http://www.abanet.org/leadership/2005/annual/dailyjournal/111.doc*); Letter to Attorney General Alberto Gonzales (9/5/06) from former senior DOJ officials objecting to Thompson Memorandum and practice of seeking waiver, available as Appendix C at *http://www.acca.com/public/attyclientpriv/agsept52006.pdf*; letter to SEC Chairman Christopher Cox from then-ABA President Karen J. Mathis (2/5/07) requesting modification of the Seaboard Report at *http://www.abanet.org/poladv/letters/attyclient/2007feb05_privwaivsec_l.pdf*.

28. "The Decline of the Attorney-Client Privilege in the Corporate Context" (March 2006), *available at http://www.acca.com/Surveys/attyclient2.pdf* (in a survey of corporate and outside counsel, almost 75 percent of those responding agreed that a "culture of waiver" existed; 30 percent of in-house counsel, and over 50 percent of outside counsel, subject to investigations in the past five years reported that the government expected waiver); *seealso* "Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack?" (Apr. 6, 2005) (in a survey of corporate and outside counsel, approximately one-third of responding attorneys reported an erosion of the privileges).

29. *See* USAM § 1-1.100; Enforcement Manual § 1.1.

30. *See*, *e.g.*, Comments of Peter B. Pope, Deputy Attorney General in New York State Attorney General's Office, at Advisory Committee on Evidence Rules: Hearing on Proposal 502 (4/24/06) (*available at http://www.uscourts.gov/rules/advcomm-miniconference.html*).

31. *See*, *e.g.*, *supra* n.27.

32. *See*, *e.g.*, Response to DOJ's Revisions of Attorney-Client Privilege Guidelines, *available at http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=0aa887f0-f40c-f557-5dbb-4aef8032b8f9*.

33. Sen. Specter previously introduced a similar bill in December 2006, before the McNulty Memorandum, and in January 2007, just after the McNulty Memorandum.

34. *See*, *e.g.*, *U.S. v. Massachusetts Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997) (finding attorney-client privilege and work product doctrine waived for materials disclosed to Department of Defense when subsequently requested by the IRS for investigation); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3d Cir. 1991) (finding attorney-client privilege and work product doctrine waived for materials disclosed to the SEC and DOJ when subsequently requested by private litigant in civil suit); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988) (finding attorney-client privilege and work product doctrine waived for materials disclosed to the government when subsequently requested by private litigant in criminal case); *In re Columbia/HCA Healthcare Corp.*, 293 F.3d 289 (6th Cir. 2002) (finding attorney-client privilege and work product doctrine waived for materials disclosed to the DOJ when subsequently requested by private litigant in civil suit); *In re Qwest Communications Int'l, Inc.*, 450 F.3d 1179 (10th Cir. 2006) (finding attorney-client privilege and work product doctrine waived for materials disclosed to the SEC and DOJ when subsequently requested by private litigant in civil suits); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981) (finding attorney-client privilege and work product doctrine waived for materials disclosed to SEC when subsequently requested by the Department of Energy for investigation); *In re Subpoena Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984) (finding attorney-client privilege and work product doctrine waived for materials disclosed to the SEC when subsequently requested by private litigant in civil suit); cf. *In re John Doe Corp.*, 675 F.2d 482 (2d Cir. 1982) (finding attorney-client privilege waived for materials disclosed to accountant when subsequently requested by grand jury subpoena).

35. Fed. R. Civ. P. 26(b)(3); *see*, *e.g.*, *MIT*, 129 F.3d at 688; *Martin Marietta*, 856 F.2d at 625–626; *Qwest*, 450 F.3d at 1182.

36. *See, e.g., Westinghouse*, 951 F.2d at 1431 n.18; *Columbia/HCA*, 293 F.3d at 307; *Permian*, 665 F.2d at 1217, 1221–1222; *Subpoena Duces Tecum*, 738 F.2d at 1369, 1372.

37. *See, e.g., MIT,* 129 F.3d at 683; *Westinghouse*, 951 F.2d at 1419; *Columbia/HCA*, 293 F.3d at 302; *Qwest*, 450 F.3d at 1181; *Permian*, 665 F.2d at 1219–1220; *but see Subpoena Duces Tecum*, 738 F.2d at 1375 (suggesting company could insist on a promise of confidentiality before disclosure of work product to the SEC).

38. *See, e.g., Qwest*, 450 F.3d at 1186-87, 1190–1191, 1195.

39. *See Diversified Indus. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978).

40. *See id.*; *In re Chrysler Motors Corp.*, 860 F.2d 844 (8th Cir. 1988).

41. *See Martin Marietta*, 856 F.2d at 623, 626.

42. *See* Senate Bill 2450, *available at http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN02450:@@@L&summ2=m&*.

43. *See Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997) (Posner, C.J.) (when ruling on the law enforcement privilege, stating that the circuits have generally rejected the selective waiver doctrine); *U.S. v. Bergonzi*, 403 F.3d 1048 (9th Cir. 2005) (stating that the availability of the selective waiver doctrine is an open question in the Circuit); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409 (Fed. Cir. 1997) (stating the Circuit has not recognized the selective waiver concept, and declining to do so under the facts of this case).

44. *See In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (although finding waiver of work product protection for materials disclosed to the SEC and requested by private litigants, declining to adopt a per se rule, and holding that there may be situations where the governmental agency and the disclosing party are working together or when disclosure occurs subject to explicit confidentiality agreement).

45. The Enforcement Manual (§ 4.3) specifically warns of a potential waiver by voluntary disclosure.

46. *See, e.g., MIT*, 129 F.3d at 686. State courts may reach different results under state rules. *See Regents of Univ. of Calif. v. Superior Ct.*, 165 Cal. App. 4th 672, 684 (Cal. App. 2008) (finding production of privileged materials to DOJ did not waive privilege protections as to later requestor under California rules).