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WHITE-COLLAR CRIME

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Waiver of Corporate Attorney-Client and Work Product Protection

The U.S. Department of Justice's policy of placing increasing emphasis on the prosecution of crimes committed by business organizations has been repeatedly stated in recent years.

The policy seeks the cooperation of subject organizations in investigations and, as a measure of that cooperation, endorses the practice of prosecutors obtaining privileged materials and communications that result from internal investigations conducted by counsel.

In the beginning, the policy was stated in the Holder Memorandum, captioned "Bringing Criminal Charges Against Corporations," issued in 1999 by then-Deputy Attorney General Eric Holder Jr. Then in 2003 came the Thompson Memorandum, a document entitled, "Principles of Federal Prosecution of Business Organizations," authored by then-Deputy Attorney General Larry D. Thompson, which revised the Holder Memorandum.

And now comes the McCallum Memorandum, recently issued on Oct. 21, 2005, by Acting Deputy Attorney General Robert D. McCallum Jr., on the subject of "Waiver of Corporate Attorney-Client and Work Product Protection."

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McCallum Memorandum

The McCallum Memorandum focuses exclusively on "[o]ne of the nine factors," under the Thompson Memorandum, that prosecutors must consider in determining whether to charge a corporation or other business organization: "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."[1] The McCallum Memorandum notes that, pursuant to the directive in the Thompson Memorandum, "some United States Attorneys have established review processes for waiver requests that require federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking a waiver of the attorney-client privilege or work product protection." Without commenting on the relative propriety of seeking such waivers in any given circumstance, the McCallum Memorandum simply directs that "consistent with this best practice" used by some United States Attorneys' offices, each individual office should "establish a written waiver review process" for their respective "district or component."

Rather than seeking the homogeneous policy that the Department of Justice mandates in matters such as sentencing pursuant to the Sentencing Guidelines, the McCallum Memorandum states that the required "waiver review processes may vary from district to district (or component to component), so that each United States Attorney or component head retains the prosecutorial discretion necessary, consistent with their circumstances, to seek timely, complete and accurate information from business organizations." Coming at a time of mounting criticism of the government's increasingly frequent, if not regular, requests for production of privileged material and communications—often at the very outset of internal investigations—the question remains: Is the McCallum Memorandum a response to the calls for moderation on the issue or another instance of the government digging in its heels in the wake of negative public reaction to the corporate misconduct that has been the focus of many investigations and prosecutions?

In addition to the DOJ memoranda, the policy underscoring the importance of corporate cooperation—often in the form of acceding to government requests to produce privileged information—in criminal and regulatory investigations is also found in the federal sentencing guidelines relating to organizations and in a published report issued by the Securities and Exchange Commission (SEC). In response to the apparent erosion of the attorney-client privilege and the work product doctrine in corporate criminal and regulatory investigations, many organizations—bar groups, the U.S. Chamber of Commerce and the American Civil Liberties Union among them—have spoken out against this perceived encroach-

ment, seeking a reversal of a policy seen as running amok or significant restrictions in its implementation.

Task Force

In October 2004, the American Bar Association formed a Task Force on Attorney-Client Privilege in reaction to concerns about erosion of the privilege in the context of corporate investigations. After extensive study, including public hearings in which it heard from members of the private bar, bar organizations, corporate counsel, academics and government representatives, the task force issued a report and proposed a resolution that the ABA's House of Delegates strengthened and then approved. In August 2005, the ABA adopted a resolution strongly supporting the attorney-client privilege and work product doctrine, and opposing the "routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the grant or denial of any benefit or advantage."

In November 2004, the U.S. Sentencing Guidelines regarding the sentencing of organizations were amended to add commentary that states, "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under [the guidelines] unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[2] The U.S. Sentencing Commission has indicated that one of its proposed priorities in the next year is to review and possibly amend the commentary relating to reductions in an organization's culpability score if the entity "fully cooperated in the investigation."

Responding to a request from the commission for feedback on its priorities in the next year, in a letter to the commission dated Aug. 15, 2005, the ABA said that the commentary is "counterproductive and undermines, rather than enhances, compliance with the law." Focusing on the language of the commentary's application notes, which states that cooperation "should include disclosure of all pertinent information known by the organization," the ABA letter said that the language, "though perhaps well-intentioned, will have a number of profoundly negative consequences." It drafted an amendment for the commission's consideration that would make clear that cooperation with government investigations need not include waiving privilege or work product protection, suggesting that the commentary's application note be changed to read "should include disclosure of all pertinent non-privileged information."

The ABA letter expresses the concern that the provision regarding organizational cooperation will be seen by law enforcement as providing "congressional ratification of the Justice Department's policy of routinely requiring privilege waivers." Federal prosecutors have said repeatedly that waivers are not required and are not routinely sought. Defense lawyers are of the view that organizations are regularly asked to waive privilege and have but a Hobson's choice in response.

On Oct. 14, the coalition said it would ask the Department of Justice and the SEC to change any policy that "effectively forces" waiver of the attorney-client privilege.

ABA Letter

The ABA letter argues that waivers undermine governance in two ways:

(1) the threat of a waiver "discourages personnel…from consulting with their lawyers," which in turn, "seriously impedes the lawyers' ability to effectively counsel compliance with the law;" and

(2) in internal investigations, "any uncertainty as to whether attorney-client and work product privileges will be honored makes it more difficult for companies to detect and remedy wrongdoing early."

Most recently, a broad coalition of groups gave notice that it would join the effort to stop the erosion of the attorney-client privilege. The coalition includes the U.S. Chamber of Commerce, the Association of Corporate Counsel, and the Business Roundtable, among many others.

On Oct. 14, 2005, the coalition announced that it would ask the Department of Justice and the SEC to change any policy that "effectively forces" waiver of the privilege. Noting that individual companies would pay a "horrific price" in challenging these government institutions, the coalition said that it intends to take its campaign to Congress, the administration, and the courts, asking agencies such as the SEC not to force companies under investigation to waive the attorney-client privilege.

In an analogue to the Department of Justice's policy memorandums, a 2001 report on an investigation of the Seaboard Corp. sets forth a list of factors that the SEC considers in determining whether to bring enforcement actions. In particular, the "Seaboard Report" lauded the company's willingness to waive the privilege, citing it as a reason that action was not taken against the company. SEC officials have argued that the agency's policy on cooperating in investigations does not force companies to waive their attorney-client privilege.

'Seabord Report'

Many lawyers believe that the "Seabord Report" reflects a policy that corporations must give up the privilege to be perceived as cooperating. The SEC has attempted to alleviate concerns that the production of privileged documents may waive the privilege by entering into confidentiality agreements to provide companies with a basis to argue that the privilege remains intact. The SEC has even intervened in a number of private securities litigations in opposition to plaintiffs' waiver arguments. In one such amicus brief, filed in support of McKesson Corp.'s arguments to preserve the privilege in light of a confidentiality agreement, the SEC argued: "If companies cannot produce documents to the SEC under a confidentiality agreement without waiving work product protection, the likely result is that companies will refuse to share written work product with the commission as many companies now refuse to do."[3]

The SEC has made other efforts to protect privileged information and the attorney work product doctrine in the context of corporate cooperation, which ultimately did not come to fruition. In February 2003, the SEC proposed a rule that would have provided that "where an issuer, through an attorney, shares with the commission information related to a material violation, pursuant to a confidentiality agreement, such sharing of information shall not constitute a waiver of any otherwise applicable privilege or protection as to other persons."[4]

The SEC withdrew the proposed rule in the face of concerns that, under the case law, companies and attorneys could not be secure in their disclosures "absent a statutory statement of express preemption."[5]

SEC Attempts

In fact, the SEC has also sought to convince Congress to recognize and remedy the uncertainty facing cooperating corporations that has produced the privileged results of their investigations to government agencies. In the last Congress, a House bill (H.R. 2179) included a provision responding to an SEC request that would have allowed a person to provide privileged information to the SEC without waiving that privilege as to other persons. The bill would have amended the law to provide:

> whenever the commission or any appropriate regulatory agency and any person agree in writing to terms pursuant to which such person will produce or disclose to the commission or the appropriate regulatory agency any document or information that is subject to any federal or state law privilege, or to the protection provided by the work product doctrine, such production or disclosure shall not constitute a waiver of the privilege of protection as to any person other than the commission or the appropriate regulatory agency to which the document of information is provided.[6]

In his testimony before Congress concerning the bill, Stephen M. Cutler, then the director of enforcement at the SEC, noted that "currently, a person who produces privileged or otherwise protected material to the commission runs a risk that a third party, such as an adversary in private litigation, could obtain that information by successfully arguing that the production to the commission constituted a waiver of the privilege or protection."[7] He acknowledged that the current situation "creates a substantial disincentive for anyone who might otherwise consider providing protected information."[8]

The report accompanying H.R. 2179 said that "this provision enhances the commission's access to significant otherwise unobtainable information."[9] The report called for a clear rule that would help ensure that regulators receive the information they need while maintaining a free flow of information between the regulators and regulated companies.[10] Despite its salutary purposes, H.R. 2179 did not become law.

Much has been written about the unsettled state of the case law—and the attendant lack of protection and certainty—concerning waiver arguments in this context.[11] Protections, if any, vary—even based on the same fact pattern—depending on the jurisdiction in which the proceedings are held. The point is best made by the several conflicting decisions in connection with McKesson Corp.'s efforts to protect confidential materials it shared with law enforcement pursuant to confidentiality agreements. Of the courts considering the issue, some agreed with the company that the confidential materials remained privileged despite their production to law enforcement; others found that the company had waived its protections by producing the confidential materials to the government.[12]

In these circumstances, it is clear that concerns regarding policy, enforcement and the unsettled state of the law must be addressed. To be sure, the government should endeavor to establish: a policy that clearly delineates the situations in which waivers will be deemed necessary; and a process by which to make case-by-case determinations.

Conclusion

Whether the answer lies in a waiver review process that varies from district to district or "component to component," as suggested by the McCallum Memorandum, remains to be seen. Perhaps the clearest answer would be provided by Congress if it were to revisit the issue upon the introduction of another bill and act in the manner previously suggested by the SEC. If the 20-year battle over the Sentencing Guidelines, which resulted in the Supreme Court's decision in *United States v. Booker*,[13] is any lesson, those who are campaigning to stop the erosion of the attorney-client privilege should stay the course and all concerned parties should participate in formulating a mutually agreeable solution.

1. http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf

2. U.S. Sentencing Guidelines Manual §8C2.5(g) cmt. n.12 (2004) .

3. See, e.g., SEC's Amicus Brief, *United States v. McCall*, No. 03-10511 (9th Cir. April 1, 2005)

4. Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6312 (Feb. 6, 2003).

5. Id.

6. H.R. 2179, 108th Cong. (2004)

7. sec.gov/news/testimony/060503tssmc.htm

8. Id.

9. H.R. Rep.No. 108-475, at 24 (2004)

10. Id.

11. "Commentary: OVER THE BRINK: FURTHER REFLECTIONS ON THE DEATH OF PRIVILEGE IN CORPORATE CRIMINAL INVESTIGATIONS," David M. Zornow and Keith D. Krakaur, 20 No. 1 White-Collar Crime Rep. 2, Andrews White-Collar Crime Reporter Sept. 30, 2005; Jay K. Musoff and Adam S. Zimmerman, "Sharing Information With Auditors,Does it waive work product protection?," NYLJ, July 18, 2005; Lee G. Dunst and Ariane J. Sims, "Cooperation With Government Probes,Subsequent Civil Litigation," NYLJ, May 13, 2005; David Francescani and Michael Autuoro, "Caught Between a Rock and a Hard Place," NYLJ, June 20, 2005.

12. See, *Salto v. McKesson HBOC Inc*. No. Civ. A 18553, 2002 WL 31657622, at *8 (Del. Ch. Nov. 13, 2002); *In re McKesson HBOC Inc. Sec. Litig.*, No. C-99-20743, slip. op. At 15 (March 31, 2005); *McKesson HBOC Inc. v. Adler,* 562 SE2d 809 (Ga. Ct. App. 2002); *McKesson Corp. v. Green,* 597 SE2d 447, 551-53 (Ga. Ct. App. 2004); *United States v. Bergonzi,* 216 FRD 487, 498 (N.D. Cal. 2003); *McKesson HBOC Inc. v. San Francisco County Super. Ct.,* 115 Cal. App 4th 1229, 1241 (Cal. Ct. App. 1st Dist. 2004).

13. 125 SCt 738 (2005).