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# Protecting Attorney-Client Privilege and Attorney Work Product While Cooperating with the Government: Cooperation Benefits and Risks (Part Two of Three)

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The DOJ and SEC offer companies that investigate potential FCPA violations strong incentives to share what they learn with the government. To earn cooperation credit in government resolutions, investigating companies generally must self-report and disclose the facts and circumstances surrounding their potential FCPA issues, including information obtained from relevant witnesses and the identities of potential individual wrongdoers.

Such disclosures, however, can at times seem in tension with the confidentiality dictates of the attorney-client privilege and the attorney work product doctrine. The information that cooperating companies are called upon to share with the government is often gathered through privileged communications between attorneys and their clients, and set forth and analyzed in attorney work product. As such, investigating companies that cooperate with the government often face important strategic questions: how much information to share, and whether to include privileged and attorney work product materials in their disclosures to the government.

This second installment in the three-part privilege series analyzes this strategic cooperation question through the lens of the attorney-client privilege and attorney work product doctrine, and identifies certain steps that companies may wish to take to try to minimize the risk, and/or extent, of a waiver resulting from whatever approach they utilize. The first part discussed the SEC and DOJ's cooperation policies and how companies can establish the attorney-client privilege and attorney work product protection in an internal investigation. The third part will discuss how to protect privileged investigation files that were shared with the government from discovery in collateral litigation with third parties.

## *"Just the Facts"*

The DOJ and SEC both state that they want cooperating companies to disclose facts relating to potential FCPA issues, and they disclaim any requirement that companies waive and share attorney-client privileged communications or attorney work product.

To that end, the DOJ and SEC direct investigating companies seeking cooperation credit to share:

- "[A]ll" of the facts they learn related to the alleged misconduct – including facts relating to how and when the alleged misconduct occurred, who promoted or approved it, and who was responsible for committing it.[1]
- The identities of all people "involved in or responsible for the misconduct at issue," no matter what title, status or seniority they hold.[2]
- "[A]ll information relevant to . . . the company's remedial efforts."[3]

As a corollary, the DOJ and SEC manuals both state that the cooperating company is not required to waive the attorney-client privilege or attorney work product protection. For example, the U.S. Attorney's Manual states, "[w]hat the government seeks . . . is not waiver of [the attorney-client privilege and attorney work product] protections, but rather the facts known to the corporation about the putative criminal misconduct under review."[4] The SEC Enforcement Manual, moreover, notes that "a party's decision to assert a legitimate claim of privilege will not negatively affect their claim to credit for cooperation."[5] The government may not grant full cooperation credit, however, if it believes a company's assertions of privilege and/or attorney work product are unfounded or overbroad.

At first glance, the government's approach seems straightforward. The distinction between facts, on the one hand, and privilege and attorney work product, on the other, has long been recognized in the law. In Upjohn Co. v. United States, for instance, the Supreme Court noted that "[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney. . . . A fact is one thing and a communication concerning that fact is an entirely different thing."[6]

Seen in this light, the analysis seems simple: facts – which are all the government says it wants – are not privileged or protected by the work product doctrine, so disclosing the facts to the government should not threaten the privilege or work product protection. Insofar as it goes, that analysis is correct. But in many cases, that analysis may not go far enough and the issue requires more nuance.

For more on government cooperation see "*Earning Cooperation Credit Under the Fraud Section's FCPA Pilot Program*" (May 18, 2016).

### *When Complexity Confounds "Just the Facts"*

Facts do not emerge, unbidden, from the ether. And they are not transplanted into the consciousness of government lawyers without some intermediary. That intermediary is often a lawyer for the investigating company. But facts that are learned, identified and transmitted to the government by lawyers for an investigating company are a product of the legal process – which may include privileged communications with clients and attorney analysis (work product) – that elicited them. In some cases, facts might be easily distinguished from attorney work product and privileged communications (as Upjohn suggests). But in other cases, it may be more difficult to extract and report facts without revealing (expressly or implicitly) protected aspects of the underlying investigation process.

The government acknowledges the potential complication. As the U.S. Attorney's Manual recognizes, "[m]any corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected." In its Enforcement Manual, the SEC expounds on this idea:

> In corporate internal investigations, employees and other witnesses associated with a corporation are often interviewed by attorneys. Certain notes and memoranda generated from attorney interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product protection.

Reiterating its comments elsewhere, however, the SEC then observes that, to earn cooperation credit, the corporation must simply produce (and the staff at all times may request) "relevant factual information acquired through those interviews." At that level, then, the government hews to the assumption that facts can be readily separated from privileged communications and attorney work product. To the extent that is true in any given matter, the basic proposition should apply that disclosing facts – which are neither privileged nor attorney work product – should not imperil the legal protections afforded to the investigating company.

But what if pure "facts" cannot be so readily extracted from the privileged communications and attorney work product that attend an investigation? Such situations call for more nuance, and a variety of measures on the part of investigating companies to protect their privilege and attorney work product.

### *Fact Work Product*

In addition to facts, and "relevant factual information" (the SEC does not explain whether that means something broader than "facts"), the SEC expressly reserves the right to request "the voluntary creation [by companies] of documents, such as chronologies of events."[7] Depending on the content, and whether it is created by counsel (or under counsel's supervision), a chronology could be considered fact work product. (The different types of work product are explained in Part One of this series.)

In general, facts become fact work product when they are prepared by attorneys in a particular form.[8] Whereas the facts contained in attorney documents are not shielded by the work product doctrine, the attorney documents themselves generally are. Fact work product generally includes tangible materials prepared or collected in connection with an anticipated litigation, such as a possible FCPA enforcement action. It can consist of items such as (among other things) handwritten notes, electronic recordings, diagrams and sketches, financial analyses, and photographs.

Both the DOJ and SEC are clear that, in requesting the facts, they do not ask cooperating companies to provide "non-factual or 'core' attorney-client communications or work product."[9] Both agencies then go on to describe "non-factual or core attorney work product" as "for example, an attorney's mental impressions or legal theories"[10] – in other words, what the courts categorize as opinion work product.

But the work product doctrine does not shield only opinion work product. It also protects fact work product, though with an exception that does not burden opinion work product.[11] According to Fed. R. Civ. P. 26(b)(3)(A), "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation," but such materials can be discoverable if "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." The SEC Enforcement Manual focuses on this exception, without directly acknowledging the fact work product protection itself.[12]

### *Disclosure Might Lead to Waiver*

Certain courts have held that disclosures of fact work product waive the protection. For example, in Westinghouse Electric Corp. v. Republic of Philippines, the Third Circuit ruled that Westinghouse's disclosure of attorney work product to the DOJ and SEC while cooperating waived the protection over the disclosed documents, thereby exposing those documents to the company's adversaries in civil litigation.[13] Other courts have held the reverse. This split, and its implications, will be discussed in Part Three of this series.

These factors only complicate the strategic questions posed at the outset: what types of information should a cooperating company share with the government? Stated differently, how much can a cooperating company afford to share, if it runs an attendant risk of potentially waiving some of its legal protections? And how much can it afford not to share, if it runs a concomitant risk that the government may deem its cooperation impaired? There is no one right answer, and each company confronting these issues must carefully consider the rewards, and risks, of sharing various categories of information. That analysis can be challenging – especially when the information or materials at issue lie somewhere on the spectrum between the clear-cut cases posited by the government, of facts, at one end, and privilege and "core" work product, at the other.

### *Two Basic Steps to Help Avoid a Waiver While Cooperating with the Government*

Regardless of how any particular cooperating company balances the considerations described above, there are certain steps that may be taken to try to minimize risks to the privilege and work product protection as cooperation proceeds.

#### *1) Enter Into a Confidentiality Agreement*

The first thing cooperating companies can do to help protect information they provide to the government – whether privileged or not – is to enter into confidentiality agreements with the respective government agencies before making disclosures. Confidentiality agreements with the government often (1) limit the government's discretion to disclose materials produced by the company; (2) include non-waiver provisions in which the government agrees that the production of any privileged communication or attorney work product does not result in a waiver; (3) provide that the government will not assert a broader

subject-matter waiver based on such disclosures; and (4) include clawback provisions to address any inadvertent disclosures of privileged material or attorney work product.

The SEC Enforcement Manual permits confidentiality agreements provided that:

> [T]he staff agrees not to assert that the entity has waived any privileges or attorney work-product protection as to any third party by producing the documents, and agrees not to assert that production resulted in a subject matter waiver. The staff also agrees to maintain the confidentiality of the materials, except to the extent that the staff determines that disclosure is required by law or that disclosure would be in furtherance of the SEC's discharge of its duties and responsibilities.[14]

The DOJ tends to use similar provisions.

Courts are split regarding whether confidentiality agreements with the government are effective vis-a-vis third parties: some enforce them, while others do not. The law governing confidentiality agreements and subsequent waiver arguments will be discussed in greater detail in Part Three of this series.

### *2) Share Facts Without Disclosing Protected Materials*

In addition to entering into a confidentiality agreement, cooperating companies can help maintain the privilege and work product protection by utilizing, where possible, the government's distinction between facts, on one side, and privileged communications and attorney work product, on the other. To the extent facts can be shared without revealing privileged communications or attorney work product, such an approach should present the least risk to a company's legal protections. As Upjohn notes, facts – standing alone – generally are not privileged, and they are not protected work product, so disclosing them should not threaten those protections.

### *Additional Precautions When Sharing Privileged or Protected Materials*

As noted above – and at the other end of the spectrum from facts – the government disclaims any need for "core" opinion work product, as well as privilege, which generally provides a bulwark for cooperating companies against inquiries that might target such materials. Nevertheless, companies sometimes share such materials, either voluntarily, of necessity or inadvertently.

#### *Voluntary Production*

The government makes clear that it is willing to accept disclosures of privileged communications or attorney work product if a company chooses to share such materials. Under certain circumstances, companies may deem it in their interests to provide materials to the government notwithstanding legal privilege and work product protection. As the SEC notes, "[d]uring an investigation, persons may produce to the staff, on a voluntary basis, substantive materials other than in response to Wells notices, including, for example, white papers, PowerPoint decks, legal memos, or letter briefs. . . ."[15] The SEC even regulates what may be contained in such voluntary submissions.

Before voluntarily providing privileged material or attorney work product to the government, companies should (1) make certain that doing so advances an important interest that cannot be attained by sharing only the facts that the government expressly says it wants; and (2) ensure that the benefit of providing such material outweighs (a) the risk that the disclosure will be deemed a waiver and (b) the consequences of more widespread disclosure if a waiver is found.

In addition to entering into a confidentiality agreement, as described above, companies that voluntarily decide to disclose privileged or protected files to the government may wish to define the precise scope of the intended waiver – e.g., the subject matter and/or dates of the privilege or work product to be waived – in a statement to or perhaps agreement with the government. This may

help avoid, or at least limit, a potential future dispute with the government over the extent (and intent) of the waiver, and also may help establish a clear, defensible limit to the waiver if it is later challenged by a third party. A recent decision from the Southern District of New York illustrates the point. There, a company's voluntary waiver as to certain privileged information, which was expressly defined by the company, was held not to waive the attorney-client privilege over documents that were created after the defined waiver period or that concerned topics that were not directly related to the materials that were waived.[16]

Such clarity can help lay a foundation for later reliance, if necessary, on Rule 502(a) of the Federal Rules of Evidence. Rule 502(a) provides that in the case of disclosures to federal agencies, a "waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." Thus, the disclosure of one privileged or protected document to the government should not waive the privilege as to a second document unless the second document relates to the same subject matter as the first and it would be unfair to consider the first document without the second.

Extending this concept beyond disclosures to the federal government, the Southern District of New York recently declined to find a broad subject matter waiver after a bank shared certain privileged communications with FINRA as part of a post-merger trading inquiry.[17] In that case, the bank's in-house counsel communicated with an employee in the course of an internal review, and disclosed those communications to FINRA in response to concerns about possible insider trading. The court ruled that although privilege was waived over the disclosed communications, there was no broader subject-matter waiver because the disclosure was outside the judicial context, the bank was not a party to the underlying case and nothing in the record indicated that the disclosure to FINRA was used affirmatively to prejudice either of the parties in the criminal proceeding.

The principles noted above should apply to both privileged communications and attorney work product. But work product also presents additional, unique considerations. For instance, companies that decide to share work product with the government can seek to limit such material to fact work product, as opposed to more sensitive opinion work product. Courts tend to be more protective of opinion work product, and a disclosure of only fact work product generally will not result in a waiver of related opinion work product. Moreover, companies sharing work product can attempt to articulate a common interest with the government that may help preserve the work product protection vis-a-vis other parties. Again, however, the case law is mixed.

Notwithstanding the range of mechanisms companies may employ to try to avoid, or at least limit the scope of, a waiver, risk remains. The courts have not developed a clear and consistent approach to questions of waiver in the context of government cooperation, as Part Three will explain. Accordingly, before voluntarily disclosing attorney-client privileged or work product protected materials to the government, companies should consider the possible impact if a court were to order a more general disclosure of the communication or material in question (and, possibly, related items, in the case of a subject matter waiver) to parties other than the government.

### *Necessary Production*

Companies also might find themselves sharing privileged communications or attorney work product with the government if they assert an advice-of-counsel defense. In such cases, both the DOJ and SEC reserve the right to ask for the underlying attorney-client communications and related attorney work product if necessary to evaluate the merits of the defense.[18] Accordingly, before asserting an advice of counsel defense, companies should consider whether the defense is worth asserting, and is likely to be effective, in light of the attendant waiver it will probably entail.

*Inadvertent Production*

Especially in large-scale or fast-moving productions, companies might inadvertently produce privileged communications or attorney work product to the government. Such unintentional disclosures can often be remedied if appropriate measures were taken to avoid such disclosures, and a clawback agreement is in place.

Federal Rule of Evidence 502(b) provides that an inadvertent disclosure of privileged or protected materials does not constitute a waiver if:

1. the disclosure was inadvertent;
2. the company took reasonable steps to prevent the disclosure, and
3. the company took reasonable steps to rectify the error.

To that end, companies producing materials to the government generally conduct a review for privilege and attorney work product. In designing such a review, with an eye towards its reasonableness, companies may wish to consider factors such as the size of the review and production, timing and other constraints and the availability of various technical methods to help identify and filter out privileged communications and attorney work product. In addition, marking appropriate documents as privileged or protected during the investigation may help avoid inadvertent disclosures of privileged or protected materials as the company works together with the government.

Clawback agreements can also help rectify inadvertent productions. Such provisions, which are often included in confidentiality agreements with the government, can be utilized and cited as among the reasonable steps a company takes to limit and recover inadvertent disclosures under Rule 502(b). Taken together with a well-constructed privilege and work product review that is reasonable under the circumstances, such an agreement can help limit potential damage – vis-a-vis the government and third parties – if a document is produced in error.

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**[1]** U.S. Attorney's Manual, § 9–28.720; SEC Enforcement Manual §§ 4.3, 6.1.2.
**[2]** U.S. Attorney's Manual § 9–28.700.
**[3]** SEC Enforcement Manual § 6.1.2.
**[4]** U.S. Attorney's Manual § 9–28.710.
**[5]** SEC Enforcement Manual § 4.3.
**[6]** 449 U.S. 383, 395–96 (1981).
**[7]** SEC Enforcement Manual § 3.2.3.
**[8]** See In re Convergent Techs. Second Half 1984 Sec. Litig., 122 F.R.D. 555, 558 (N.D. Cal. 1988).
**[9]** SEC Enforcement Manual § 4.3; U.S. Attorney's Manual § 9-28.710.
**[10]** U.S. Attorney's Manual § 9-28.720; SEC Enforcement Manual § 4.3.
**[11]** See Fed. R. Civ. P. 26(b)(3)(A).
**[12]** SEC Enforcement Manual § 4.1.2.
**[13]** 951 F.2d 1414, 1429–30 (3d Cir. 1991).
**[14]** SEC Enforcement Manual § 4.3.1.
**[15]** SEC Enforcement Manual § 3.2.3.2.
**[16]** United States v. Mount Sinai Hosp., 185 F. Supp. 3d 383, 390-93 (S.D.N.Y. 2016).
**[17]** Memorandum Order, United States v. Stewart, No. 15-cr-00287 (S.D.N.Y. July 22, 2016) E.C.F. No. 141.
**[18]** U.S. Attorney's Manual § 9–28.720 ("Occasionally a corporation or one of its employees may assert an advice-of-counsel defense, based upon communications with in-house or outside counsel that took place prior to or contemporaneously with the underlying conduct at issue. . . . Accordingly, where an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it."); SEC Enforcement Manual §§ 4.1.1–4.1.2 ("In order for the staff to credit an advice-of-counsel defense in an investigation, the party asserting the defense must provide evidence sufficient to enable the staff to evaluate the validity of the defense, even if this requires disclosure of privileged information" and attorney work product).
**[19]** This article contains the views of the authors, and does not necessarily represent the views of Skadden, Arps or any one or more of its clients.