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ATTACKS ON CLIENT PRIVILEGE INCREASING

Government insistence on waiver jeopardizes value of corporate privilege

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In a recent public talk, Mary Jo White, former U.S. Attorney for the Southern District of New York, lamented that waiver of corporate privilege has become a litmus test for whether a company is cooperating with an investigation. Her lament is apt.

Federal prosecutors increasingly demand waiver of attorney-client privilege and work product protection at the inception of investigations. As described by Deputy Attorney General Larry Thompson in his January 2003 memorandum, entitled "Principles of Federal Prosecution of Business Organizations," waiver is not "an absolute requirement," but prosecutors should consider willingness to waive "as one factor in evaluating the corporation's cooperation." Thompson's memorandum revised 1999 guidelines and increased the "emphasis on and scrutiny of the authenticity of . . . cooperation." Pursuant to the 2003 revisions, prosecutors use willingness to cooperate as one of eight factors to determine whether to bring charges against a business organization.

White Collar Crime

Although prosecutors demand waiver more frequently, corporate privilege continues to serve an essential purpose. Attorney-client privilege and work product privilege protect communications between attorneys and their corporate clients. As the U.S. Supreme Court recognized 20 years ago in *Upjohn Co. v. United States,* corporate privilege is essential because it facilitates "communication of relevant information" between attorneys and clients. Such uninhibited dialogue enables companies to comply with applicable laws, because compliance with "the vast and complicated array of regulatory legislation confronting the modern corporation" is "hardly an instinctive matter."

Without legal advice unfettered by the risk of disclosure, corporations may be less able to make informed decisions in accordance with the law. Failure to recognize a robust corporate attorney-client privilege ultimately may contribute to lawlessness. Without assurances that communications will remain confidential, organizations may not only be hindered in their efforts to determine what laws apply and how to follow them, but may turn a blind eye to existing wrongdoing.

Federal prosecutors who aggressively pursue waiver show little regard for the importance of privilege. Prosecutors possess considerable discretion at each stage of federal criminal investigations and prosecutions. They not only decide whether to seek criminal charges, but they also determine what charges and sentences to seek. Since principles of corporate criminal liability are extremely broad, almost all acts of all employees may be imputed to the organization, giving prosecutors further tremendous discretion. Given that authority, prosecutorial demands are frequently accepted. Prosecutors requesting waiver present corporations a difficult choice between seeking leniency and safeguarding privilege.

Tough Choices

Business entities succumbing to government demands for waiver face three major problems. First, corporations waiving privilege generally receive no guarantees that the government will refrain from bringing charges. Second, corporations may have difficulty asserting the privilege against private plaintiffs. Third, waiver could chill communications between the company's attorneys and its employees.

Government requests for corporate waiver often arise at the outset of an investigation, and almost certainly prior to any resolution of possible enforcement actions. On occasion,

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companies must decide whether to waive without even knowing what information they are ceding. In all these events, it is unlikely the company will know what benefits, if any, it will receive by virtue of its waiver.

In some situations, waiver may result in prosecution rather than leniency. Perhaps the most chilling example of this first problem is the 2002 indictment of Arthur Andersen. According to public reports, Andersen agreed to waive attorney-client privilege during the government investigation in an effort to cooperate and was rewarded with an indictment. Of course, a company cannot recall its waiver when it does not receive leniency from the government. At Andersen's criminal trial, the Justice Department offered once-privileged communications between Andersen employees and Andersen in-house counsel. One such communication formed the basis for the jury's conviction, according to the jury's post-verdict press conference.

Although the government's decision to charge Andersen led many experienced white-collar practitioners to question the value of a company waiving privilege, the pressure to waive still exists. Credit Suisse First Boston ("CSFB") recently decided to waive its attorney-client privilege, possibly out of fear of corporate prosecution. Prosecutors in Manhattan sought and obtained a waiver of privilege from CSFB, apparently after learning of a December 2000 e-mail message by CSFB star banker Frank Quattrone, regarding "time to clean up those files." According to charging documents against Quattrone, the Quattrone e-mail approved a recommendation by a banker in his department to destroy files just weeks after CSFB had received a federal grand jury subpoena. At the prosecutors' request, CSFB waived its attorney-client privilege with respect to some e-mail communications between Quattrone and CSFB's attorneys. A chain of e-mail messages between Quattrone and CSFB's then-general counsel surfaced, showing that, at the time Quattrone urged others to destroy documents, he had already been told of the government investigations of CSFB. Quattrone was subsequently indicted on obstruction of justice and witness tampering charges, alleging that he ordered the destruction of documents despite knowing that SEC and DOJ investigations were underway.

Private Plaintiffs

The law is unsettled, but some court decisions suggest that waiver in a government investigation also may act as waiver in concurrent or subsequent private actions.

Last year, the 6th Circuit in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, held that a corporation that disclosed the results of internal audits to the Justice Department, in cooperation with a government inquiry into Medicare and Medicaid fraud, waived any privilege attaching to those audits with respect to private plaintiffs suing for fraud. The court rejected the corporation's argument that a "selective waiver" agreement with the government kept the privilege intact, holding instead that when the attorney-client privilege is waived for one purpose to one third party, it is waived for all purposes to all third parties. In this way, the attorney-client privilege differs significantly from the work product protection, which is party-specific and can be selectively waived.

In January, a district court judge ordered McKesson Corp., the medical supply and information company, to produce the results of an internal investigation to two former executives who had been indicted for securities, mail and wire fraud. In 1999, McKesson had announced accounting irregularities in its newly-acquired HBO & Co., and conducted an internal investigation. McKesson turned the final report of that investigation over to the SEC and DOJ pursuant to a confidentiality agreement, and the DOJ used the report to indict two former executives of HBO & Co. In finding waiver despite the confidentiality agreement—which by its terms authorized the DOJ to disclose the report as it saw fit—the district court declined to follow decisions that allowed a party to waive privilege "selectively" to government agencies but not to other parties. McKesson has appealed the district court's order to turn over the report to the two criminal defendants.

Waiver essentially turns a corporation's lawyers into an investigative arm of the government. Some commentators have pointed out that this arrangement allows prosecutors to evade the Fifth Amendment: whereas employees might invoke their right against self-incrimination when questioned by the government, they are unable to assert it against their employer without the very real possibility of losing their jobs. As a result, employees who know that privilege has been or will be waived are understandably skittish about talking with the corporation's lawyers.

For corporations that do waive privilege at the government's demand, the purpose of the privilege has been largely dissolved. Yet, even before the government has made such a request, or even after the corporation refuses, there could be a chilling effect, since employees have no certainty that privilege will not eventually be waived. As the Supreme Court in *Upjohn* recognized, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege . . . is little better than no privilege at all."

Better Solutions?

Companies facing government requests for waiver should proceed carefully and attempt to provide cooperation to the government without a waiver. The corporation should lay its concerns before investigators and try to negotiate resolutions (or at least gain an understanding of the likely resolution) in advance of waiver. If the company believes that a prosecutor is acting unreasonably in demanding early waiver, it might appeal to the prosecutor's supervisor, the U.S. Attorney, or even the Deputy Attorney General. In any event, it should take the case as far as it can before deciding to waive. If the corporation is ultimately required to waive, there should be a written confidentiality agreement in place. While the 6th Circuit recently rejected such an agreement, other courts have upheld them.

Ultimately, a policy change is called for to resolve the present dilemma. One solution is for the DOJ to reconsider, on a department-wide basis, the appropriateness of its requests for waiver of attorney-client privilege by organizations. Given Thompson's recent memorandum and the current climate of financial scandals, this result is extremely unlikely.

A recent report by the SEC suggests a more feasible, albeit partial, solution. The Sarbanes-Oxley Act of 2002 required the SEC to undertake a study of recent enforcement actions in order to identify areas of financial reporting most susceptible to fraud and manipulation. The act directed the SEC to report its findings to Congress, including recommended regulations or legislation, which the SEC did in January. The report recommends amending the Securities Exchange Act of 1934 "to allow parties who choose to produce privileged or protected material to do so without fear that their production to the Commission will be deemed to waive privilege or protection as to anyone else." The report concludes that this change "would enhance the Commission's access to significant, otherwise unobtainable, information."

Testifying before a House subcommittee in February, SEC Director of Enforcement Stephen Cutler explained, "In many cases, persons or entities would be willing to share privileged information with the commission's staff if they would otherwise maintain the privileged and confidential nature of the information." Whether Congress will act on this recommendation remains to be seen.

Until a better solution surfaces, prosecutors' aggressive insistence on waiver may have the perverse effect of inhibiting corporate compliance instead of promoting it. ■