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Government regulations may place attorney-client privilege at risk

The initial issue any subject of a governmental investigation must address is what level of cooperation it will offer to the government. However, in the corporate context, cooperation has become synonymous with the waiver of the attorney-client privilege and work product protections.

As a result of policies adopted by the U.S. Department of Justice and the Securities and Exchange Commission, credit for cooperation may be withheld if the company refuses to waive the attorney-client privilege or work product protections during the course of the government's investigation.

This may be the result even where the company is cooperative in every other respect.

Until recently, federal sentencing guidelines also contributed to the waiver environment by encouraging federal prosecutors to require corporate defendants to waive these protections before a downward sentencing adjustment would be considered. The consequences of such a waiver policy are far reaching and ultimately detrimental to the notion of confidentiality between a client and legal counsel.

POLICY OF COOPERATION

Much of the genesis of the current waiver environment evolved from a policy adopted in a 1999 memorandum by then-Deputy Attorney General Eric Holder that encouraged federal prosecutors to require corporations being investigated by the Justice Department to waive the attorney-client privilege and work product protections as a condition for receiving cooperation credit. The policy was reinforced and expanded in a 2003 memorandum written by then-Deputy Attorney General Larry Thompson. The Thompson memo was unambiguous in its purpose. It identified



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numerous factors to be considered by prosecutors in reaching a decision on prosecution. Chief among those is the company's "willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection."

Although the Thompson memo states that waiver of these protections is not an absolute requirement for determining the availability of cooperation credit, recent surveys provide evidence to the contrary.

Surveys conducted by an American Bar Association task force on attorney-client privilege and the Coalition to Preserve the Attorney-Client Privilege revealed the Justice Department was in fact requiring, with alarming frequency, the waiver of the attorney-client privilege and work protections in its investigations of corporations, and that a refusal to waive these protections was regarded as uncooperative.

In addition, a 2004 amendment to the federal sentencing guidelines allows federal prosecutors to subjectively determine when it was necessary for corporate defendants to waive these protections before a culpability score reduction would be recommended by a prosecutor.

Fortunately, on March 15, the U.S. Sentencing Commission recommended to Congress that the 2004 amendment be removed.

Consequences of a waiver

Any short-term benefit realized by the government in seeking a waiver of the attorney-client privilege and work product protections is outweighed by the harm a waiver of these protections causes to American corporations and our legal system.

Consequences may include:

- Less robust internal compliance programs and internal investigations if management knows information may be used against the company.
- Employees of corporations are likely to be less forthcoming with internal investigators when they realize their statements may be revealed to government investigators.
- Shareholder lawsuits against management and board members become more difficult to defend if an earlier waiver to the government is later found to be a complete waiver.

Government investigations rarely leave corporate subjects unharmed. Regardless of the level of action taken by the government against a corporation, some damage is inevitable. Cooperating with a governmental investigation has always been an effective strategy for mitigating that damage. However, when that cooperation evolves into the compulsory waiver of privileges and work product protections, the decision to cooperate becomes much more difficult for management and boards of directors. In some circumstances corporations may be well served by following the famous anti-drug campaign slogan and "just say no" to the government's waiver demand.

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