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CORPORATE LITIGATION WEBSERIES

Handling Government Requests To Waive Privilege

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Attorney-Client Privilege

- Common formulation is that it covers “confidential communications” between a client and its lawyer “made for the purpose of facilitating the rendition of professional legal services to the client.” Proposed Fed. R. Evid. 503(b) (unadopted, but persuasive authority).
- Communications do not become privileged simply because a lawyer is involved
- Laypersons often believe that the privilege is broader than it is

Work-Product Protection

- Fed. R. Civ. P. 26(b) – pretrial discovery in civil litigation
  - Applies generally to "documents and tangible things that are prepared in anticipation of litigation or for trial"
  - Exception if party seeking disclosure of factual materials shows "substantial need" for materials and inability to "obtain their substantial equivalent" without "undue hardship"
  - Absolute protection for "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation"
- Fed. R. Crim. P. 16(b) – pretrial discovery in criminal litigation
  - Protects "reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense"

Pre-Holder Memorandum: How The DOJ Rewarded Cooperation By A Corporation

- Non-Prosecution for cooperation through a formal agreement currently codified at U.S. Attorneys Manual Section 9-27.600 et seq.
- Several Voluntary Disclosure Programs
  - SEC (1975)
  - DOJ – Antitrust Division (1978)
  - OTS (1988)
  - DOD (1986) Adopted by DOJ's Criminal Fraud and Civil Fraud Sections in 1987
  - DOJ – Environmental Crimes (1991)
  - EPA (1994)
  - HHS-OIG (1995) pilot program
- Inconsistent results depending on which part of DOJ and which US Attorney handled the matter
- No discussion about credit given for waiver of privilege

Holder Memorandum

- Issued June 16,1999 by Eric Holder, Deputy Attorney General
- Articulated eight non-mandatory factors as general guidance in deciding whether to charge corporations
- Factors included "[t]he 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 the corporate attorney-client and work product privileges"
- First time DOJ made express reference to "waiver" of corporate-held privileges as a factor in charging decisions

Thompson Memorandum

- Issued January 20, 2003, by Larry D. Thompson, Deputy Attorney General
- No longer viewed as mere “guidance;” but instead, “principles” which were mandatory
- Continued to instruct prosecutors to consider a corporation’s waiver in making charging decisions
- Advised that prosecutors may consider whether a corporation is advancing attorneys’ fees to its employees in evaluating the extent of cooperation

Thompson Memo – Key Changes In Tone And Substance

- Memo explained that it was designed to increase "emphasis on and scrutiny of the authenticity of a corporation's cooperation"
- Asserted that "[t]oo often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the *quick and effective exposure of the complete scope of the wrongdoing* . . . ."
- Nevertheless, reiterated that individual defendants were the goal of an investigation: ("[I]ndividual liability may provide the strongest deterrent against future corporate wrongdoing. *Only rarely* should provable individual culpability not be pursued even in the face of offers of corporate guilty pleas.")

Thompson Memo – Effect

- Created tension – prosecutors given the carrot of offering non-prosecution or deferred prosecution agreements to corporations, but were also pressured to obtain conviction of individuals
- Created an atmosphere of distrust – explicitly takes a skeptical view of purported cooperation by corporations
- Effect, whether intended or not, was often to pit the company against its allegedly culpable employees

Atmosphere After Thompson Memorandum

- In a 2003 *Wall Street Journal* interview, then DAG Larry Thompson noted that the DOJ had "directed its prosecutors to evaluate the authenticity of and completeness of cooperation . . . Because it allows the government to conserve its limited resources in investigations . . . ."
- Prosecutors were asking that corporations waive attorney-client and work-product privileges in investigations as well as requesting that corporations cut off or refuse to pay attorney fees of its employees who were not cooperating with the government

McCallum Memorandum

- Issued October 21, 2005, by Robert D. McCallum, Jr., then Acting Deputy Attorney General
- Issued in response to increased criticism regarding the practice of prosecutors routinely seeking waivers
- Directed that US Attorneys establish written waiver review procedures
- Failed to set forth any standard or procedure applicable across offices
- Created the possibility for disparate standards

KPMG

- *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006)
- As part of an investigation into the creation and marketing of illegal tax shelters, the government sought to have KPMG withhold attorneys' fee payments for all targets who the government stated had failed to cooperate
- Court held that portions of the Thompson Memorandum violated the 5th and 6th Amendments

McNulty Memorandum

- Issued December 12, 2006, by Paul J. McNulty, then Deputy Attorney General
- Issued in the wake of the backlash to the Thompson Memorandum
- Sought a more conciliatory tone
- Emphasized the importance of the attorney-client privilege in the American justice system
- Nevertheless, prosecutors still permitted to ask for waivers, though in more limited contexts

McNulty – Waiver

- Explicitly states that a waiver is not a prerequisite to a finding of cooperation
- Directs prosecutors to seek the "least intrusive waiver necessary"
- Government may request a waiver only "when there is a *legitimate need* for the privileged information to fulfill their law enforcement obligations"

McNulty – "Legitimate Need"

- Provides that "[a] legitimate need for the information is not established by concluding it is merely desirable or convenient to obtain privileged information."
- Depends upon four factors (which seem to cut in favor of seeking a waiver):
  - (1) the likelihood and degree to which the privileged information will benefit the government's investigation;
  - (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
  - (3) the completeness of the voluntary disclosure already provided; and
  - (4) the collateral consequences to a corporation of a waiver

McNulty's New Paradigm – Category I And II

- Category I defined loosely as "purely factual information, which may or may not be privileged"
- Category II defined loosely as attorney-client communications or non-factual attorney work product which "includes legal advice given to the corporation before, during, and after the underlying misconduct occurred"

McNulty – Category I Information

- Before seeking a waiver of Category I info, AUSA must obtain written authorization from the US Attorney, who must consult in writing with the AAG for the Criminal Division (and AAGs of any other impacted divisions)
- US Attorney retains ultimate authority to decide whether to authorize a request for a waiver of Category I info
- Government may consider "[a] corporation's response to the government's request for waiver of privilege for Category I information" in determining whether the entity has cooperated

McNulty – Category II Information

- May be sought only if Category I info "provides an incomplete basis to conduct a thorough investigation"
- May be sought only in "rare circumstances"
- US Attorney must obtain prior written authorization from the DAG before requesting a waiver of Category II info
- Prosecutors "must not consider" a corporation's refusal to waive privilege as to Category II info in making a charging decision
- Nevertheless, "[p]rosecutors may always favorably consider a corporation's acquiescence to the government's waiver request"

Prosecutors' Response To McNulty

- Avoiding need for waivers by seeking as much non-privileged information as possible
- Still accepting "unsolicited" waivers
- DOJ has counseled its prosecutors that:
  - They may advise defense counsel that "I am aware of McNulty obligations, however, although I am not asking for a waiver: (1) have you conducted an investigation, and (2) do you consider any or all of the results to be privileged?"
  - They may raise the subject of waivers without prior authorization by making clear to defense counsel that the discussion is only preliminary, does not obligate the company to waive, and that the prosecutor would comply with McNulty before making a formal waiver request

Anecdotal Evidence On The Application Of McNulty

- To date accurate information is unavailable
  - The National Association of Criminal Defense Counsel estimates that between 5 and 12 approvals of requests for Category I information have been made
  - DOJ claims no request for Category II information has been approved
- Veasey Report
  - E. Norman Veasey, former Chief Justice Delaware Supreme Court, agreed to receive information from entities who felt that McNulty Memorandum had been violated, but who wanted to report complaints anonymously
  - Veasey did not independently verify alleged violations
  - Recounts a handful of investigations where prosecutors allegedly ignored McNulty, either explicitly or by strongly suggesting the consequences/benefits to a corporation of waiving privileges
  - Suggests that although supervisors are instructing prosecutors to obey all DOJ directives, outside of their presence, the requests for waivers continue

Proposed Legislative "Fix"

- Attorney-Client Privilege Protection Act
  - House version passed in 2007. *See* H.R. 3013, 110th Cong. (2007).
  - Senate version re-introduced on June 26, 2008. *See* S. 3217, 110th Cong. (2008).
    - Prohibits requesting corporate waivers, threatening to or actually punishing an entity for refusing to waive, or offering to or actually rewarding an entity for agreeing to waive
    - Government may not consider an entity's assertion of a privilege, or its agreement to pay for counsel for its employees, in charging decisions or in assessing an entity's cooperation
    - Allows government to accept a "voluntary and unsolicited offer" of waiver

Filip Letter

- On July 9, 2008, Deputy Attorney General Mark Filip advised the Senate Judiciary Committee that the DOJ intends to revise its policy regarding the charging of corporations "in the next few weeks"
  - The Department will no longer measure "cooperation" by the extent to which a corporation waives its privileges
  - Prosecutors may not demand the disclosure of "Category II" information as a condition for cooperation credit
  - Prosecutors may not consider whether the corporation has advanced attorneys' fees to its employees in assessing that entity's cooperation
  - The government will not take into account whether a corporation has entered into a joint defense agreement in determining its cooperation
  - The Department will not consider whether a corporation has sanctioned or terminated its employees in measuring cooperation

Senator Specter's Response

- On July 10, 2008, Senator Arlen Specter responded to Filip, expressing "concern[ ] about the delay in enacting legislation" given that the DOJ continues to act under the McNulty Memo, requiring individuals to incur "enormous attorneys' fees"
- "I think it is too much to ask for the legislative process to await a written revision of McNulty and then await a review of the implementation of a new memorandum"
- Requests detailed information from the DOJ about costs incurred by individuals, as well as the DOJ's handling of cases where a corporation has advanced attorneys' fees, entered into a joint defense agreement, or decided not to sanction its employees
- Requests a more explicit "Filip Memorandum"
- Advises that Specter intends to recommend that the Senate move ahead with legislation

Pros And Cons Of Waiver

- Despite internal directives or legislation, likely that in practice, prosecutors will continue to look favorably on waivers
- Thus, waiving likely to continue to be a way to demonstrate cooperation
- Provides mechanism to present exculpatory evidence and remedial measures taken
- Key downsides:
  - Potential incrimination of corporation and/or employees
  - Most courts have rejected notion of "selective waiver," holding instead that disclosure to the government waives any privilege that might be asserted against private plaintiffs
  - Waiver therefore likely to expose entity to increased risk in later class actions or other civil suits

Considerations When Conducting Internal Investigations

- Give *Upjohn* warnings
- Be aware of issues created by statutes obligating you to conduct an investigation
- Consider dual track investigations
- Interviewing witnesses: purely factual v. mental impressions
- Consider making only an oral presentation of findings to the government