Legal Backgrounder

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Ave., NW
Washington, D.C. 20036
202.588.0302

Vol. 18 No. 11 April 4, 2003

DOJ REAFFIRMS AND EXPANDS AGGRESSIVE CORPORATE COOPERATION GUIDELINES

by

Richard Ben-Veniste and Lee H. Rubin

Since the Justice Department originally distributed its internal policy memorandum "Federal Prosecution of Corporations" (popularly referred to as the "Holder Memorandum") in June 1999, the white collar corporate defense bar has reacted to those guidelines with a great degree of consternation. And for good reason. The Holder Memorandum contains an all but explicit requirement that corporations must waive the protections of the corporate attorney-client privilege and attorney work product doctrine in order to avoid a prosecution of the corporation itself. *See* Holder Memorandum at Part VI.B ("One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, employees and counsel."). Such a *sine qua non* for cooperation raises a host of concerns, not the least of which is the effect such a requirement is likely to have on the company's ability to conduct a meaningful internal investigation and the resulting risk of waiver of the privilege in the all-too-inevitable civil litigation that follows the disclosure of misconduct.

The Bush Justice Department has revisited the principles outlined in the Holder Memorandum, but unfortunately has made matters worse rather than better. The revised guidelines, distributed by Deputy Attorney General Larry Thompson on January 20, 2003 ("Thompson Memorandum"), leave untouched the privilege waiver provisions and suggests additional conditions for cooperation — including strict limitations on the corporation's representation of its employees. These dual prerequisites for cooperation, combined with the ever more frequent government practice of seeking a blanket waiver of the privilege before the company has completed its internal probe, are likely to make it increasingly difficult for companies simultaneously to cooperate with the government and conduct a meaningful investigation into alleged misconduct. Ironically, the Department's emphasis on privilege waivers and vitiating the relationship between company counsel and its employees may undermine a company's ability to root out fraud and assist the government in its law enforcement efforts. By marginalizing the role of corporate counsel, the revised guidelines may well frustrate

---

Richard Ben-Veniste and **Lee H. Rubin** are partners in the Washington, D.C. office of the law firm Mayer, Brown, Rowe & Maw, specializing in white collar defense and corporate investigations. Mr. Ben-Veniste formerly served as Chief of the Special Prosecutions Section of the U.S. Attorney's Office for the Southern District of New York, and as Chief of the Watergate Task Force of the Watergate Special Prosecutor's Office. Mr. Rubin was a federal prosecutor in the Civil Rights Division and the U.S. Attorney's Office for the District of Columbia, and recently served as a member of the trial team for Arthur Andersen, LLP in the Department's prosecution of the firm for obstruction of justice. The views stated by the authors are their own and do not necessarily reflect the views of Mayer, Brown, Rowe & Maw or its clients.

important policy objectives (articulated in other portions of the Department's guidelines), including the avoidance of a multitude of separate cooperation agreements with company employees and the encouragement of prompt and effective disciplinary measures against those involved in the misconduct. *See* Holder Memorandum at Part VI.B; Thompson Memorandum at Part VI.B. Moreover, to the extent the government anticipates piggybacking on the company's "coercive" use of job termination to compel the cooperation of its employees, the government may unwittingly be placing its entire investigation at risk.

Historical Concerns Raised by the Department's Privilege Waiver Demands. The government's practice of requesting a privilege waiver from a company seeking to cooperate finds its origin in the early 1990s in a small number of U.S. Attorney's Offices, most notably in the Southern District of New York. *Conference Rep. on 15th Ann. Nat'l Inst. on White-Collar Crime: DOJ Guidelines Corporate Waivers of Attorney Client Privilege Draws Criticism*, 68 CRIM. L. REP. (BNA) 563 (Mar. 28, 2001) ("*Conference Rep. on DOJ Guidelines*"). Such requests became sufficiently commonplace throughout the Department to memorialize the practice in the Holder Memorandum in mid-1999. The fundamental concerns raised by such a waiver demand are by now well known.

First and foremost, the courts have generally deemed that such waivers extend to any subsequent civil litigation.[1] Thus, companies which decide to waive the privilege in criminal investigations must do so with the sober recognition that they also may be handing over their internal documents to both the plaintiffs' bar and relevant federal and state regulatory authorities. This is a particularly difficult pill to swallow in light of the fact that even if the privileged information corroborates the information otherwise furnished the government, there is no assurance that the company will not be indicted anyway, as was the case with Arthur Andersen.

Second, the prospects of a company waiver may also restrict the free flow of information between company employees and counsel and, by creating disincentives to formalize thoughts or convey impressions in writing, may produce undesirable changes in the manner in which company lawyers (both inside and outside) perform their jobs. Indeed, there is emerging evidence that the waiver policy is altering the way in which corporate counsel conduct their affairs. *See. e.g.,* David Hechler, *Scandals Help Erode Privilege*, NAT'L L.J. at A22, (Dec. 23-30, 2002) (describing corporate counsel's practice of avoiding preparation of "written reports containing results of internal investigation because of likelihood that waiver will be required as part of cooperation agreement with the government").

The Expanding Waiver Policy Undermines Both Internal Probes and Department Objectives. There is little doubt that, as originally conceived, a waiver request by the Department would be warranted in those circumstances where the company has voluntarily reported wrongdoing by company employees and the Department needs access to the internal investigation and other privileged materials to confirm the completeness and accuracy of the company's disclosure. Indeed, the language of the Holder Memorandum itself reflects such a limitation. *See* Holder Memorandum at Part VI.B (prosecutor may consider "adequacy of a corporation's cooperation is the completeness of its *disclosure* including, if necessary, a waiver of the attorney-client and work product protections") (emphasis added). Of late, however, the government's waiver requests have extended beyond this paradigm to situations where the company has not yet had an opportunity to conduct its own investigation into the alleged wrongdoing (the Department's current investigation of obstruction of justice at Credit Suisse First Boston is only the latest example of such an approach). *See Conference Rep. on DOJ*

---

[1] *See*, *e.g.*, *Permian Corp. v. United States*, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981) (defendant's production to SEC of privileged attorney-client material waived privilege in subsequent litigation); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988), (company's submission of position paper to the U.S. Attorney constituted waiver of privilege of both the document and the underlying witness statements from which the paper was derived); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993) (work-product privilege was waived for a memorandum submitted to the SEC during its investigation); but *see Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977) (surrender of privileged material pursuant to SEC subpoena did not constitute a universal waiver of the privilege because "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers"); *Saito* v. *McKesson HBOC, Inc.*, No. Civ.A. 18533, 2002 WL 31657622 (Del. Ch. Nov. 13, 2002) (holding that disclosure to SEC pursuant to confidentiality agreement did not constitute waiver of work product privilege).

  ISBN 1056 3059

Guidelines, 68 CRIM. L. REP. at 564. Some commentators have speculated that such government requests reflect a recognition on its part that by coopting the corporate internal investigation, it can obtain information that otherwise may not be as easily ascertainable through the normal investigative process. *See* Steven Seidenberg & Tamara Loomis, *DOJ Gets Tougher On Corporations*, 26 NAT'L L.J. at A13 (Feb. 24, 2003). According to this theory, by leveraging the company's power to threaten termination of its employees who are otherwise reluctant to talk, the government can quickly and effectively gather information about the alleged corporate malfeasance that it would not otherwise be able to obtain.[2] The Department implicitly acknowledges this point, noting at Part VI.B in both memoranda that "[i]n investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself." Coercing waivers is an efficient, if unwise, way for the Department to overcome these obstacles.

The government's increasing appetite for seeking waiver commitments at the outset of an investigation raises a number of unique concerns beyond the inherent problems (outlined above) resulting from a coerced waiver policy. While commandeering the corporate investigative process may hold certain appeal to the government, it is fraught with substantial risk for both the company and federal officials, as such a policy may in fact lead to the disclosure of *less* information to the government rather than more. A government waiver request prior to any internal investigation presents company counsel with a kind of Hobson's choice. He or she must either blindly waive the privilege in an effort to stay in the government's good graces, or refuse to make such a momentous decision without more complete information, and as a consequence, place the company at greater risk of prosecution and harsher treatment under the Federal Sentencing Guidelines. *See* U.S.S.G. § 8C2.5(g) (Nov. 1, 2002) (listing types of "cooperation" and "acceptance of responsibility" that decreased corporate culpability scores). It is hard to justify forcing a company to choose its course before it has any meaningful opportunity to assess the costs and benefits of its choice, particularly when the stakes are so high.

Waiving the privilege at the inception of an investigation has the potential to discourage employees who may have critical information from talking to company counsel about what they know, understanding that such statements are essentially communications with the government as well as in-house counsel. Indeed, if the company and the government already have reached an understanding that the company will share the results of its internal probe prior to interviewing certain employees, company counsel almost certainly has an ethical obligation to alert such employees of its intentions prior to the interviews. While threat of job loss may "persuade" reticent employees to cooperate, corporate counsel may feel less comfortable using that weapon for fear of being accused of acting in concert with the government to "coerce" statements. And if the government insists that company use its disciplinary authority to encourage cooperation, an employee subsequently might seek to preclude the use of his statements against him on the ground that such statements were the product of governmental coercion and thus were obtained in violation of his Fifth Amendment rights. *See*, *e.g.*, *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) (statements obtained from public employee under threat of removal from office may not be used in subsequent criminal prosecution).

Accordingly, what the government may view as an effective means to quickly investigate corporate misconduct may in fact result in reducing the free flow of information to government investigators. This, of course, would be a loss for the company as well, which typically shares an overriding interest in quickly determining the nature and scope of any misconduct.[3] What is more, if the threat of termination is required to shake loose information from employees, the government may find itself defending a whole new generation of constitutional challenges, which could place at risk its entire approach of seeking corporate cooperation.

---

[2]The pressure on a company to resort to harsh disciplinary sanctions to encourage cooperation stems in part from the Department's pronouncement that cooperation will be measured in part on the extent to which the company punishes those who may have been involved in the misconduct. *See* Holder Memorandum at Part VI.B; Thompson Memorandum at Part VI.B (corporation's "retaining the employees without sanction for their misconduct . . . may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation").

[3]Notably, in *Upjohn Co. v. United States*, 449 U.S. 383, 392-93 (1981), the leading case on the corporate attorney-client privilege, the Supreme Court recognized the essential importance of employees at all levels of a corporation communicating freely with corporate counsel to ensure that organizations received informed advice on how to comply with the law.

  ISBN 1056 3059

The Thompson Memo Further Exacerbates the Problem. Unfortunately, the Thompson Memorandum offers no comfort that the government is likely to reconsider its aggressive waiver approach anytime soon. Indeed, the few revisions contained in the Thompson Memorandum suggest that the current administration either does not recognize or has turned a blind eye to the potential fallout from the government's posture. Of particular note, in describing the kind of cooperation required to be eligible for non-prosecution, the Thompson Memorandum cautions that "overly broad assertions of corporate representation of employees or former employees" as well as "direction to decline to be interviewed" will be regarded as efforts to impede the investigation and thus will weigh against the company when the government decides whether to the charge the enterprise. Thompson Memorandum at Part VI.B.

Whatever its drafters' intentions, the near certain result of this new admonition will be to spur company counsel to facilitate retention of separate counsel for an "overly broad" swath of employees at the inception of an investigation. Even before the release of the Thompson Memorandum, corporations involved in investigations had been spending vast sums of money on separate counsel for its employees (Enron Corporation being only the most prominent recent example). The revised guidelines will only accelerate this substantial expenditure of resources.

The presence of separate counsel, combined with the Thompson Memorandum's express discouragement of information sharing through joint defense arrangements, will mean that the revisions will severely handicap a company's ability to conduct a meaningful internal probe. These limitations in turn will mean that any internal investigation that the government would otherwise like to take advantage of is less likely to produce meaningful results. To this extent, then, the government's desire to create a distance between company counsel and its employees is at cross-purposes with its desire to capitalize on a company's aggressive internal investigative efforts. Indeed, in describing the need for privilege waiver, the Thompson Memorandum (like the Holder Memorandum before it) notes that "[s]uch waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements." *See* Thompson Memorandum at Part VI.B. Obviously, this recent revision will increase, not decrease, the necessity of such individual agreements.

Moreover, by making it more difficult for the corporation to obtain critical information from its employees, the company may feel constrained in taking the type of disciplinary action that the Department expects from a cooperating organization (s*ee supra*, note 1), notwithstanding the intense pressure that will be placed on the company to impose punishment before all the facts are known. In this respect as well, the natural consequences of the Thompson Memorandum's revisions may run counter to other important policy objectives and, as a result, place the corporation in an increasingly untenable position in satisfying the Department's cooperation demands.

The Department's Waver Policy Should Be Revisited. A case can be made that where a company has conducted its own investigation and voluntarily reported wrongdoing, it may not be unreasonable to seek a limited waiver prior to declining prosecution as part of the company's cooperation obligations. Because the government typically has other means to verify the accuracy of the corporate disclosure that do not involve a complete waiver, and in light of the potential adverse effects on a company's internal processes and the mischief such a waiver brings to subsequent or parallel civil litigation, such waiver requests should be the rare exception and not the rule.[4] Unfortunately, far from limiting its scope, the government appears to be expanding its waiver policy far beyond its original roots. The Bush Administration had a great opportunity to return the waiver policy to its sound original footings, but instead has made the waters for corporate counsel even more treacherous to navigate. The government has every right to expect corporations to be good citizens by voluntarily disclosing corporate misconduct and by taking prompt, effective steps to punish wrongdoers. A company's cooperation, however, should not be measured by whether it blindly waives its privilege or agrees to become an accomplice to government coercion. In the end, such an approach may do more to hinder than aid the corporation's and the government's efforts to uncover corporate misdeeds.

---

[4]Indeed, in most cases the government's legitimate investigative interest can be satisfied by disclosing facts, perhaps including factual attorney work product, but not opinion work product or attorney-client communications. The Supreme Court implicitly recognized this point twenty-plus years ago in *Upjohn*.

  ISBN 1056 3059