

Corporate Update

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Prosecutors and Regulators Continue to Pressure Corporations to Waive the Attorney-Client Privilege and Attorney Work Product Doctrine

Corporate clients and their counsel have long relied upon the attorney-client privilege and attorney work product doctrine to protect communications with counsel and counsel's thought processes from disclosure to prosecutors, regulators and private litigants. The attorney-client privilege is designed to encourage frank communication between clients and their counsel. The work product doctrine is designed to protect the integrity of the adversary process by generally making counsel's trial preparation materials, strategy and thought process off limits (i.e., not discoverable) to the other side in a litigation or other adversarial proceeding.

Like all privileges, the attorney-client privilege and the attorney work product doctrine are exceptions to the general rule of full disclosure of information relevant to matters in public litigation. Prosecutors and regulators, therefore, view corporate assertions of the attorney-client privilege and work product doctrine with skepticism. They are particularly troubled by the prospect that corporate criminals can use protections that belong to the entity victimized by their wrongful conduct to conceal that very wrongdoing.

Over the past several years, prosecutors and regulators have sought to erode those protections.

The main tool for doing so has been to offer corporate targets immunity from prosecution or a lower penalty in exchange for "cooperation" with the prosecution or investigation. Such cooperation, they argue, must include a "voluntary" agreement to waive the protections of the attorney-client privilege and work product doctrine.

In 2001, the Securities and Exchange Commission issued the so-called Seaboard Release, in which the SEC set forth thirteen factors to be considered in determining whether, and how much, to credit cooperation and remediation efforts undertaken by a corporation in determining whether to charge a

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corporation with violations of the securities laws and the amount of any fine or other penalty that might be imposed upon the corporation for such a violation.¹ Among those factors is “[w]hether the company voluntarily disclosed information to the SEC.” Although the Seaboard Release does not specifically require corporations to waive the attorney-client privilege or attorney work product protections under this factor, enforcement personnel at the SEC often view a corporation’s invocation of those protections as inconsistent with a “voluntary disclosure of information.” Thus, it is now routine for SEC enforcement personnel to demand that a corporation “voluntarily” waive those protections, including a blanket waiver at the inception of the investigation, to obtain “credit” for cooperation under the Seaboard Release.

The Department of Justice has been more candid in its view that a corporation’s invocation of the attorney-client privilege and work product protections is inconsistent with notions of cooperation with a criminal investigation.² In a memorandum issued in 2003 to United States Attorneys by Deputy Attorney General Larry D. Thompson, the DoJ set forth nine factors to be considered by prosecutors in determining whether to bring charges against a corporate target of a criminal investigation. Factor 4 in the Thompson Memorandum is “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.” The waiver contemplated by this factor includes information “with respect to [the corporation’s] internal investigation and with respect to com-

munications between specific officers, directors and employees and counsel.” Such waivers, the Memorandum explains, “are often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.” The Thompson Memorandum cautions that the DoJ “does not . . . consider waiver of a corporation’s attorney-client and work product protection an absolute requirement,” and instructs prosecutors to “consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation’s cooperation.” Not surprisingly, prosecutors often have considered a waiver to be “necessary” to confirm whether the corporation has provided “timely and complete information” in an attempt to cooperate with an investigation and, like their counterparts in the SEC’s enforcement division, have not hesitated to demand a blanket waiver early in the criminal investigation process.³

Finally, federal sentencing guidelines also take into account a corporation’s cooperation with the prosecution in determining the range of sentence. The guidelines — and they are only guidelines; the judge has the final say⁴ — establish a formula for calculating the applicable punishment for a given crime. (For corporations, the punishment typically is a monetary fine.) The formula starts with identifying the “offense level” for the charged crime, from level one to level forty-three. A base fine is associated with each offense level. Next is the calculation of the corporation’s “culpability score.” Each starts with a score of five that is adjusted upward for aggravating factors (such as malicious

¹Securities Exchange Act of 1934, Release No. 44969, Oct. 23, 2001. The Seaboard Release may be found at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

²The Thompson Memorandum may be found at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

³More recently, in a one-page memorandum issued in 2005 to United States Attorneys by acting Deputy Attorney General Robert D. McCallum, Jr., the Department of Justice sought to ensure that prosecutors “exercise appropriate prosecutorial discretion” with regard to requests that corporations waive the attorney-client and work product protections. The McCallum Memorandum directed United States Attorneys “to establish a written waiver review process” regarding such waiver requests. Nevertheless, the Memorandum permits those processes to “vary from district to district” so that each United States Attorney “retains the prosecutorial discretion necessary, consistent with their circumstances, to seek timely, complete, and accurate information from business organizations.”

⁴See *United States v. Booker*, 125 S. Ct. 738 (2005).

intent) and downward for mitigating factors (such as cooperation with prosecutors). Each culpability score has associated with multipliers used to multiply the base fine to create a minimum and maximum fine. It is up to the judge to set the fine, typically within that range.

Federal sentencing guidelines provide for a two-point culpability score reduction for active cooperation with the prosecutor's investigation, and a five-point culpability score reduction for active cooperation coupled with, among other things, voluntary disclosure of the wrongdoing before the investigation began.

Revisions to the guidelines which became effective in November 2005 stated in commentary that although a waiver of the attorney-client and work product protections "is not a prerequisite to a reduction in culpability score, . . . in some circumstances waiver of the attorney-client privilege and of the work product protections may be required in order to satisfy the requirements of cooperation" under the guidelines. The commentary explained that a waiver would be a prerequisite to obtaining cooperation credit when it "is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

Earlier this month, however, under pressure from the American Civil Liberties Union, the United States Chamber of Commerce, the American Bar Association and other organizations, the Sentencing Commission voted unanimously to strike the new language in the commentary regarding waiver. This decision may signal that the trend toward an expectation that corporations will waive the protections of the attorney-client privilege and attorney work product doctrine has peaked. Of course, this change to the sentencing guidelines does not affect Factor 4 in the Thompson Memorandum that guides prosecutors on whether to bring charges against a corporation in the first place.

Management of corporations that are targets of criminal or regulatory investigations must remain cognizant that many prosecutors and SEC enforcement personnel do not distinguish between cooperation and capitulation. Management must be prepared in advance for the prospect that information which hitherto would have been protected behind the attorney-client privilege or attorney work product doctrine is likely to be disclosed in a criminal or SEC investigation.



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