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Cooperation and the risk of privilege waiver in government investigations

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A corporation facing a government investigation – or merely aware of potential wrongdoing – stands to gain substantial benefits from cooperation. Cooperation with an existing inquiry, or voluntary disclosure of misconduct as yet unknown to the government, may result in a favourable resolution (or even a declination), reduced fines and penalties, and the ability to limit or shape the government's investigation, among other benefits. But cooperation often calls for disclosures to government authorities that may jeopardise an entity's ability to assert the attorney-client privilege or work-product protection over aspects of counsel's internal investigation in the context of parallel civil litigation or other requests for disclosure of company materials.

A December 2017 ruling in *Securities and Exchange Commission v. Sandoval Herrera*, a fraud case in the US District Court for the Southern District of Florida, highlights the challenges facing companies that seek to balance preservation of legal privileges with complete cooperation with government authorities. In Sandoval, a federal magistrate judge concluded that company counsel, in

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providing detailed oral summaries of witness interviews to the Securities and Exchange Commission (SEC), had waived work-product protection with respect to the notes and memos on which those summaries were based. The *Sandoval* decision follows over a decade of shifting government guidance on the requirements for corporate cooperation credit, and shows that while the Department of Justice (DoJ) and SEC will not seek privilege waivers as a condition of cooperation, they do define full cooperation in a manner that, at a minimum, risks a judicial finding of waiver.

Cooperation credit: a brief history

Since 1999, the DoJ has issued and then repeatedly revised and refined a list of factors governing the decision whether to criminally charge a corporate entity. The so-called Holder memo, issued in June 1999 by then deputy attorney general Eric Holder, provided that "[a] corporation's timely and voluntary disclosure of wrongdoing[,] and its willingness to cooperate" with the government's investigation – "including, if necessary, the waiver of the corporate attorney–client and work product privileges" – should be weighed against various other factors, including the nature and seriousness of the offence, the pervasiveness of wrongdoing within the company and the company's history of similar conduct, if any. The memo noted that privilege waivers "are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation", and that prosecutors could therefore, "in appropriate circumstances", request privilege waivers as to "the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue".

In January 2003, against the backdrop of the Enron and WorldCom scandals, Larry Thompson issued a slightly revised set of principles for the prosecution of corporations, with an "increased emphasis on... the authenticity of a corporation's cooperation". The Thompson memo took the view that, "[t]oo often", corporations "purport[] to cooperate with a [government] investigation" while taking steps to prevent exposure of the full scope of misconduct. The memo incorporated much of the text of the Holder memo verbatim, including the passages concerning privilege waiver, but in effect treated a company's willingness to waive privilege as a measure of the authenticity of its cooperation.

Under the Thompson memo, the DoJ routinely sought privilege waivers and other demonstrations of 'authentic' corporate cooperation. Notably, in a 2004 investigation concerning KPMG, KPMG not only waived privilege but also, at the DoJ's urging, withheld payment of legal fees for employees who refused to cooperate. The government ultimately indicted 13 KPMG employees. But in June 2006, in *United States v. Stein*, Judge Lewis Kaplan of the Southern District of New York dismissed the indictment as to all 13 employees, on the basis that the government's tactics with respect to legal fees effectively deprived the employees of their constitutional rights to counsel and due process.

Later that year, amid growing concern about the 'culture of waiver' in the DoJ and other government agencies, legislation was introduced in the US Senate to prohibit federal prosecutors and regulators from requesting privilege waivers. The bill stalled in the Senate, but within a week of its introduction, deputy attorney general Paul McNulty issued a revised set of guidelines, requiring

senior-level preapproval for all waiver requests, and limiting such requests to situations of "legitimate need". Two years later, addressing concerns that the McNulty memo had not gone far enough in removing the pressure to waive privilege, Mark Filip, McNulty's successor, revised the DOJ guidelines yet again. The Filip memo shifted the focus to whether the cooperating corporation had disclosed "the relevant facts". It expressly instructed prosecutors not to request privilege waivers, and noted that "[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection".

In a footnote, the Filip memo glossed over the challenge of providing non-privileged 'facts' obtained in a privileged context and memorialised in privileged materials. With respect to interviews of corporate employees (which are a standard fact-gathering tool in internal investigations), the Filip memo acknowledged that notes and memos may be protected by the attorney-client privilege and work-product doctrine, and that companies need not produce those notes and memos, but that they do "need to produce, and prosecutors may request, relevant factual information".

Today, the DoJ continues to follow this framework, and other federal agencies take a functionally similar approach. For instance, the SEC's Enforcement Manual provides that "a party's decision to assert a legitimate claim of privilege will not negatively affect [its] claim to credit for cooperation", and that the critical factor is the party's disclosure of "all [relevant] facts within [its] knowledge".

SEC v. Sandoval Herrera

Despite the DoJ's suggestion that non-privileged 'facts' may easily be separated from privileged materials and thus may be requested as part of a company's cooperation, the 5 December 2017 ruling in *SEC v. Sandoval Herrera* illustrates the risk of waiver in such cases. In Sandoval, General Cable Corporation (GCC), a manufacturer of industrial cable and wire, conducted an internal investigation, with the assistance of outside counsel, into certain accounting irregularities at its Brazilian subsidiary. Counsel interviewed dozens of GCC employees, many on site in Brazil. The lawyers took notes at the interviews and later prepared memos summarising the relevant facts. In November 2012, GCC voluntarily disclosed its investigation to the SEC. The SEC launched its own investigation and requested documents and information from GCC. In 2013, GCC's outside counsel met with the SEC staff and provided 'oral downloads' of 12 interviews that counsel had conducted – in essence, bare recitations of the substance of the interview notes and memos.

In December 2016, GCC agreed to pay a penalty of $6.5m to the SEC to resolve the matter. Separately, the SEC pursued charges against GCC executives, including Mathias Francisco Sandoval Herrera and Maria Cidre, who allegedly took steps to conceal the accounting errors when they became aware of them in 2012. The executives' lawyers served a subpoena on the company's outside counsel, seeking production of the interview notes and memos. Counsel objected on grounds of work-product protection, and the executives filed a motion to compel the firm to produce the materials.

In adjudicating the motion, Magistrate Judge Jonathan Goodman determined that counsel's 'oral downloads' to the SEC operated as a waiver of work-product protection as to the underlying notes and memos. (The judge did not address the attorney-client privilege, as

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counsel apparently did not assert that the materials were subject to the privilege.) He explained that he was "not convinced... [that] there is a meaningful distinction between the actual production of a witness interview note or memo [to an adversary] and providing the same or similar information orally". He noted that counsel conceded that it had orally conveyed the 'substance' of the notes and memos to the SEC.

The judge also pointed to *SEC v. Vitesse Semiconductor Corp*., a 2011 decision in the Southern District of New York, where Judge Jed Rakoff similarly ordered a company to produce its lawyer's handwritten notes of certain witness interviews, because the company had provided an 'oral summary' of the interviews to the SEC, which operated as a waiver of work-product protection. In his ruling, Judge Rakoff noted that the company provided "very detailed, witness-specific information" to the SEC, and that the SEC's notes of the oral summaries matched the lawyer's handwritten notes "almost verbatim" in many places. He suggested that the outcome might differ where a company orally provides "general impressions without organizing the presentations in a witness-specific fashion".

After the *Sandoval* ruling, counsel filed a motion for clarification of the order, seeking to limit the scope of the work-product waiver. The magistrate judge scheduled an evidentiary hearing and ordered counsel to file its interview notes and memos under seal for the court's review. Counsel and the *Sandoval* defendants ultimately resolved the discovery dispute privately, and the judge cancelled the hearing and dismissed the motion for clarification as moot.

Takeaways

The DoJ and the SEC routinely require – and companies routinely provide – factual presentations that include summaries of outside counsel's witness interviews. Such presentations are often a critical means of providing cooperation that qualifies as sufficiently useful to result in a benefit to the corporation when the time comes for a civil or criminal resolution. But such presentations raise real risks of privilege waiver, particularly where their substance draws heavily on underlying work product such as lawyers' notes or memos.

When preparing for oral presentations, corporations and their counsel should consider drafting standalone outlines or talking points, both to separate the presentation from the investigative work product and to document the metes and bounds of the information provided to the government. Moreover, counsel should strive to synthesise factual information into common features and themes, and avoid structuring content in a witness-specific manner. Government authorities should recognise that under certain circumstances, disclosures of 'purely' factual information pose real risks of waiver, and should endeavour to accommodate counsel's reasonable requests to structure presentations so as to minimise that risk. These measures cannot entirely eliminate the risk of waiver, but they will best position companies – and government authorities – to cooperate fully while protecting legal privileges. ■